NEW JERSEY SCHOOL LAW DECISIONS

Indexed

January 1, 1980 to December 31, 1980

vol. 2

New Jersey
State Department of Education
225 West State Street
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New Jersey
State Department of Education
Trenton

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FRED G. BURKE
COMMISSIONER OF EDUCATION

KATHRYN R. FOX,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

For the Respondent, Buttermore, Mullen & Jeremiah
(William S. Jeremiah, Esq., of Counsel)

Petitioner who was employed as a nontenured teacher of biology from September 1974 through June 1976 by the Watchung Hills Regional Board of Education, hereinafter "Board," alleges that the Board wrongfully and illegally refused to tender her an employment contract for the 1976-77 school year. The Board, conversely, asserts that its nonreemployment of petitioner was a legal exercise of its discretionary authority in conformance with its employment policies.

After both parties had filed Motions for Summary Judgment, the Commissioner of Education, relying on the pleadings, affidavits, exhibits and Briefs of counsel, issued an opinion on October 11, 1977 granting summary judgment in favor of the Board. Thereafter, the State Board of Education in its appellate review capacity remanded the matter to the Commissioner directing that a plenary hearing be held. A hearing was conducted on July 28 and August 11, 1978 by a hearing examiner at the office of the Somerset County Superintendent of Schools, Somerville. Post-hearing briefing was completed March 15, 1979. The hearing examiner report follows, setting forth first those relevant facts which are not in dispute.

Petitioner was in her second year of service as a biology teacher when she was notified by the Board in April 1976 that her contract would not be renewed. When she requested reasons for nonreemployment she was informed by letter from the then Superintendent as follows:

> "***You were recommended to the Board of Education by the administration, but, with reservations. These reservations included the following:

1. A concern about large percentage of low marks and failing grades to pupils in K classes.

2. An abnormal pattern of pupil requests to transfer from your classes.

"The Board of Education, in reviewing non-tenure appointments for 1976-77 took the position that no teacher should be reappointed if the administration held reservations about the performance of a teacher and has adhered to that position. The Board of Education stated that this is an important part of the Board's aim to up-grade the staff of the school." (P-13)

The Board afforded petitioner an informal appearance on June 21, 1976 but on July 7 confirmed its earlier determination not to reemploy her for the ensuing year.

Petitioner's observation reports and evaluations by the head of the science department and the vice-principal during 1974-76 contained numerous constructive criticisms but may be characterized as complimentary. (P-1-7, 9-11) Therein she was commended for subject matter competency, appropriate teaching techniques, high standards, participation in the science department, professionalism, attention to detail, dedication, and responsiveness to constructive criticism. Both of these supervisors recommended, without reservation, that she be reemployed for 1976-77. (P-9-11) Petitioner's principal evaluated the one lesson he observed as satisfactory. (P-8)

A comparison of grades assigned by petitioner with those assigned by the other three biology teachers in the science department to college preparatory biology pupils, as evidenced by tabulation of the vice-principal in R-4a, c, follows:

1974-75 Biology K (College Preparatory)

Grade	Petitioner		Others	
A	5	4.3%	15	8.4%
B	16	13.8%	57	31.8%
C	42	36.2%	84	46.9%
D	38	32.8%	20	11.2%
F	15	12.9%	3	1.7%
	116	100%	179	100%

1975-76 Biology J (College Preparatory, Honors)

Grade	Petitioner		Others	
A	10	25.0%	19	33.9%
B	14	35.0%	26	46.4%
C	10	25.0%	11	19.6%
D	5	12.5%	-	
F	1	2.5%	-	
	40	100%	56	100%

1975-76 Biology K (College Preparatory)

Grade	Petitioner		Others	
A	5	7.5%	17	7.6%
B	12	17.9%	51	22.9%
C	23	34.3%	74	33.2%
D	23	34.3%	56	25.1%
F	4	6.0%	25	11.2%
	67	100%	223	100%

That same compilation of statistics also revealed the following comparisons of percentages of pupil grades:

Grades	Petitioner		Other Biology Teachers	
	1974-75	1975-76	1974-75	1975-76
A & B	(K) 18.1%	(K) 25.4%	(K) 50.2%	(K) 30.5%
D & F	(K) 45.7%	(K) 40.3%	(K) 12.9%	(K) 36.3%
A & B		(J) 85 %		(J) 80.3%
D & F		(J) 15 %		(J) 0. %

The additional category designated as Biology L, which is not a course designed for college-bound pupils and which was not taught at any time by petitioner, is not relevant to the issues in dispute.

Petitioner testified at the hearing that prior to her summary evaluation in February 1976 she had never been advised by her supervisors of any concern over her grading system or over pupils requesting transfers from her classes. (Tr. I-26, 31, 38-40, 55) She testified that the principal during the fall of 1974 had conducted an orientation session for new teachers and had explained certain aspects of the grading system. Petitioner testified that she had few parent and pupil complaints and that she had never been advised by her superiors of any such complaints against her in compliance with the negotiated agreement which specified that one was to be notified of any complaints to be considered in a teacher's evaluation. (P-14; Tr. I-48, 68-70)

Petitioner testified further that her department chairman had advised his teachers that he wanted "***strict discipline and tough grading." (Tr. I-64) This testimony is unrefuted.

The then principal testified that in September 1974 new teachers, including petitioner, had been provided at an orientation session with a "Guide to Course Grouping at Watchung Hills" (R-1) which delineates information on the grouping procedures at the school. (Tr. I-82-83) He testified that after he, his vice-principal and the Superintendent discussed petitioner's grades on a number of occasions he had concluded that they were too severe. (Tr. I-104-105) In this regard he testified as follows:

> "***I expressed my reservation about whether or not if our assignments were continued and involve K groups whether the problem could continue. I could not be sure in my own mind if it would go away if she had K classes assigned in the future, and I could not be assured that she would not have K classes assigned in the future, so I had reservations." (Tr. I-98)

And,

> "***Well, the business of education is kids and we're supposed to be in the business to *** help kids, and when you have situations where kids are having difficulty, one tries to *** alleviate the situations***. 45 percent poor grades could be such a problem so we would be concerned." (Tr. I-146)

The then Superintendent testified that when Board members raised questions of concern over the severity of petitioner's grading, he had requested that her grades and those of other biology teachers be charted by the vice-principal who supervised the science teachers. He testified that after he had reviewed those charted grades and the evaluations of petitioner he concluded that she had given an unreasonable number of D and F grades. He testified that he, nevertheless, recommended to the Board, with reservations, that she be reemployed. (Tr. I-148-155) He testified that the Board then agreed that they "***would not re-appoint non-tenure teachers where there were expressed reservations by the Administration.***" (Tr. I-156) The Superintendent also testified that he had at no time brought to petitioner's attention the concerns which were later stated as the reasons for her nonreemployment but delegated that responsibility to the vice-principal. (Tr. I-157-160)

The vice-principal testified that he had charted petitioner's grades at the request of the Superintendent. He testified further that when he perceived in 1974-75 the level of subject matter difficulty of material presented by petitioner to her K classes, he determined to assign her two J classes for 1975-76 on the assumption that those honors classes would be better able to cope with and profit from her subject matter presentations. (Tr. II-6-11) He testified also that in the fall of 1975 in a conference he had advised petitioner of the concern of the Board and administrators over the number of low grades in her classes. It is evident that he again brought this to her attention in her evaluation of February 26, 1976. (P-10) He testified, however, that he had advised her that he "***[didn't] see [her] grading pattern as a particular problem." (Tr. II-15) In this regard should be noticed the vice-principal's February 27, 1976 letter to the Superintendent wherein he characterized petitioner's grading system as "*** rigorous, [but] they are consistent and fair***." Therein he again recommended her reemployment "*** without reservation***." (P-11)

The testimony of a Board member corroborated that concerns had been raised by the Board over petitioner's grading pattern. He testified that an extended discussion over the question of her reemployment ensued in April 1976 which resulted in a vote of 5-4 against her reemployment. In this regard he testified that:

> "***[T]here were those who felt that this indicated the excellence that we were looking for, and others felt that we weren't reaching the students that we wanted to reach."
>
> (Tr. II-41)

The hearing examiner, having carefully reviewed the documentary evidence and the testimony of witnesses at the hearing, makes the following additional findings of fact which should be considered in pari materia with those uncontroverted facts hereinbefore set forth:

1. Petitioner's D and F grades for K biology pupils ranged between 45.7% in 1974-75 to 40.3% in 1975-76. The D and F grades assigned by all other K biology classes ranged in the same period from 12.9% to 36.3% of all pupils in those classes. Petitioner's percentage of D and F grades to honors pupils in 1975-76 was 15% compared to other teachers of J biology classes who assigned no D or F grades during that year.

2. Petitioner was advised as early as the fall of 1975 by her vice-principal of the concerns of the Board over the number of low grades she assigned. She was never notified prior to receipt of the Board's reasons that requests for withdrawal from her classes caused similar concern.

3. Petitioner was aware of the grouping patterns in her classes which would make inappropriate the imposition of a bell shaped curve on grades assigned to classes composed primarily of college-bound pupils. A further finding that petitioner was aware or should have been aware of this is grounded on petitioner's own testimony that she received a brochure on grading early in the 1974-75 school year which stated, inter alia, that:

> "***In many course sections, a normal distribution of student abilities does not exist, owing to 'homogeneous grouping'***. In these sections, teachers will best convey ***their judgments***by distributing the letter grades in consideration of the ability distribution.***" (Emphasis in text.) (R-2)

4. There was a sharp cleavage between the department chairman and the vice-principal on the one hand and the principal and the Superintendent on the other over whether petitioner's grading was too severe.

5. No supervisor or administrator at any time recommended to the Board that petitioner not be reemployed. The principal and the Superintendent, however, recommended her with reservations based on her assignment of pupil grades.

6. It was petitioner's distribution of grades as requested and duly reported to the Board, together with the principal's and Superintendent's reservations based on her grading pattern, which caused the Board by a vote of 5-4 to withhold a successor contract of employment. The second stated reason given, that of requests for withdrawal from her classes by pupils, was peripheral.

7. The Board entered into serious and prolonged discussion over petitioner's performance before making its determination.

It is noted that petitioner has abandoned her original argument that her constitutional rights were violated. Thus, petitioner's sole argument in support of the relief which she seeks in the form of reinstatement with lost salary is that the Board's action was arbitrary and capricious. (Tr. I-3)

While it is evident that there was a divergent view among her supervisors and members of the Board over the appropriateness of petitioner's grades, it is clear that she was advised in timely fashion of those concerns as early as the fall of 1975. There is in the record no credible evidence that the Board or any of its administrators were unduly influenced by complaints by parents or pupils against petitioner's grading system. Conversely, it must be concluded that their evaluations were motivated by genuine concern for the educational welfare of over 40

percent of petitioner's college preparatory pupils who received poor or failing grades in the two years she taught for the Board. Petitioner protests that the Board had established no fixed standards of grade distribution for its college preparatory classes. The hearing examiner, however, believes that the imposition of such fixed standards would be educationally indefensible since there are wide variables between classes in such areas as motivation, prior training and innate ability.

The hearing examiner recommends that the Commissioner determine that the Board did not abuse its discretionary authority nor act arbitrarily or capriciously when it voted not to reemploy petitioner but that its action was in full conformance with its statutory discretionary authority under N.J.S.A. 18A:11-1 et seq. and the interpretation of the Court in Porcelli et al. v. Titus et al., 108 N.J. Super. 301 (App. Div. 1969), cert. den. 55 N.J. 310 (1970) wherein it was stated that:

> "***We endorse the principle, as did the court in Kemp v. Beasley, 389 F. 2d 178, 189 (8 Cir. 1968), that 'faculty selection must remain for the broad sensitive expertise of the School Board and its officials,'***."
>
> (at 312)

While it is true that the Board's administrative officers recommended petitioner's reemployment, it is clear that the ultimate authority in such matters must rest with the Board. Mary C. Mihatov v. Board of Education of the Borough of Woodcliff Lake, 1977 S.L.D. 1

In conclusion it is recommended that the Commissioner grant the Board's Motion to Dismiss entered at the conclusion of petitioner's case at the hearing and held in abeyance by the hearing examiner for action by the Commissioner.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the matter controverted herein including the report of the hearing examiner.

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

Petitioner argues that the hearing examiner erred in not undertaking a more thorough analysis of the individual grade distributions of other biology teachers. Said distributions, it is argued, reveal that at least two other teachers assigned a greater percentage of F's and a smaller percentage of A's than did petitioner in comparable classes. The Commissioner disagrees.

Petitioner's reliance upon the citation of those statistics most favorable to her contention, while excluding others less favorable, are without merit in the instant matter. As the Commissioner has stated in Long Branch Education Association and William Cook v. Board of Education of the City of Long Branch, 1975 S.L.D. 1029.

> "***[I]n the matter of reemployment of a nontenure teacher, it is not incumbent upon the Board to prove its reasons as in a hearing of charges against a tenured employee. Absent a showing of bad faith, arbitrariness, capriciousness, unreasonableness, statutory or constitutional violation, sham, or frivolity on the part of the Board, its discretionary determination must prevail. The Commissioner so holds.***" (at 1037-38)

Respondent Board, having reached a determination not to renew the employment of petitioner due to "***concern about large percentage of low marks and failing grades to pupils in [Biology] K classes", was only constrained to demonstrate that such action represented a reasonable exercise of its discretionary authority to reemploy or not to reemploy a probationary teacher.

The Commissioner further observes that a rate of over 40% D's and F's among college preparatory biology students over each of two academic years represents sufficient basis for the determination reached by the Board, without regard to the grades assigned by other teachers. Appropriate to the dispute herein in the Commissioner's statement in Leroy Lynch et al. v. Board of Education of the Essex County Vocational District, 1974 S.L.D. 1308, aff'd State Board of Education 1975 S.L.D. 1098:

> "***The appointment of teaching staff members, and the pattern of staff utilization are two of the vital factors which influence and determine the quality of the educational program within a given school district. This is so because the ability and competence of the teaching staff members have a higher coefficient of correlation to the instructional process and the achievement of pupils than any other factor such as the schoolhouse, or the materials for instruction. It was an understanding of these principles that caused the court in the case of Victor Porcelli et al. v. Franklyn Titus, Superintendent, and the Newark Board of Education, 108 N.J. Super. 301 (App. Div. 1969), cert. den. 55 N.J. 310 (1970), to state that:
>
> > '***We endorse the principle, as did the court in Kemp v. Beasley, 389 F.2d 178, 189 (8 Cir. 1968), that 'faculty selection must remain for the broad sensitive expertise of the School Board and its officials.'***' (at p. 312)
>
> "***[The] Board and all other local boards of education have the responsibility to appoint the most able and competent person to fill any teaching staff position, including all administrative and supervisory positions. This is a basic responsibility which underlies the comprehensive requirement of all local education boards to provide the most thorough and efficient program of education possible, given all the circumstances unique to each school district.***" (at 1315)

Petitioner also takes exception to the hearing examiner's purported failure to ***set out a standard of review applied in his review of the action of the board" as required by the remand from the State Board of Education. Petitioner further alleges that said purported failure has resulted in the acceptance of an arbitrary and capricious action by the Board which violated her constitutional rights to due process.

Petitioner avers that since she was encouraged by her immediate supervisor in both her teaching methods and grading system, the Board's action in criticizing her for these same factors represents evidence that its determination was arbitrary and capricious.

The Commissioner will not comment on petitioner's allegation relative to the hearing examiner's report but will, in the alternative, set out the standard of review applied by him in the instant matter.

The Commissioner has long held

> "***that a board, absent bias or violation of protected rights, may chose to rely, or not to rely, in whole or in part, upon the subjective evaluations and recommendations of its supervisors and administrators.***"
>
> Deborah Strauss v. Board of Education of the Borough of Glen Gardner, 1977 S.L.D. 841, 850
>
> > ***While the Commissioner would expect that all boards of education look to their professional employees for recommendations and guidance in matters in which educational judgments are to be made, the board is not compelled to accept the suggestions or advice it receives, for it has the authority to make the ultimate determination.***" William A. Wassmer et al. v. Board of Education of the Borough of Wharton, 1967 S.L.D. 125, 127

The Board, in the instant matter for reasons that were neither frivolous nor without rational basis reached a decision not to reemploy petitioner. This action is entitled to a presumption of correctness. As was emphasized in Michael Fiore v. Board of Education of the City of Jersey City, 1965 S.L.D. 177:

> "***The Legislature has committed the operation of local schools to district boards of education. It has provided a system of administrative appeals from such boards to the Commissioner, R.S. 18:3-14, and thereafter to the State Board, R.S. 18:3-15. The powers of boards of education in the management and control of school districts are broad. Downs v. Board of Education, Hoboken, 12 N.J. Misc. 345, 171 A. 528 (Sup. Ct. 1934), affirmed sub nominee Flechtner v. Board of Education of Hoboken, 113 N.J.L. 401 (E. & A. 1934) Subject to statutes relating to tenure, they are vested with wide discretion in determining the number of employees necessary to carry out the program, the services to be rendered by each and the compensation to be paid for such services.

> Where a board, in the exercise of its discretion, acts within the authority conferred upon it by law, the courts will not interfere absent a showing of clear abuse. 78 C.J.S., Schools and School Districts, §128, p. 920; Boult v. Board of Education of Passaic, 135 N.J.L. 331 (Sup. Ct. 1947), affirmed 136 N.J.L. 521 (E. & A. 1948). ***In short, we may not substitute our discretion for that of the local board, nor may we condemn the exercise of the board's discretion on the ground that some other course would have been wiser or of more benefit to the parties or community involved. Boult, supra***" (at 178)

Boards of education must of necessity concern themselves with the grades assigned by teachers. They must similarly be concerned with faculty selection and the establishment of appropriate academic standards and reasonable pupil performance expectations.

Based upon the foregoing, the Commissioner is constrained to reject petitioner's contention that the Board acted in an arbitrary, capricious and unreasonable manner. Petitioner has failed to demonstrate that the Board's actions were frivolous or without rational basis. Petitioner's assignment of D's and F's to 45.7% and 40.3% of her college preparatory Biology K pupils in 1974-75 and 1975-76 respectively was, in the Commissioner's view, sufficient to arouse concern on the Board's part without regard to her specific evaluations or the recommendations of her immediate superiors.

In rendering decisions of this kind, the Commissioner has consistently upheld the following standard of review:

> "***[T]he Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when it is affirmatively shown that the action was arbitrary, capricious and unreasonable.***" (Emphasis added.) John J. Kane v. Board of Education of the City of Hoboken, Hudson County, 1975 S.L.D. 12.

Petitioner additionally excepts to the hearing examiner's ignoring of her laudatory evaluation reports as entered into evidence in these proceedings. The Commissioner finds this argument to be repetitive and without merit. Having dealt with the right of a board of education to reach a deter-

mination contrary to that recommended by its supervisory and administrative staff, ante, the Commissioner will not address this matter further.

Finally, petitioner takes exception to the finding of the hearing examiner that petitioner had been provided with an orientation session based upon a "Guide to Course Grouping at Watchung Hills." The Commissioner observes that no such finding was reached by the hearing examiner nor does the question have any particular bearing on the matters being herein decided.

Having addressed petitioner's exceptions and having found the Board's action to be proper in all respects including the full rendering of all procedural rights guaranteed to petitioner by statute and regulation, the Commissioner affirms the finding and determinations of the hearing examiner's report and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

July 11, 1980

Pending State Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

BARBARA KUBOSKI,	:	INITIAL DECISION
	:	
PETITIONER,	:	AGENCY DKT. NO. 331-75
	:	
V.	:	
	:	
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	
	:	
RESPONDENT.	:	

APPEARANCES:

For the Petitioner, Mandel, Wysoker, Sherman, Glassner, & Weingartner (Jack Wysoker, Esq., of Counsel)

For the Respondent, Robert J. Cirafesi, Esq.,

BEFORE THE HONORABLE LILLARD E. LAW, ALJ

DOCUMENTS IN EVIDENCE:

PR-12	Evaluation of Barbara Kuboski dated March 1, 1975
PR-13	Evaluation of Barbara Kuboski dated December 1, 1974
PR-14-A	Letter dated August 19, 1974 to Barbara Kuboksi from Dr. Stanley Godleski, Assistant Superintendent
B	Employment Contract issued to Barbara Kuboski dated September 1, 1974
C	Miss Barbara Kuboski resume
PR-15	Letter dated August 13, 1974 to Dr. Stanley Godleski from William P. Slawoski, principal
PR-19	Letter dated March 20, 1974 to Barbara Kuboski from Dr. Stanley Godleski

PR-21 Evaluation of Barbara Kuboski dated March 21, 1974

PR-20-A Employment Contract issued to Barbara Kuboski dated March 18, 1974

B Miss Barbara Kuboski, resume

PR-25 Letter of Appointment dated October 17, 1973 issued to Barbara Kuboski

PR-26-A Letter dated October 1, 1973 to Barbara Kuboski from Leonard A. Tobias, Superintendent of Schools

B Letter dated October 5, 1973 to Dr. Godleski from Mr. Slavoski

C Letter dated September 13, 1973 to Mr. Tobias from Mr. Slavoski

The matter having been opened before the Commissioner of Education on a Notice of Motion by petitioner Kuboski requesting an Order to reopen for further hearing on Count Three of petitioner's Amended Petition of Appeal in the matter of Barbara Kuboski and Florence Sgromolo v. Board of Education of the Borough of South Plainfield, Middlesex County, 1978 S.L.D. _____ (decided March 28, 1978). The Commissioner, on September 20, 1978, granted petitioner's Motion and Ordered further hearing pursuant to petitioner's request. A hearing was held on January 8, 1979 at Rutgers University Labor Education Center, New Brunswick.

On July 2, 1979 the matter was transferred to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

Petitioner Kuboski's Third Count of her Amended Verified Petition filed before the Commissioner on June 3, 1976 reads, in pertinent part, inter alia, as follows:

> "*** The non-renewal of Barbara Kuboski for the 1975-76 school year, and termination of her employment in said school district resulting therefore, was illegal since Petitioner Barbara Kuboski was under tenure at the time of said termination. ***."

Petitioner seeks, inter alia, reinstatement to an appropriate teaching position with full back pay, a determination of seniority as an elementary teacher with tenure, and all benefits and emoluments denied her while she was employed by the Board as a Title I and supplemental teacher. The Board opposes the Motion to reopen the hearings and asserts that the Commissioner's determination in Kuboski, supra was correct and should stand.

With regard to petitioner's employment history with the Board, the uncontroverted facts as set forth in Kuboski, supra are these:

Petitioner Kuboski commenced her employment with the Board on December 3, 1971 and continued until June 30, 1972 as a per diem Title I teacher at the rate of $5.00 per hour, four hours per day, five days per week. (PR-53) Subsequently, on December 19, 1972 the Board appointed her as a first grade teacher effective January 1, 1973 until June 30, 1973. (PR-27A, B) On October 16, 1973 the Board appointed her to the position of supplemental instructor commencing October 15, 1973 at the rate of $6.00 per hour, four hours per day, five days per week, assigned to teach reading and mathematics and to terminate on June 30, 1974. (PR-25, 26A,B,C) During the course of the 1973-74 school year, specifically, on March 18, 1974, petitioner was removed from the Board's per diem rolls and assigned a full-time classroom position until the end of the school year June 30, 1974. (PR-19, 20A) On April 16, 1974, the Board voted not to renew her teaching contract for the 1974-75 (PR-18) Subsequently, on August 20, 1974, the Board awarded petitioner a teaching contract for the 1974-75 school year replacing a tenured teacher on maternity leave of absence. (PR-14A,B)

Petitioner's testimony with respect to the period of employment with the Board from October 15, 1973 until March 17, 1974 revealed that she was compensated at the rate of $6.00 per hour assigned to regular teaching staff members to teach reading and mathematics to approximately seven or eight fourth grade pupils and reading to five or six sixth grade pupils. She testified that she instructed the fourth grade pupils in "one corner of the room" while the regular teacher worked with the remainder of the class. For the sixth grade supplemental instruction, petitioner removed the pupils from the classroom and instructed them in the school's cafeteria. (TR. 16-17) She testified that she made lesson plans for the work to be covered by the pupils in consultation with the regular classroom teachers. In addition, she administered

tests to the pupils and marked their papers. The ultimate pupil evaluation, however, was the responsibility of the regular teacher. (TR. 18-21, 41-42)

Petitioner testified that her school day was less than that of a regular teacher. She stated that regular teachers arrived at school at 8:15 a.m. while her day began at 8:30 a.m. and that her school day was officially completed at 1:15 p.m. and the regular teachers remained in their classrooms until 2:45 p.m. (TR. 38-39) Petitioner testified that during the period of time she served as a supplemental teacher she did not participate in the schools curriculum planning, in-service workshops, faculty meetings, budget preparation, textbook selections or pupil progress reports to parents. (TR. 41-47)

Petitioner testified that on March 18, 1974 she ceased her supplemental teaching activities and commenced as a full-time first grade substitute teacher replacing the regularly assigned teacher who was granted a maternity leave of absence by the Board. She stated that she completed the 1973-74 school year and was compensated in accordance with the Board's salary policy and received all of the benefits and emoluments enjoyed by the Board's regular teaching staff members. She stated that she had full control and responsibility for the pupils under her direction and charge. (TR. 23-27) Petitioner testified that the contract she signed with the Board for the period of March 18, 1974 to June 30, 1974, contained a clause which read, "Replacing teacher on Maternity Leave of Absence." (TR. 28-29) (PR-20A) Petitioner asserted that she was employed from September 1, 1974 to June 1975 replacing the first grade teacher on maternity and Child Care Leave of Absence. The contract for the 1974-75 school year contained the same clause that she was "Replacing teacher on Maternity Leave of Absence." (TR. 29, 32-33).

Petitioner contends that the Commissioner erred in his decision in Kuboski, supra, wherein he held that her employment between October 15, 1973 to March 17, 1974 as a supplemental teacher was not cognizable toward tenure accrual. She cites the Commissioner's language in Kuboski, supra, wherein he denied accrual of tenure rights to supplemental teachers "*** unless they perform all of the principal duties and assume all of the principal responsibilities of regular teachers ***". Barbara Kaplan v. Board of Education of the East Windsor Regional School District, et al, Decision

on Motion, April 21, 1978. Petitioner cites the matter in Point Pleasant Beach Teachers Association, et al v. Board of Education of the Borough of Point Pleasant Beach, Ocean County, decision of January 10, 1979, reversing Commissioner of Education decision of December 9, 1977, wherein the State Board of Education stated, at page 2, that the determinative factor with regard to whether the petitioner's therein accrued tenure within the definition of "teaching staff member" was whether the nature of their employment was "temporary" or "regular." Petitioner states that the State Board therein proceeded to hold that since the source of funding of the Title I program was uncertain, the Board was within its rights to establish a "temporary" employment relationship, and thereby precluding the status of "teaching staff member" with accrual of tenure. Petitioner asserts that "teaching staff member" as defined in N.J.S.A. 18A:1-1 and N.J.A.C. 6:8-1.1, includes all teachers in a position of employment in a school district who hold appropriate certificates. Those teaching staff members entitled to accrue tenure under N.J.S.A. 18A:28-5 are defined in similar fashion therein.

Petitioner avers that New Jersey's Public School Education Act of 1975, at N.J.S.A. 18A:7A-5 provides as follows:

> "4. The goal of a thorough and efficient system of free public schools shall be provided to all children in N.J., regarding (sic) of socio-economic status or geographical location, the educational opportunity which will prepare them to function politically, economically, and socially in a democratic society.
>
> "5. A thorough and efficient system of free public schools shall include: *** c. instruction intended to produce the attainment of reasonable levels of proficiency in the basic communications and computational school skills; d. a breadth of program offerings designed to develop the individual talents and abilities of pupils; e. programs and supportive services for all pupils, especially those who are educationally disadvantaged or who have special educational needs. g. qualified instructional and other personnel."

Petitioner asserts that her work and duties as a supplemental teacher under the Beadleston Act. N.J.S.A. 18A:46-1 et seq, particularly with regard to the primary nature of her work,

and as corroborated by the testimony of the full-time teaching staff member, make clear the importance of the supplemental teacher program in achieving the goal of New Jersey Public School Education Act. Petitioner asserts that this was further confirmed by the testimony of the Superintendent regarding the importance of the supplemental teaching program, and its continunity in the school district since it began in 1970. (TR. 16-17, 65-70, 94-111)

Petitioner asserts that our Courts have held that the tenure status is to be applied uniformly to all categories of teachers within its ambit, Rall v. Board of Education of the City of Bayonne, 104, N.J. Super 236, (1969), reversed on other grounds, 54 N.J. 373 (1969). Petitioner avers that supplemental teachers have been provided throughout the State of New Jersey under the Beadleston Act (N.J.S.A. 18A:46) because of the Legislature's recognition that handicapped, classified children require specialized, individualized attention in order to be able to survive academically. She states that, although she worked with both classified and non-classified pupils, she worked as a primary teacher in mathematics and reading, thereby relieving the regular classroom teachers in order that they were able to provide more individualized attention to their remaining pupils of both a primary and remedial nature. (TR. 96-97) Petitioner contends that it cannot be disputed that such supplemental teaching is essential to carry out the Legislative mandate of providing the children with a thorough and efficient education. N.J.S.A. 18A:7A-1 et seq.

Petitioner admits that while she was paid an hourly rate, and her position was part-time without benefit of any other fringe benefits or emoluments, she asserts that the record is absent of any uncertainty with regard to the state funding as found by the State Board of Education in Point Pleasant Beach, supra. She asserts that the record makes clear that the manner in which she was hired, worked, and was compensated, was not understood to be temporary because of any concern regarding the elimination of the sources of funding. She asserts further that her duties included many, if not all, of the principal duties and responsibilities of the regular teaching staff member. She asserts that her teaching responsibilities were primary, rather than remedial, being responsible for the pupils mathematics and/or reading, without the classroom teacher covering the subjects; she prepared regular lesson plans, administered tests and marked papers; was available to meet with parents when necessary, was evaluated; reported the progress of the pupils to the regular classroom teacher;

played a role with regard to the promotion of the pupils; and also maintained progress folders regarding each child. (TR. 16, 18, 19, 20, 45-47, 57)

Petitioner asserts that she cannot be denied tenure on the grounds that her employment was part-time, since it had been established beyond dispute that part-time teachers acquire tenure rights if employed steadly and regularly during the school year. See Fox v. New Providence Board of Education, 1939-49 S.L.D. 134; Josephine DeSimone v. Board of Education of the Borough of Fairview, Bergen County, 1966 S.L.D. 43; Woodbridge Township Federation of Teachers Local Number 822 AFL-CIO and Woodbridge Township School Administrators Association v. Board of Education of the Township of Woodbridge, 1974 S.L.D. 1201. She asserts that the Commissioner held that in Woodbridge, supra at 1206-1207:

> "*** Such steady employment is contrasted with employment which is occasional or for a brief duration of days or weeks. Under these circumstances the steadily employed teacher would be entitled to a pro rata benefit as a principal of equity ***"

See also Zimmerman v. Board of Education of the City of Newark, 38 N.J. 65, 183 (1962); Nearier v. Board of Education of the City of Passaic, 175 S.L.D. _____.

Petitioner observes that N.J.S.A. 18A:66-2(p), concerning the Teachers' Pension and Annuity Fund defines:

> "any regular teacher, special teacher, helping teacher *** and other members of the teaching professional staff *** and any persons under contract or engagement to perform one or more of these functions ***"

She asserts that the Teachers' Pension and Annuity Fund exclude from its coverage only substitute teachers and those not regularly engaged in performing teaching functions as a full-time occupation outside of vacation. She asserts that even though the Board unilaterally elected not to make contributions on her behalf to TPAF, her employment whether called that or regular teacher, special teacher or helping teacher, involved her in performing one or more regular teaching functions as a full-time occupation, even though on a part-time basis.

Petitioner argues that a statute's purpose should not be frustrated by an interpretation contrary to that purpose. Grogan v. Disapio, 11 N.J. 308 (1953); State v. Weissman, 73 N.J. Super 274 (App. Div. 1962). She argues that the teachers tenure law N.J.S.A. 18A:28-1 et seq., particularly 18A:28-5, should be construed liberally in order to effect its purpose of providing competent and steadily employed teachers with the security of tenure. Viemiester. She v. Board of Education of the Borough of Prospect Park asserts that it should be applied broadly and liberally just as any other enactment with remedial purpose, Frazier v. Robin Dee Day Camp, 44 N.J. 480 (1965). To act otherwise, merely opens the door to a broad-ranged attack upon the frustration of the basic objective of the tenure statute rejected in Downs v. Board of Education of Hoboken, at 13 N.J. Misc. 854.

Petitioner asserts that her employment with the Board from March 18, 1974 to June 30, 1974 is cognizable toward tenure accrual and that she met the tenure provisions of N.J.S.A. 18A:28-5(c) which provides, in pertinent part, that "all teachers" holding appropriate certificates who are employed in the school district for "the equivalent of more than three academic years within a period of four consecutive academic years ***".

Petitioner observes that the Commissioner held in Kuboski, supra, that the matter of Nicoletta Biancardi v. Waldwick Board of Education, 1974 S.L.D. 360, affirmed State Board of Education 368, reversed 139 N.J. Super 175 (App. Div., 1976), affirmed 73 N.J. 37 (1977) was controlling, since the Court held that employment as a substitute teacher for a regular teacher was not cognizable to achieve a tenure status. Petitioner submits that Biancardi, supra, is significantly different from the facts and circumstances in the instant matter and therefore is inapplicable. Petitioner asserts that the only similarity between Biancardi and Kuboski, is that petitioner Kuboski replaced a teacher out on leave. She asserts that in no other respect was her relationship, either in terms of agreement regarding terms and conditions of employment with the board, or in terms of duties and responsibilities, that of a substitute. Petitioner Kuboski states that she was employed for thirteen and one half months, was employed under regular teaching staff contract similar to the contracts executed by the Board and all other non-tenure teaching staff members, and was paid the same salaries, fringe benefits and emoluments, including contributions to TPAF, just as all other regular teaching staff members who were not substitutes. In addition, petitioner

states that she was paid at advanced steps on the salary guide, was evaluated by her superiors and when no further employment was offered her for the following school year, she was notified pursuant to N.J.S.A. 18A:27-10. Petitioner asserts further, that the matter of Joan Driscoll v. Board of Education of Clifton, Passaic County, 1976 S.L.D. _____, affirmed State Board of Education, May 5, 1976 reversed Docket A-3588-75, New Jersey Superior Court, Appellate Division, to October 18, 1977 is also distinguishable with respect to Kuboski, supra.

Petitioner relies on the matter of Juanita Zielinski v. Board of Education of Guttenberg, 1970 S.L.D. 202, reversed State Board of Education S.L.D. 664, affirmed Docket A-1357-70 New Jersey Superior Court, Appellate Division February 16, 1972 (1972 S.L.D. 692), wherein it was held that employment is that of a regular teacher or substitute teacher is not to be determined by the designation or nomenclature used by the employing board, but such determination requires an examination of the relevant fact picture. Petitioner asserts that such examination herein, discloses that the board established a relationship with petitioner Kuboski during the aforesaid period of time identical with the relationship it established with regular teaching staff members who did not replace regular teachers on either maternity leave or a child care leave. Petitioner argued that if one is to honor the Court's statement that designation or nomenclature used by the Board is not controlling, one must instead look to the employment relationship voluntarily established by the petitioner and the board. She argues that it is the nature of that employment relationship in actual fact that determines whether the employment is as a substitute or a regular teacher. Downs v. Hoboken Board of Education. 13 N.J. Misc. 853 (Sup. Ct. 1935); Jersey City Board of Education v. Wall, 119 N.J.L. 308 (Sup. Ct. 1938)

Petitioner does not dispute that the board herein had the right to hire substitute teachers, as substitutes, N.J.S.A. 18A:29-16. She asserts, however, that the Board clearly failed to do so. She contends that any belated efforts to now treat petitioner Kuboski retroactively as a substitute in order to preclude credit towards tenure accrual is clearly a belated effort to so categorize her and a subterfuge to evade the tenure act. Such an action, she argues, was held impermissible by our former highest court in Schultz v. State Board of Education, 132 N.J.L. 345, 353 (E. & A. 1945).

Petitioner relies upon the language of the Commissioner as follows:

> "Tenure is a legislative status and *** may not be abrogated or waived by any person or any Board of Education. Hazlet Township Teachers Association, et al, 1976 S.L.D. 5
>
> "***It is clear *** that teachers who are regularly and steadily employed are entitled to protection. Josephine DeSimone v. Board of Education of the Borough of Fairview, 1966 S.L.D. 43.

Petitioner observes that the tenure laws are essentially protective in nature, and that their purpose is to grant a measure of security to teachers who have faithfully served for the requisite span of time in a regular teaching capacity. Barnes v. Board of Education of Jersey City, 85 N.J. Super 42, 45 (App. Div., 1964) certif. den. 43 N.J. 450 (1964); Viemiester, supra. She asserts that the essential purpose or spirit of the act mandates a liberal approach to its interpretation and application to factual situations. Barnes, supra; Viemiester, supra.

The Board contends that the courts have held that where a teacher has knowingly agreed to and accepted a temporary employment in the district, such employee does not make an employee a teaching staff member and, therefore, service during the period of employment does not count towards the accrual of tenure. Point Pleasant Beach, supra,; Biancardi, supra. It relies upon the words of the State Board in Point Pleasant, supra, wherein it said;

> "***The determinative factor, then, is the nature of the employment voluntarily agreed to by the teacher whether or not it is 'temprary' as contrasted 'regular'."

The Board argues that where the evidence established that the employee knew and understood her employment to be temporary, and there is no allegation or evidence that the Board herein used a temporary appointment as a device to avoid tenure entitlement, tenure does not accrue during the period of such temporary employment.

The Board observes that petitioner argues in her post-hearing brief that since she was employed and renumerated in all respects as the regular classroom teachers at the time,

the board should not be permitted to retroactively change her employment status as a "subterfuge." The Board argues, to the contrary, that at all times it was forthright and open with petitioner Kuboski, and fully advised her in documentary and verbal fashion that her position was to be a true temporary, replacement position. It observes that it so admitted at the hearing. (TR. 49-50). The Board argues that time served as a substitute is not tenurable for the reason that such substitutes are not "teaching staff members" within the meaning of the tenure statute. Schultz v. State Board of Education, 1932 N.J.L. 356 (E. & A. 1944); Driscoll, supra.

The Board submits that petitioner's effort to distinguish this case from Biancardi, supra, and Driscoll, supra, is to no avail. The Board observes the fact that petitioner Kuboski was paid similar renumerations to a regular classroom teacher and did participate in the Teachers' Pension and Annuity Fund, however, it does not answer the question as to whether employment was, in its nature and within the intent of the parties, of a temporary, substitute nature. The Board asserts that there is nothing in the record, as now supplemented by the hearing, which would point to any other conclusion than that reached by the Commissioner in his original determination that "*** petitioner Kuboski was fully aware and understood that her employment during March through June, 1973 and for the 1974-75 school year was that of replacement of regularly employed tenured teachers on leave of absence and that she accepted such conditions in executing the employment contracts." Kuboski, supra, at p. 18.

With respect to petitioner's employment as a supplemental teacher, the Board argues that there be no question but that petitioner Kuboski did not perform all of the principal duties and assume all of the principal responsibilities of a regular classroom teacher. It asserts that her duties were on a limited basis, in a limited subject matter and always as an adjunct to the regular classroom teacher. It notes that in one instance her duties were actually performed in the same classroom as the regular classroom teacher. The Board asserts that petitioner operated as a true supplementalist engaged to meet temporary, specific needs of pupils in the district.

The Board asserts that the decision in Capella and Fitts v. Board of Education of Camden County Vocational and Technical, 1975 S.L.D. p. 178 as well as the decisions in Driscoll, supra, and Point Pleasant, supra, supports its position that petitioner's services during this period do not accrue towards tenure. It observes that in the Point Pleasant, decision the State Board of Education de-emphasized the question of distinguishing

between the duties performed by a substitute-supplementalist-Title I teacher, and a regular classroom teacher, emphasizing more the nature of the relationship and whether it was understood that the position was to be a true substitute, temporary position. It asserts that petitioner's duties in Point Pleasant included the execution of weekly lesson plans, scheduling pupils to be served ordering supplies and materials, arranging and conducting parent conferences, maintaing individual progress folders, etc., all of which duties were insufficient to raise the employment therein to the level of tenure employment. It argues that in many instances, petitioner Kuboski did not perform any of those services performed by petitioners in Point Pleasant.

The Board asserts that petitioner Kuboski understood that supplemental instructors employed by it were so employed to augment and reinforce various designated and specific needs of pupils beyond the instruction given in the regular instructional program. It avers that such supplemental instruction can be given at all levels, K through 12, and often is provided at the recommendation of the Child Study Team. It asserts that petitioner understood that the amount and duration of instruction at a particular time is to be determined by the needs of the pupils. It contends that the need for flexibility in the number of instructors, their instructional load, the subject areas to be supplemented, is of paramount concern in order to adequately provide for pupils' needs as they are identified. In addition, it argues the commencement, termination, and intensity of instruction is dependent upon the deficiencies and results noted in each individual pupil. It asserts that assignment to such functions is often on a "per case" basis rather than a class basis typically given to regularly employed teachers. The Board submits that the State Board of Education recognized the need for flexibility in this area where it stated in Point Pleasant, supra as follows:

> "In order to be able to run a thorough and efficient school system, a Board of Education must enjoy flexibility in the establishment and termination of special programs which may have a spasmodic nature and doubtful future. Such flexibility would be severally hampered if the Board had to bear the seniority and other burdens which would result if teachers hired temporarily for such a program were to obtain tenure and the program itself were thereafter discontinued."

The Board argues that petitioner's time served as a supplemental teacher is not cognizable for tenure status.

Having carefully reviewed and considered the entire record in the instant matter, including the Commissioner's decision in Kuboski, supra, the documents in evidence, the testimony of the witnesses at the hearing of January 8, 1979, and briefs of counsel with their respective arguments, I FIND the following to be true in fact:

1. The uncontroverted employment history of petitioner Kuboski is herein accepted as a finding of fact.

2. That petitioner's employment from October 15, 1973 to March 18, 1974 as a supplemental teacher did not provide petitioner with a contract issued by the Board similar to such contracts issued to regular teaching staff members in its employ.

3. That from March 18, 1974 to June 30, 1974 petitioner was employed to replace a teacher who was granted a maternity leave of absence by the Board.

4. The contract entered into between petitioner Kuboski and the Board for the period of March 18, 1974 to June 30, 1974 contained the clause "replacing teacher on maternity leave of absence."

5. Petitioner's employment for the 1974-75 school year was also employment to replace a teacher on maternity and/or child care leave, and the contract entered into between petitioner and the Board also contained the clause "replacing teacher on maternity leave of absence."

The first issue to be determined is whether or not petitioner Kuboski's employment as a supplemental teacher from October 15, 1973 to March 18, 1974, is cognizable toward tenure accrual. I CONCLUDE that pursuant to the State Board of Education decision and the decision of the Appellate Division in the matter of Point Pleasant, supra, that such time is not cognizable toward a tenure status. As the State Board stated in the Point Pleasant Beach matter:

> "The central question is whether or not any of the Petitioner's in this case enjoyed the status of 'teaching staff member' within the meaning of the tenure statute. It is established law that where a teacher

> has knowlingly agreed to and accepted temporary employment in the District, such employment does not make the employee a teaching staff member, and therefore, service during the period of such employment does not count toward the accrual of tenure. (Biancardi; Schultz.) The determinative factor, then, is the nature of the employment voluntarily agreed to by the teacher -- whether or not it is 'temporary' as contrasted with 'regular'"

Petitioner Kuboski accepted the position as supplemental teacher knowing that she would be compensated at the rate of $6 per hour, without any benefits or emoluments afforded regular teaching staff members, and that her hours of work were less than those of regular teaching staff members. Under such circumstances she was aware that her employment was different than that of regular teaching staff members in the employ of the Board. Thus, IT IS CONCLUDED that petitioner's employment as a supplemental teacher was in fact temporary employment.

With regard to the employment period of March 18, 1974 to June 30, 1974, I CONCLUDE that the matters of Biancardi, supra, and Driscoll, supra, control with regard to this issue. It is uncontroverted that petitioner Kuboski knew at the time of employment that she was replacing a tenured teaching staff member granted maternity leave by the Board. Notwithstanding the fact that the Board of Education entered into a formal contract with petitioner providing her with the appropriate salary, emoluments and benefits afforded regular teaching staff members, the contract explicitly stated that petitioner would be "replacing a teacher on maternity leave." Petitioner knew and was aware that when the teacher on maternity leave returned to the Board's employ that the position would no longer be available to her. Petitioner did, in fact, substitute for a teacher granted the maternity leave. In Wall v. Board of Education of Jersey City, Hudson County 1938 S.L.D. 614, reversed State Board of Education 618, affirmed 119 N.J.L. 308 (Sup. Ct. 1938), the State Board said, in agreement with the Commissioner's opinion that :

> "The word 'substitute *** denotes one put in place of another or one acting for taking the place of another. ***'" at p. 619)

It is clear that petitioner was "acting for" the regular tenured teacher and, in so doing, accepted the position

to substitute teach. Having done so, petitioner accepted the contractual conditions offered to her by the Board. As the Commissioner said in the matter of Cossaboon v. Board of Education of the Township of Greenwich, Cumberland County, 1974 S.L.D. 706, 708:

> "***Once the employment was offered and accepted, the action of the parties effectively established contractual relationship. ***"

The Board therefore, under its statutory authority pursuant to N.J.S.A. 29-16 employed petitioner as a substitute teacher to replace the regular tenure teacher on leave. Biancardi, supra, Driscoll, supra.

I similarly conclude that petitioner's employment for the 1974-75 school year was not cognizable toward tenure accrual. Such conclusion is grounded upon the fact that petitioner again executed a contract with the board which specifically stated that she was "replacing a teacher on maternity leave". The record is clear that the regular tenured teacher on maternity leave did not resign her teaching position as required by N.J.S.A. 18A:28-8. The record reveals that, subsequent to the regular teachers maternity leave, she applied for and was granted by the Board a child care leave, therefore, protecting and maintaning her tenure rights to the teaching position she held with the Board upon the expiration of her leave. Accordingly, no vacancy existed to which petitioner could permanently fill and subsequently claim tenure.

In summary, I CONCLUDE that the Commissioner's decision in the matter of Kuboski, supra, should stand. Accordingly, the Amended Petition of Appeal IS HEREBY DISMISSED.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1 et seq.

AGENCY DKT. NO. 331-75

I HEREBY FILE with the Commissioner of Education, Fred G. Burke, my Initial Decision in this matter and the record in these proceedings.

20 May 1980
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

BARBARA KUBOSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

Petitioner excepts to the conclusion of Judge Lillard E. Law, ALJ that her employment as a supplemental teacher from October 15, 1973 to March 18, 1974 was temporary employment. The Commissioner cannot agree with petitioner's arguments. Petitioner at great length pleads to the "importance" of her work as a supplemental teacher. The Commissioner determines that the "importance" of what is done by a teacher is not alone and of itself sufficient criteria to determine its applicability towards the accrual of tenure. Surely, in Biancardi, supra, a substitute teacher might have argued as to the "importance" of her work in the classroom by keeping it open with children occupied in the learning process as an alternative to closing the class entirely. Yet, just as surely it has been recognized that the substitute teacher is just that, one whose work is of a temporary nature as replacement of and in lieu of the work of the regular teacher. Petitioner's argument as to the "importance" of her work for tenure purposes must fall.

So, too, must her exception to Judge Law's conclusion that her work as a replacement for a tenured staff member properly granted a maternity leave of absence does not accrue towards tenure. Petitioner knew by the contract she received from the Board that albeit she was provided with all the salary, emoluments and benefits offered a regular teaching staff member she was substituting for the tenured teacher who had not relinquished her position and had protected her tenure rights by a maternity leave of absence until she could return to work. Biancardi, supra; Point Pleasant Beach, supra.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

July 11, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DAVID PAVLIK, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY AND THOMAS J. BRADSHAW, ASSISTANT SUPERINTENDENT OF SCHOOLS, RESPONDENT.	)	INITIAL DECISION OAL DOCKET NO. 4246-79 AGENCY DOCKET NO. 347-8/79A

APPEARANCES:

For petitioner, Mandel, Wysocker, Sherman, Glassner & Weingartner, Eqs. (Jack Wysoker, Esq., appearing and on the Brief)

For respondent, R. Joseph Ferenczi, Esq., appearing and on the Brief

BEFORE THE HONORABLE DANIEL B. MC KEOWN, A.L.J.

DOCUMENTS IN EVIDENCE

J-1 Letter, dated August 21, 1979 (Bradshaw to Pavlik)
J-2 Letter, dated August 21, 1979 (Bradshaw to Rebovich)
J-3 Letter, dated August 27, 1979 (Bernard to Bradshaw)

Petitioner, (Pavlik) a teaching staff member who has acquired a tenure status in the employ of the Board of Education of the Township of Edison, (Board) alleges the assistant superintendent of schools (Bradshaw) illegally and otherwise improperly transferred him to another school for the 1979-80 academic year and that the Board, by ratifying that action, acted arbitrarily and unreasonably.

The Commissioner of Education, before whom the Petition of Appeal was filed, denied Pavlik's Motion for Interim Relief by written decision on September 21, 1979. (See David Pavlik v. Board of Education of the Township of Edison and Thomas J. Bradshaw, 1979 S.L.D. ___ (decided on Motion, September 21, 1979) Thereafter, the Commissioner transferred the matter to the Office of Administrative

Law as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. The parties agreed at a prehearing conference to submit the matter for summary decision on the stipulated facts and Briefs in support of their respective positions. The record was closed and readied for disposition on April 18, 1980, the day after the Board's Brief was filed.

The parties agreed at the prehearing conference that the pleadings raise the following issues for adjudication: (See Prehearing Order, dated January 4, 1980)

> Within the context of the stipulated facts and stipulations as to what testimony would be set forth post, is petitioner's assignment to the Piscatawaytown School contrary to the provisions of N.J.S.A. 18A:25-1 or arbitrary, capricious, and/or unreasonable to the extent that relief, financial or otherwise, must be afforded.

At the same prehearing conference the parties entered the following stipulations as to fact for purposes of the summary proceeding herein as to what certain testimony would be had the matter proceeded to hearing:

A. Pavlik is a teaching staff member, with tenure, in the Board's employ.

B. During 1978-79, Pavlik was assigned to teach 6th grade at the Board's Madison Elementary School.

C. He was advised on May 29, 1979 he was to be assigned to the Clara Barton School, 5th grade, for 1979-80.

D. The Board adopted a resolution on August 13, 1979, effectuating that assignment.

E. Pavlik would testify he reported to Barton School on August 6, 21, and 24, 1979 and spent approximately twenty hours in preparing his classroom for 1979-80.

F. On or about August 24, 1979, Pavlik was notified by letter from the assistant superintendent he was to be assigned to the Piscatawaytown Elementary School for 1979-80. (J-1) He would testify he had no prior knowledge of this possibility.

G. The assistant superintendent knew on July 9, 1979 of the need to assign Peter Rebovich, another teacher, to a classroom because of the prior abolishment of his position of acting principal in April.

H. Rebovich would testify that sometime the week of July 25, 1979 he informed assistant superintendent he would accept assignment as teacher in any one of three schools including Barton.

I. Rebovich was notified by letter dated August 21, 1979 from the assistant superintendent that he was assigned to the Barton school for 1979-80. (J-2)

J. The Association, on behalf of Pavlik, submitted a letter dated August 27, 1979 to the assistant superintendent in regard to the reasons for Pavlik's assignment to Piscataway town School and an opportunity to be heard. (J-3) The Board asserts the assistant superintendent informed the Association on August 29, 1979 the reasons for the transfer were stated to Pavlik in the letter dated August 21, 1979 (J-1) and that he, the assistant superintendent, would meet with Pavlik and an Association representative. The assistant superintendent also was to have stated a meeting with the Board was not legally required.

K. Pavlik commenced his assignment at the Piscataway town School for 1979-80 on September 4, 1979 and is still there.

L. Rebovich commenced his assignment at the Barton School for 1979-80 and is still there.

M. The Board, on September 10, 1979, adopted a resolution authorizing Pavlik's assignment to Piscataway town School for 1979-80.

N. Pavlik has been in the Board's employ 6 years; Rebovich has been in the Board's employ 16 years.

Petitioner argues that his assignment to the Piscataway town School by Bradshaw on August 24, 1979, effective September 4, 1979 is illegal because the Board had not authorized such transfer at that time. Though petitioner recognizes the Board ratified the transfer on September 10, 1979, he asserts that given the facts and circumstances of the entire matter, both Bradshaw's action and the Board's subsequent ratification of that action must be set aside.

Petitioner, by way of relief, seeks (1) a declaration pursuant to N.J.S.A. 2A:16-51, et seq., the Uniform Declaratory Judgments Law, that he was entitled to a statement of reasons and an informal appearance before the Board prior to his transfer from one school to another; (2) that he be compensated for the approximate hours he spent in preparation of his assigned classroom at the Clara Barton School prior to his transfer to the Piscataway town School; (3) that the Board be directed to assign him to its James Madison Elementary School where he had been assigned during his first several years of employment; and (4) any other relief which is deemed proper, just, and equitable.

Petitioner grounds his requested relief upon the allegation that his transfer to Piscataway town School by Bradshaw, three months after he had been transferred to the Clara Barton School from his original assignment at the James Madison Elementary School, is absent the characteristic good faith necessary for a board of education's controverted action to carry the presumption of correctness and to be upheld.

Petitioner maintains Bradshaw should have notified him of his transfer to Piscataway town School as early as July 9, 1979 but no later than July 25, 1979 when he, Bradshaw, learned of Rebovich's desire to be assigned to Clara Barton

School. Had this occurred, petitioner argues, he would have realized the classroom at the Clara Barton School, he spent twenty hours preparing, was not to be his assigned classroom for 1979-80.

In summary, petitioner challenges the propriety and legality of his transfer to the Piscatawaytown School for the following reasons:

1. He was not notified of the transfer until August 24, 1979;

2. The transfer was the second transfer of his assignment within three months;

3. Prior to being notified by Bradshaw on August 24, 1979 of his transfer to Piscatawaytown School, petitioner spent time preparing his classroom at the Clara Barton School;

4. The Board ratified petitioner's transfer to Piscataway-town School on September 10, 1979, six days after he began that assignment.

It must be noticed that Bradshaw advised petitioner of his transfer by letter, dated August 21, 1979, as follows:

> " I regret the need to make a change in your 1979-80 assignment at this late date. However, since Mr. Peter Rebovich was not appointed to an elementary principalship, it is necessary for me to find a placement for him for 1979-80 and to take into account his seniority in doing so. Mr. Rebovich has requested placement at the Clara Barton School and in order to be able to accomodate him, it is necessary to transfer you from your scheduled placement in Grade 5 at Clara Barton School to 4th Grade at the Piscatawaytown Elementary School. Since you were already displaced from the James Madison School, I hope that this change in your assignment will be more acceptable than it otherwise would be *** "

Petitioner does not allege that the reasons stated in Bradshaw's letter in regard to his transfer are false. Petitioner does complain that the Board, in its ratification of Bradshaw's transfer of him, did not itself give him its reasons for such transfer and opportunity to be heard.

The Board to the contrary argues that a transfer of a teaching staff member is within its authority and prerogative; that absent an affirmative showing of bad faith on its part a transfer of assignment on a relatively short notice is not sufficient reason to invalidate such otherwise proper and legal action; that its action on September 10, 1979 to ratify Bradshaw's initial transfer of petitioner to Piscatawaytown School is a proper exercise of its authority; that there is no requirement for it to afford a teaching staff member it reassigns a statement of reasons or an informal opportunity to be heard; and, finally, that

petitioner failed to carry the burden of proof to establish his controverted transfer is in any way illegal or improper. The Board seeks dismissal of the Petition of Appeal.

DISCUSSION OF LAW

Local boards of education are empowered to transfer tenured teaching staff members from one position to another subject only to the limitations of the statute N.J.S.A. 18A:25-1 which provides:

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

Such power of local boards is more directly and explicitly stated in decisions of the courts. In Cheeseman v. Gloucester City, 1 N.J. Misc. 318 (Sup. Ct. 1923), the Court held:

> "***The Gloucester City Board of Education had the power of transfer***" (at p. 319)

In Wilton P. Greenway v. Board of Education of the City of Camden, 129 N.J.L. 461 (E.&A. 1942) the Court held:

> "The district boards are expressly invested with authority to transfer principals and teachers. *** The exercise of the power rests in sound discretion ***. The transfer was in no sense a demotion***. (at p. 465)

See also John C. McGrath v. Board of Education of the Town of West New York, Hudson County, 1965 S.L.D. 88; James Mosselle v. Board of Education of the City of Newark, Essex County, 1972 S.L.D. 197; Dorothy Agress et al v. Board of Education of the Township of Hamilton, Mercer County, 1975 S.L.D.

Thus, the power of a board of education to transfer teaching staff members to comparable positions within its school district is clear, absent a showing that in some manner the Board's discretion had been abused.

More recently, the New Jersey Supreme Court in Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 affirmed the discretionary authority of boards of education to transfer its teachers.

There, the Court ruled that the issue of teacher transfer is not subject to mandatory collective negotiation because a teacher's transfer is part of the "*** inherent managerial responsibilities ***" of boards of education. (at p. 156)

While a board of education's authority to transfer teachers is explicit, it is the authority of the board to transfer --- not an administrator's. Here, Bradshaw, as school administrator, caused a notice of transfer (J-1) to be sent petitioner on August 21, 1979 absent Board authorization. Though the transfer

was not effective until September 4, 1979, when petitioner reported to Piscataway town School for the start of the 1979-80 academic year, the Board did not notify Bradshaw's transfer of petitioner until September 10, 1979.

While it is readily apparent that petitioner's transfer became effective prior to the Board ratification, I fail to find this course of events sufficient reason to set aside petitioner's controverted transfer. Furthermore, it has been held that a board's action to ratify an administrator's action to transfer a teacher without prior board approval is valid. (See Gregory Cordano v. Board of Education of the City of Weehawken, Hudson County, 1974 S.L.D. 316, 322, dismissed State Board of Education 1974 S.L.D. 323)

Petitioner's demand for a statement of reasons from the Board and an informal opportunity to be heard by it prior to it ratifying the transfer is grounded upon the principles of elemental fairness and justice as expressed by the New Jersey Supreme Court in Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974)

Though the principles of elemental fairness and justice expressed in Donaldson require a statement of reasons to be given a nontenure teacher whose employment has not been renewed by a board as well as requiring an informal opportunity for the teacher to be heard by that board, such principles in the form of a statement of reasons or informal appearance do not extend to the managerial perogative of a board of education to transfer teachers from one assignment to another. Elemental fairness and justice is served, I conclude, in a transfer matter when the transfer is to a comparable position within the Board's employ.

But even though I find no basis in law which requires reasons to be given for a transfer, petitioner was advised by Bradshaw of the reasons why his assignment to Piscataway town School was necessary. (J-1, supra)

I find no authority upon which to declare petitioner was entitled to a statement of reasons and an informal opportunity to be heard by the Board prior to its determination to ratify his transfer to Piscataway town School.

Though it is recognized here that petitioner's controverted transfer was his second transfer in three months and that he was not notified of the second transfer until August 24, 1979 and that by that time he had spent some time preparing a classroom he did not use, I find no basis upon which to conclude that the timeliness of the action of Bradshaw or the Board was calculated in a manner to be deleterious to him.

In short, given all the circumstances herein and recognizing that the entire transfer matter may have been handled more efficiently, I find no basis upon which to grant petitioner relief.

I CONCLUDE petitioner has failed to carry the burden of proof that the Board or Bradshaw acted illegally, arbitrarily, unreasonably, or capriciously to the extent he should be awarded any relief.

The Petition of Appeal is DISMISSED.

This recommended decision may affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

I HEREBY FILE with Fred G. Burke, Commissioner of Education, my Initial Decision in this matter and the record in these proceedings.

May 28, 1980
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, A.L.J.

DAVID PAVLIK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, AND THOMAS J. BRADSHAW, ASSISTANT SUPERINTENDENT, MIDDLESEX COUNTY,	:	DECISION
RESPONDENTS.	:	

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

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

Petitioner excepts to the failure of Judge Daniel B. McKeown, ALJ to find that petitioner's transfer which was initially ordered by the Assistant Superintendent and subsequently ratified by Board action was improper. The Commissioner cannot agree. The Board, by its action on September 10, 1979, adopted a resolution authorizing petitioner's assignment previously made by the Assistant Superintendent. The Board, in effect, properly corrected a procedural deficiency. Cordano, supra, at 321

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

July 14, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

JOSEPH PINNELLI	)	INITIAL DECISION
V.	)	OAL DKT.NO. EDU 5685-79
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY	)	AGENCY DKT.NO. 240-6/79A

APPEARANCES:

Theodore M. Simon, Esq. for Petitioner

Nicholas P. Nasaranko, Esq., for Respondent

BEFORE THE HONORABLE ROBERT P. GLICKMAN, A.L.J.:

This matter comes before the Court by way of petition filed pursuant to N.J.S.A. 18A:6-9 vesting the Commissioner of Education with jurisdiction to hear or determine all controversies and disputes arising under the school laws. This matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14-1 et seq.

At a prehearing conference on February 6, 1980, the following issues were identified:

1. Did respondent, Board of Education, comply with N.J.S.A. 18A:29-11 with regard to giving petitioner credit on the salary guide for his military experience?

2. If not, what sum of money is owed petitioner?

3. Is petitioner barred from recovery by the doctrine of laches, and/or statute of limitations and/or waiver and/or estoppel?

4. Is petitioner a teaching staff member as defined in N.J.S.A. 18A:29-6? If not, in what way would this limit petitioner's claim?

The following stipulations were made at the prehearing conference and at the hearing:

1. Petitioner commenced employment with respondent in March, 1967 and worked until June, 1967 on Step 1 of the salary guide. Petitioner was employed on the aforementioned dates under an emergency certificate.

2. Petitioner's date of certification was August, 1976 when petitioner was certified by the Department of Education, State Board of Examiners as a teacher of industrial arts. (J-2)

3. Petitioner served in the United States army from February 26, 1943 to November 16, 1945 when he was honorably discharged. (J-1)

4. Petitioner was placed on Step 1 of the salary guide of respondent when hired.

5. Petitioner filed his petition of appeal on June 20, 1979, with the Commissioner of Education.

6. Petitioner was employed during the 1967-68 school year on Step 1 of the salary guide.

7. During the 1968-69 school year, petitioner was employed on Step 2, and for each year thereafter, he was advanced one step so that now he is on Step 13 of the salary guide.

On April 29, 1980 a hearing took place at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey at which time the following exhibits were marked into evidence:

1. J-1, enlisted record and report of separation of petitioner.

2. J-2, certificate of petitioner from State Department of Education.

3. P-1, application for teacher's position.

4. P-2, chart setting forth 13 Steps on salary guide, the amount petitioner should have received with two years military credit, and the amount petitioner should have received with three years military credit.

No witnesses testified at the hearing. The Court requested certain post hearing materials which were to be submitted by May 29, 1980 on which date the hearing was deemed to be concluded. (See Proposed Uniform Administrative Procedural Rules of Practice 19:65-16.1).

On May 15, 1980 petitioner's attorney submitted to the Court, with a copy to respondent's attorney, a letter and salary guide. The letter in pertinent part states:

> "...The amount that petitioner was paid during the 1978/79 school year was $15,098. There is no figure of $15,098 on the salary guide. Annexed hereto is the official salary guide. Since petitioner was on Step 12 for 1977/78, it would appear in the normal course that he would have been placed at Step 13 which would be $15,698. Apparently the Board, even by its own calculations, shortened petitioner by the sum of $600. In any event, his salary with one year military credit should be $17,090 and his salary with two years military credit should be at super maximum for the sum of $17,687.
>
> Accordingly, with one years military service credit the petitioner would receive a differential of $1992 and with two years military service credit petitioner would receive a differential of $2,589. ..."

Since this Court has received no objection to the contents of petitioner's letter of May 15, 1980, this Court shall consider it as part of the evidence in this matter. By letter dated May 27, 1980, petitioner withdraws his claim for military service credit prior to September, 1976, and requests credit for the years 1976-77, 1977-78, 1978-79 and 1979-80.

Based on the aforementioned uncontroverted stipulations of fact and the exhibits submitted herein, this Court FINDS:

1. Petitioner commenced employment with respondent in March, 1967.

2. Between March, 1967 and June, 1967 petitioner worked on Step 1 of the salary guide.

3. Upon his initial employment, petitioner had an emergency certificate. (Emphasis added).

4. In August, 1976 petitioner was granted a permanent certificate by the State Board of Examiners as a teacher of industrial arts.

5. Petitioner served in the U.S. Army from February 26, 1943 until November 16, 1945 when he was honorably discharged.

6. Petitioner was placed on Step 1 of the salary guide when he was hired by respondent and was given no credit on the salary guide for his military service.

7. Petitioner filed his petition of appeal with the Commissioner of Education on June 20, 1979.

Since petitioner was not statutorily eligible for credit for his military service, it is unnecessary to make any findings with regard to damages. The statute which petitioner relies upon is N.J.S.A. 18A:29-11 which states in pertinent part:

> "Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States or of this State,...shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other State or territory of the United States, except that the period of such service shall not be credited toward more than four employment or adjustment increments. ..." (Emphasis added)

The term "member" is defined in N.J.S.A. 18A:29-6 which states:

> "... 'Member' shall mean a full-time teaching staff member as defined in this title except one who is the holder of an emergency certificate;" (Emphasis added)

It is clear from the uncontroverted proofs before this Court that at the time petitioner was hired, he held an emergency certificate. Petitioner, thus, was not a "member" as defined by statute. Since only "members" are eligible for credit for military service pursuant to N.J.S.A. 18A:29-11, it follows that petitioner's claim must fail. Since petitioner was not a "member" at the time of initial employment by respondent, the subsequent attainment of his permanent certificate in 1976 does not bestow upon him any rights or entitlement to credit for military service. The operable or significant date for purpose of credit for military service is the date of initial employment. Since petitioner did not qualify at that time, subsequent events would not correct the initial statutory defect.

It is axiomatic that where the wording of a statute is clear and explicit, the Court is not permitted to indulge in any interpretation other than that called for by the express words set forth. See Duke Power Co., v. Patten, 20 N. J. 42 (1955); Zietko v. New Jersey Manufacturers Casualty Ins. Co., 132 N.J.L. 206, 211 (E & A 1944); Bass v. Allen Home Improvement Co., 8 N.J. 219, 226 (1951); Sperry-Hutchinson Co. v. Margetts, 15 N.J. 203, 209 (1954); 2 Sutherland, Statutes and Statutory Construction (3rd. ed. 1943), Section 4502.

Additionally, the law is abundantly clear that the meaning of a statute is primarily ascertained by reading the language employed in its ordinary and common significance. Lane v. Holderman, 23 N. J. 304 (1957); Jamouneau v. Harner, 16 N.J. 500, 513, petition for certiorari denied 349 U.S. 904, 75 S. Ct. 580, 99 L. Ed. 1241 (1954); Julius Roehrs Co. v. Division of Tax Appeals, 16 N.J. 493, 497, 498 (1954); Abbots Dairies, Inc. v. Armstrong, 14 N.J. 319, 325 (1953); Bass v. Allen Home Improvement Co., 8 N.J. 219, 226 (1951); Eckert v. New Jersey State Highway Dept. 1 N.J. 474, 479 (1949).

Because the language and meaning of the applicable statute is clear, it is, therefore, CONCLUDED that petitioner's claim be dismissed with prejudice for his failure to qualify as a "member"pursuant to N.J.S.A. 18A:29-11 and 18A:29-6. All other issues raised in the prehearing order are, thus, without merit.

Accordingly, it is ORDERED that the petition be and is hereby DISMISSED with prejudice.

This recommended decision may be affirmed, modified or rejected by the head of agency, the Commissioner of Education, Fred G. Burke, who by law is empowered to make a final decision in this matter. However, if the head of the agency does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with the Commissioner of Education, my Initial Decision in this matter and the record in these proceedings.

May 29, 1980
DATE

ROBERT P. GLICKMAN, A.L.J.

JOSEPH PINELLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

Petitioner excepts to that portion of the initial decision of Judge Robert P. Glickman, ALJ which declares that petitioner did not become eligible for military service credit concomitant to attaining permanent certification. The Commissioner does not agree.

It is clear that petitioner, when first employed, held an emergency certification. N.J.S.A. 18A:29-9, Agreement as to initial salaries, states in whole:

> "Whenever a person shall hereinafter accept office, position or employment as a member in any school district of this state, his initial place on the salary schedule shall be at such point as may be agreed upon by the member and the employing board of education."

At the time of his initial employment, petitioner although working for the Board could not satisfy the definition of member in N.J.S.A. 18A:29-6 which states:

> "'Member' shall mean a full-time teaching staff member as defined in this title except one who is the holder of an emergency certificate***."

For nine years after the date of initial employment petitioner worked for the Board before becoming permanently certified. His initial place on the salary schedule was at some point agreed upon by petitioner and the Board. Subsequent change of certification does not alter the date of initial employment and the point in time at which petitioner could negotiate with the Board for his rate of pay.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

IN RE:	)	INITIAL DECISION
THOMAS BIERMAN	)	**OAL DKT NO. EDU 3497-79**
V.	)	
BOARD OF EDUCATION OF	)	AGENCY DKT NO. 31608/79A
THE BOROUGH OF GLEN ROCK,	)	
BERGEN COUNTY	)	

APPEARANCES:

Theodore M. Simon, Esq., of Goldberg & Simon, Attorneys for Petitioner,

Irving C. Evers, Esq., of Parisi, Evers & Greenfield, Attorneys for Respondent,

Mabel B. Perry, appearing Pro Se, joined in as a "necessary party". Brief submitted by **Cynthia M. Jacob**, Esq., of Norris, McLaughlin and Marcus, attorneys for the "necessary party".

BEFORE THE HONORABLE **JACK BERMAN,** A.L.J.:

Petitioner seeks a full-time mathematics position with respondent. He claims that his position is being denied him by virtue of a reduction in force as calculated by the respondent and seeks an order from the Commissioner of Education establishing his seniority in that regard. The respondent asserts that it acted within its prerogatives in making the appointments in the manner it did. This action comes before the Court pursuant to N.J.S.A. 18A:28-9 through 18A:28-13 and N.J.A.C. 6:3-1.10. This matter was then transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

Respondent brought a motion seeking to join Mrs. Mabel Perry, as a necessary party to the action, asserting if petitioner's position is sustained in these proceedings, Mrs. Perry, a guidance counsellor with respondent, would have to be let go completely or retained on a part-time basis. That motion was granted on November 27, 1979, by way of the pre-hearing order emminating from a conference held the preceding day.

At the prehearing conference, the petitioner and respondent agreed to the following issues:

(A) whether or not petitioner's seniority rights have been violated?

(B) is petitioner entitled to the requested relief, i.e., full mathematics position and back pay?

(C) whether or not respondent has the right to assign staff and maintain Affirmative Action Programs?

(D) has the Board the right, in order to maintain Affirmative Action Programs, to reduce a full-time employee to part-time, to be able to maintain that program and to assign accordingly?

It was agreed at the prehearing conference that the petitioner has the burden of proof of issues lettered (A) and (B) and respondent has the burden of proof with respect to issues lettered (C) and (D).

Mabel B. Perry was joined as a necessary party on December 10, 1979, satisfactory proof having been furnished to the Court by the petitioner that she was served with a copy of the order joining her as a necessary party to these proceedings.

Pursuant to the provisions of N.J.S.A. 52:14F-1 et seq., a hearing was scheduled for January 10, 1980. At the hearing Mrs. Perry requested an adjournment in order to obtain council. That request was granted by the Court and the hearing was adjourned until January 21, 1980. Mrs. Perry was further ordered to set forth her legal position either through an attorney or by herself, pro se, on or before January 14, 1980. Mrs. Perry brought a motion seeking leave to stay the proceedings scheduled for January 21, 1980 claiming various jurisdictional defects in that this matter involved questions of

Federal law and should be adjudicated in a Federal Court. Decision was reserved until January 21, 1980.

A few days prior to January 21, 1980, Mrs. Perry requested that the matter be adjourned until after February 20, 1980, for the reason that she had been in touch with the New Jersey State Educational Association and they had agreed to consider her request for them to supply her with council at a meeting to be held on February 20, 1980. Mrs. Perry was advised by the Court that unless she received the consent of the parties in this matter to an adjournment, the case would proceed accordingly, for hearing on January 21, 1980. Mrs. Perry later that day informed the Court that she was unable to obtain the consent of the parties in these proceedings for an adjournment.

On January 21, 1980, a hearing was held. At the outset , Mrs. Perry made a motion to have the matter adjourned to enable her to secure council, asserting that she was being denied due process rights by being caused to proceed without legal representation. That motion was denied. Mrs. Perry's motion for leave of this Court to stay these proceedings for lack of jurisdiction, was also denied.

On January 21, 1980, the Court heard the testimony of Dr. Betty Ostroff Carpenter, Superintendent of Schools of the Borough of Glen Rock in Bergen County and also received subsequent to the hearing, certain exhibits which are listed in the appendix attached hereto. The Court has also read and studied all of the pleadings, exhibits and arguments of council and briefs. The hearing was deemed to be concluded on April 25, 1980, the date when the necessary party's reply brief was submitted. (See proposed Uniform Administrative Rule Of Practice 19:65-16.1).

Dr. Carpenter testified that she had been Superintendent of respondent's schools since 1974, and is familiar with the experience records of respondent's teachers. For the 1978-1979 school year, the following individuals were employed as guidance counselors: Carol Abbitt, Ellen Barrett, Walter Freebairn, Donald Gray, Mabel Perry, Thomas Tunny, and Frances Bragger. Petitioner in the 1978 and 1979 academic term, was employed in the Mathamatics Department. Carol Abbitt, acted as a guidance counselor for the Glen Rock Board of Education and had one of the longest seniorities in the system. Dr. Carpenter believed that Ms. Abbitt was tenured around 1966 and had been employed as a guidance counselor throughout her experience and is certified as such.

Ellen Barrett, obtained tenure in 1964. She commenced as a Secondary English teacher and also served as a half-time guidance counselor. She is also certified as a guidance counselor.

Walter Freebairn commenced employment with respondent around 1961 and served as a full-time guidance counselor from approximately that date to the present. He is certified as a guidance counselor.

Donald Gray is certified as a guidance counselor and is also certified as a K-8 general teacher. He has also taught within his general certificate in the Glen Rock School System.

Mabel Perry who is a certified guidance counselor, has not served in any other capacity. As of 1978-79 academic school year, Mrs. Perry has had eight years tenure as a guidance counselor.

Mr. Tunny is not employed for the 1979-80 school year with the Glen Rock School System and is not certified as a guidance counselor. He is certified as a mathematics teacher.

The petitioner is not certified as a guidance counselor, but is certified as a mathematics teacher. He was employed since 1970 and sometime around 1973, obtained his tenure and has taught alternately in the Mathematics and Science Departments.

Frances Bragger by the end of the 1978-79 academic school year had served a total of 15 years as a guidance counselor for the respondent's school system.

This witness stated that the decisions with respect to the Guidance Department for the 1979-80 school year, took into account the seniority of the individuals in the Guidance Department. She listed in the order of the most senior the following:

1. Mr. Freebairn, 2. Miss Bragger, 3. Mrs. Abbitt, 4. Mr. Gray. She testified that the board had asked that two positions be cut from the department thereby leaving a total of 4.2 positions for the Guidance Department.

Dr. Carpenter testified that she presented to the Board a proposal that every-

one in the Guidance Department be reassigned part-time to a teaching position in order to keep the full complement of people at least part-time in the Guidance Department. The Board, she testified, after careful review, denied her proposal.

She stated that Mr. Gray at that point, had requested that he be returned half time to the Mathematics Department for the 1979-80 academic year. He was so reassigned. This thereby created an opening for Mrs. Perry to work half-time in the Guidance Department.

This created some difficulty for petitioner, "who was the least senior in the Mathematics Department, and left only a part-time, half-time position for [him]. He was offered that position and he refused it."

She testified that had the Board adhered to the strict seniority system, Mr. Freebairn, Ms. Bragger, Mrs. Abbitt and Mr. Gray would have comprised the Guidance Department plus a .2 position would have been specifically made for Miss Barret later, "because of her work with the special education youngsters." She stated that if the Board of Education would have done this and Mr. Gray had not left the Guidance Department, the petitioner "would not have been affected." She stated that Mr. Gray's teaching experience in mathematics antedates the experience of petitioner.

She testified on cross-examination that all persons in the Guidance Department last year, are present there this year, except possibly on a different time basis. She stated that if the Board had not taken the action it did, Mabel Perry would have had to been let go. She stated that Mrs. Perry had never taught in respondent's school system. She has only served as a guidance counselor in respondent's school system.

At the conclusion of this testimony, the parties rested.

The exhibits, submitted pursuant to the Court's request for additional discovery, reveals that Mrs. Perry is certified to teach Social Studies. Ct-1, is a schedule of the Initial Employment of the guidance counselors. It shows the following:

INITIAL EMPLOYMENT DATES

CAROL ABBITT	1966-67	Hired as a Guidance Counselor
ELLEN BARRETT	1961-62	Latin, English Teacher

	1971-72	Part Time Guidance, English
THOMAS BIERMAN	1970-71	Hired as Mathematic Teacher
	1973-74	Science Teacher
FRANCES BRAGGER	1964-65	Hired as Guidance Counselor
WALTER FREEBAIRN	1962-63	Hired in Special Education
	1964-65	Psychology
	1966-67	Guidance
DONALD GRAY	1960-61	Hired as Mathematic Teacher
	1962-63	Guidance, English, Social Studies
	1971-72	Guidance
MABEL PERRY	1971-72	Hired as Guidance Counselor

Therefore, based on a review of the entire record in this matter, the **COURT FINDS**:

1. Petitioner is a tenured teacher.

2. Petitioner is certified as a mathematics teacher.

3. The respondent underwent a reduction in force in its Guidance Department effective for the 1979-80 school year.

4. For the 1978-79 school year the following individuals were employed as guidance counselors: Carol Abbitt, Ellen Barret, Walter Freebairn, Donald Gray, Mabel Perry, Thomas Tunny and Frances Bragger.

5. In the 1979-80 school year as a result of the reduction in force in respondent's Guidance Department, the respondent determined to grant full-time guidance positions for the 1979-80 school year to Mr. Freebairn, Miss Bragger, Mrs. Abbitt, while granting Mr. Gray a one-half guidance, one-half math position; Mrs. Perry a one-half guidance position and Miss Barrett a four-fifths English, one-fifth guidance position.

6. Donald Gray who had greater seniority rights than petitioner, requested to be returned to the Mathematics Department for the 1979-80 school term. That request was honored by respondent to the extent that Mr. Gray instead of being assigned to the Guidance Department on a full-

time basis, was assigned to the Mathematics Department on a half-time basis and to the Guidance Department on a half-time basis. This resulted in the further action of respondent in assigning petitioner, a full-time mathematics teacher, to a half-time mathematics teaching position for the school year 1979-80, which he refused to accept. Mrs. Mabel Perry was given the half-time guidance position created by Mr. Gray's transfer half-time to the Mathematics Department.

7. Mrs. Mabel Perry is a tenured teacher with eight years seniority in respondent's school district as a Guidance Couselor.

8. Mrs. Mabel Perry is certified to teach Social Studies but has never taught in respondent's school system.

A Board's authority to reduce staff is N.J.S.A. 18A:28-9 which states:

"Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article."

The reason for dismissal resulting from such a reduction appears in N.J.S.A. 18A:28-10 ". . .shall be made on the basis of seniority according to standards to be established be the commissioner with the approval of the state board." The language that precedes this is relevant here. It states "Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation . . .". (Emphasis supplied).

N.J.A.C. 6:3-1.10. (b) Standards for determining seniority specifically states that seniority ". . .shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided."

Petitioner asserts that as "a tenured member of the teaching staff, [he] was entitled to a full-time mathematics position by virtue of his seniority. . .".p. 7.

petitioner's brief. This Court agrees.

Essentially the reduction in force (RIF) occurred in the Guidance Department. That is, if the arrangement that respondent implemented would not have occurred, one person, namely Mrs. Perry, who had the least seniority in that department, would have been RIFed. Respondent's plan was to invade another department i.e. mathematics, by reducing a full-time teacher to part-time without regard to seniority rights of that individual. If such a plan would be allowed, no teacher with seniority "in specific categories" (N.J.A.C. 6:3-10) would be secured in its department when a reduction in force is had in another department.

Respondent in its Brief In Opposition To Brief Filed On Behalf Of Mrs. Mabel Perry, and consistent with the testimony of Dr. Carpenter, recognizes this on p. 5 by stating "Had the Glen Rock Board failed to exercise its powers of transfer, Mrs. Perry would have had to have been let go under strict application of seniority principles."

Respondent cites Hightstown Ed. Ass'n. et al. v. Bd. of Ed. of East Windsor Regional School District, et al., Mercer County, 1979 S.L.D. - - (May 4, 1979) for the proposition that "Boards of Education have the power to assign teaching staff members to positions they are certified to fill", p. 3 respondent's brief. Respondent further asserts that it has the authority "to transfer its teaching staff members within the scope of their certificates is clear and unequivical" citing Kuett et. al. v. Bd. of Ed. of Westfield Union County, 1976 S.L.D. 601, 604: and Agress v. Bd. of Ed. of Hamilton Tp., Mercer County 1975 S.L.D. 984 p. 4 respondent's brief. These propositions are true subject to the seniority statutes and regulations.

Respondent alludes to a dilemma with respect to implementing its reduction in force and preserving its Affirmative Action policy citing N.J.A.C. 6:4-1 et seq. It therefore determined to honor teacher Gray's request by transferring him from a full-time guidance position to a half-time guidance and half-time mathematics position, thereby allowing respondent to maintain its Affirmative Action policy by continuing albeit on a half-time basis, Mrs. Perry its sole black guidance counselor. By so doing, it is this Court's opinion, respondent went too far, beyond the call of necessity to the disadvantage of petitioner's seniority and contrary to N.J.S.A. 18A:28-10 "Dismissals . . . shall not be made by reason of . . . race." This action further caused a reverse discrimination similar

to the unnecessary use of racial quotas to remedy past discrimination.

In Lige v. Town of Montclair 72 N.J. 5 (1976) the Court stated: "All persons are to have the opportunity to obtain employment without such discrimination" as at p. 16 and that Court's cite of Equal Employment Opportunity Commission v. Local 638, 532 F. 2d at 827 which states:

> ". . .'reverse discrimination' contradicts our basic assumption that individuals are to be judged as individuals, not as members of particular racial groups" at p. 22.
>
> ***
>
> "Curing an illegally imposed racial discrimination against an individual is understandable and justifiable - but race is not an appropriate standard to apply on a class basis. *** As a matter of wisdom, no one can quarrel with the overall purpose. It is the method which is pernicious. It is the racial classification irrespective of qualification that mandates its invalidation." (76 N.J. at 23) (emphasis supplied.)

The Court's attention is next directed to the position asserted by Mabel Perry, the necessary party. Mrs. Perry, contrary to this Court's order, failed to set forth her legal position by January 14, 1980 and consequently the parties at the hearing, were in no position, as respondent points out in its responsive Brief in Opposition To Brief Filed On Behalf of Mrs. Mabel Perry at p. 2, to "parry and thrust at unwarranted and improper assumptions or joust with windmills."

In the Brief submitted on Behalf of Mrs. Perry it is proposed that Mrs. Perry who is certified to teach Social Studies although has never done so in respondent's school district, "should be afforded every opportunity for placement within the Glen Rock School District in a discipline within which she is certified and that she should be given priority over any nontenured new comer." p. 8 Brief on Behalf of Mabel Perry. Although this Court's sentiment may be similar, it is a managerial decision that rests solely with the respondent. No statute, regulation or decisional law mandates this upon respondent. In

Newark Teachers Union Local 481, on behalf of Mary Archibald and Others Similarly Situated v. Board of Education of the City of Newark, Essex County, 1978 S.L.D. — (Nov. 28, 1978) the Commissioner stated "The Legislature, recognizing in 1942 the growing complexities of school systems in the State, directed the establishment of seniority standards for administrative, supervisory, teaching and other educational services. When promulgated, they stated that teaching staff members should attain seniority only in those categories of their employment with boards of education, regardless of the number of certificates held. N.J.A.C. 6:3-1.10 (b) and (h). Thus, a certified teacher of secondary mathematics who also holds an elementary teacher's certificate but who never served in the category of elementary teacher may not, by seniority, claim the right to replace an experienced teacher of elementary subjects. Nor may an elementary school teacher who also holds a secondary science certificate, but who has never served in the category of secondary school teacher, replace an experienced chemistry teacher. The wisdom of establishment of seniority categories is self evident in the interests of a thorough and efficient system of education." (Emphasis added).

Unless there be any doubt neither this Court nor the Commissioner, has the power to direct a board of education to interfere in the operations of a school by dictating to the board what types of positions it should create. "*** [I] t is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly) or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions. ***" Boult and Harris v. Board of Education of Passaic, 1939-49 S.L.D. 7,13, affirmed State Board of Education 15, affirmed 135 N.J.L. 329 (Sup. Ct. 1947) 136 N.J.L. 521 (E.& A. 1948).

"..Subject to statutes relating to tenure, they are vested with wide discretion in determining the number of employees necessary to carry out the program, the services to be rendered by each and the compensation to be paid for such services. Where a board, in the exercise of its discretion, acts within the authority conferred upon it by law, the Courts will not interfere absent a showing of abuse. 78 C.J.S., Schools and School Districts, S 128, p. 920; Boult v. Board of Education of Passaic, 135 N.J.L. 331 (Sup. Ct. 1947) affirmed 136 N.J.L. 521 (E.& A. 1948). * * * In short, we may not substitute our

discretion for that of the local board, nor may we condemn the exercise of the board's discretion on the ground that some other course would have been wiser or of more benefits to the parties or community involved. Boult, supra * * *." (At. p. 178). Long Branch Education Association et al. v. Board of Education of the City of Long Branch, Monmouth Co., 1975, S.L.D. 1029, aff'd by State Board of Education, 1976 S.L.D. 1150, aff'd. by App. Div. 1977 S.L.D. 1294.

Notwithstanding this discretionary power, respondent is subject to statutory mandates regulating reduction in force. Thus N.J.S.A. 18A:28-12 must be respected. It states:

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

Mrs. Perry holds a certificate to teach Social Studies. She is a tenured teacher with eight years seniority in respondent's school district. If she is dismissed as a result of a reduction in force, she is entitled to remain on a preferred eligible list to be reemployed "whenever a vacancy occurs in a position for which" she is qualified.

The Court therefore CONCLUDES:

1. Petitioner's seniority rights have been violated.

2. Petitioner is entitled to his requested relief, i.e., full mathematics position and back pay;

3. Respondent has the right to assign staff and maintain Affirmative Action programs but not in violation of petitioner's seniority rights.

4. Respondent Board has the right, in order to maintain Affirmative Action Programs, to reduce a full-time employee to part-time to be able to maintain

that program and to assign accordingly subject to the statutes and regulations pertaining to seniority rights.

5. Mrs. Perry "shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which" she is qualified. N.J.S.A. 18A:28.12.

It is hereby **ORDERED** that respondent restore petitioner to full mathematics position; and it is **FURTHER ORDERED** that respondent pay to petitioner all back pay less sums in mitigation thereof.

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

I HEREBY FILE with FRED G. BURKE, COMMISSIONER OF EDUCATION, my Initial Decision in this matter and the record in these proceedings.

May 22, 1980
DATE

Jack Berman
JACK BERMAN, A.L.J.:

THOMAS BIERMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLEN ROCK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

The necessary party, Mrs. Perry, excepts to the determination by Judge Jack Berman, A.L.J. that she not be made a social studies teacher although certified in that field. The Commissioner does not agree. She was hired as a guidance counselor in 1971-72 and although she was certified in the field of social studies at the time of her employment never taught in that field and attained no seniority in it. Such assignment on the part of the Board is discretionary. The Board excepts to the conclusion reached by Judge Berman and makes corrections in the detail of the record as to titles and certifications held by Tunny and Gray and their assignments.

The Commissioner has carefully examined the record and is aware of the sensitivity of the problems involved therein as they involve Affirmation Action Goals and the Seniority Rights earned by tenured teachers.

The Commissioner is constrained to note the standards for determining seniority pursuant to N.J.S.A. 18A:28-9 et seq. and N.J.A.C. 6:3-1.10.

The Education Department has developed an Affirmative Action policy which prohibits discrimination on the basis of race, sex, color, creed, religion, ancestry, national origin or social and economic status in any of the programs or activities under the jurisdiction of the Department.

An Affirmative Action program with positive results is legally required by

1. Title VII of the Civil Rights Act of 1966 as amended by Employment Opportunity Act of 1972;

2. Federal Executive Order 11246 as amended;

3. Equal Pay Act of 1963 as amended;

4. Title IV of the Education Amendments of 1972;

5. New Jersey State Board of Education Resolution 1975 (N.J.S.A. 18A:36-20) Chapter 4;

6. State Executive Order 14.

A search of his own records reveals to the Commissioner his Affirmative Action statement from the Affirmative Action Plan of the New Jersey State Department of Education, December 1976 which states in pertinent part:

> "***It is the policy of the New Jersey State Department of Education to seek and employ qualified personnel in all of its offices and facilities, to provide equal opportunities for the advancement of employees including up-grading, promotion, and training and to administer these activities in a manner which will not discriminate against any person because of race, color, religion, national origin, ancestry, age, political affiliation, sex, armed forces liability or physical handicap.
>
> "Affirmative action in terms of equal opportunity means that all segments of our society have an opportunity to enter State service on the basis of open competition and advance according to relative ability without discrimination.***" (at p. 2)

The Commissioner observes the awareness of the State Board of Education for the necessity to obviate discriminatory practices in the Public Schools by the formulation of rules for equality in educational programs. N.J.A.C. 6:4-1.1 et seq.

The Commissioner finds nothing in the goals established for Affirmative Action programs or in the rules and regulations that establish standards to be applied as guidelines in the situation of a reduction in force that refute or delimit the seniority status earned by tenured teaching staff members.

The Commissioner affirms the right of the Board to maintain Affirmative Action Programs but not in violation of the seniority rights earned by each tenured teaching staff member. He further notes the reasons for the dismissal of persons under tenure on account of such reduction in N.J.S.A. 18A:28-10 herewith set down in full.

> "Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board."

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Mrs. Perry shall be placed on a preferred eligibility list on the basis of seniority as prescribed by law.

Petitioner shall be restored to a full position of teacher of mathematics with remuneration mitigated by earnings during that time.

COMMISSIONER OF EDUCATION

July 17, 1980
Pending State Board of Education

EVELYN BLITZ AND IRVING MARSHALL,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF BRIDGETON,

RESPONDENT,

AND

DOUGLAS RAINEAR AND PETER SAULIN,

INTERVENORS.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, Goldberg, Simon and Selikoff
(Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Casarow, Casarow and Kienzle
(A. Paul Kienzle, Esq., of Counsel)

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

Petitioners were teaching staff members at Bridgeton High School, employed under full certification to teach social studies in September 1972. In March 1977 petitioners were informed by respondent that their positions of employment had been abolished for the 1977-78 academic year under N.J.S.A. 18A:28-9. Petitioners aver that in dropping only two of the four social studies positions and refusing petitioners the positions remaining, respondent violated the seniority rights possessed by petitioners as vested in them by N.J.S.A. 18A:28-10 and N.J.A.C. 6:3-1.10. Respondent maintains that it had a legal basis for abolishing the positions and that it rightfully assigned more senior teaching staff members to the remaining two positions in social studies under N.J.S.A. 18A:28-5 and the standards for seniority found in N.J.A.C. 6:3-1.10.

By agreement of the parties, the matter is submitted to the Commissioner for decision on an agreed set of stipulated facts and briefs of counsel. The facts basic to this adjudication may be stated succinctly as follows:

1. Petitioners Blitz and Marshall taught social studies at Bridgeton High School continuously from September 1, 1972 under proper certification issued in May 1972.

2. Intervenor Rainear taught business education continuously at Bridgeton High School from October 1971 through June 1977 under business education certification. Rainear also taught social studies during a six-week summer school program conducted by respondent in 1976. He did no other teaching of social studies for respondent prior to the filing of the instant Petition of Appeal.

3. Intervenor Saulin was employed by respondent as a teacher of elementary physical education beginning September 1970. From January 1973 through June 1977 Saulin taught social studies at Bridgeton High School under provisional certification made permanent in November 1973.

4. In March 1977 respondent, through its Superintendent of Schools, notified petitioners that they would not be reemployed and that they would be placed on a preferred eligibility list for reemployment in the secondary social studies category should vacancies occur.

5. In June 1977, acting under N.J.S.A. 18A:28-11, respondent determined to follow the advisory opinions provided by a tri-partite state panel and notified petitioners that they would be displaced because of a necessary reduction-in-force among social studies teachers.

In their Petition of Appeal, petitioners argue that Intervenor Rainear could not have a higher level of seniority than they inasmuch as his only teaching experience in the social studies category occurred during the 1976 summer school session conducted by Respondent Board. Petitioners rely on Compton v. Board of Education of the Township of Hanover, 1972 S.L.D. 2 wherein the Commissioner found that a teaching staff member who has never taught in a category, even though certified, is not "qualified" for such a position within the meaning of N.J.S.A. 18A:28-12. Petitioners argue further that summer school teaching is outside the "academic year" as defined in N.J.S.A. 18A:1-1 and as such not applicable to N.J.S.A. 18A:28-5. Since seniority and tenure are linked in Chapter 28 of Title 18A, petitioners maintain that summer school teaching is not within the scope of "qualified" as referred to in Compton, supra.

Petitioners likewise maintain that since N.J.A.C. 6:3-1.10 provides that not more than one year of employment may be counted toward seniority in any one academic or calendar year, Intervenor Rainear cannot count both his year as a business education teacher and his six weeks as a social studies teacher for seniority purposes.

In regard to Intervenor Saulin, petitioners find his claim to seniority flawed because he taught elementary physical education on a full-time basis from October 1970 through December 1972 while improperly certificated. N.J.A.C. 6:11-8.3(c) provides that,

> "Teachers with elementary endorsements are permitted to devote up to one-half time to teaching *** physical education in the elementary grades."

After examining copies of certificates held by Intervenor Saulin from 1970 to 1977, the Commissioner finds that he never held a physical education teacher certificate with an elementary endorsement. Instead, he held an elementary teaching certificate and later a secondary social studies certificate and apparently between 1970 and 1972 was not employed or assigned teaching duties within the scope of his certification as required by law.

Petitioners aver that if Intervenor Saulin was denied credit for the period in which he was improperly certified and therefore illegally teaching under N.J.S.A. 18A:1-1, he would have less seniority than they.

Petitioners claim further that one who commences employment in possession of a secondary certificate with a particular subject or field thereon, but who subsequently obtains a second such endorsement and is transferred for the purpose of teaching within the latter field, has seniority rights as a teacher in the latter field which date only from the time of transfer, citing Morer v. Board of Education of the Township of Teaneck, 1976 S.L.D. 963; Dedrick v. Board of Education of Hammonton, 1977 S.L.D. 1043; and Lautenschlager et al. v. Board of Education of Jersey City, 1961 S.L.D. 98 to bolster their argument.

Respondent denies that its actions were in any way illegal or violative of the rules and regulations of the State Board of Education, or contradict the substance of decisions of the Commissioner in relevant and analogous matters. Respondent argues that there is no merit to the Petition of Appeal, claiming on the contrary that it followed all statutory, administrative and decisional guidelines, including seniority advisory opinions pursuant to N.J.S.A. 18A:28-11 in making the controverted decision to retain the intervenors and not petitioners when faced with reducing the social studies staff from four positions to two.

In particular, respondent insists that summer school teaching is equatable to teaching within the academic year and that time taught without proper certification is as countable toward tenure and ultimately toward seniority ranking as time taught with proper certification.

Intervenors also deny any allegations of illegality or impropriety. They argue that both survive the tests for tenure and seniority outlined in N.J.S.A. 18A:28-10 and N.J.A.C. 6:3-1.10. They argue further that Compton, supra, and Morer, supra, are not applicable to their cases since the situations, in their opinion, are not analogous.

The Commissioner, after carefully reviewing the joint stipulation of facts and the briefs filed in behalf of petitioners, respondent and intervenors, finds the allegations of illegality in the assignment of a teacher outside the parameters of his certification, and impropriety in equating summer school teaching and academic year teaching to be of great import. Determination of these charges is the nucleus of the instant decision and thereby substantively affects proper adjudication of the controverted issue.

First, the matter of the legality of Intervenor Saulin's service as a teacher of physical education in the elementary school from September 1970 through December 1972, a period of two years and three months. Certification rules permit a teacher with an elementary education certificate to teach full time in a self-contained K-8 classroom. These rules further provide that a teacher of a specialized subject, such as physical education, covered by another certificate may devote not more than half time to the specialized subject.

It is clear from the facts above that Intervenor Saulin was not properly certified for the twenty-three month period from September 1970 through December 1972 since he taught a specialized subject full time for which he was not certified. The penalty for failure to fulfill certification requirements can be found in N.J.S.A. 18A:29-1 as follows:

> "No teaching staff member shall be entitled to any salary unless he is a holder of an appropriate certificate."

The illegality of permitting a teaching staff member to teach without meeting the rudimentary requirements of certification law and the illegality of compensating a non-certificated teacher out of public funds in contravention of N.J.S.A. 18A:29-1 combine to cast serious doubt on whether or not a teaching staff member so involved can count a period of contested employment toward other perquisites which inure to a professional presumed to have proper and acceptable entrance credentials. For the period of time a person cannot be legally compensated to be counted later toward meeting the time requirements of seniority and tenure, also set down in the statutes, would be, in the Commissioner's judgment, to condone what at best is malpractice, and at worst misfeasance.

Furthermore N.J.S.A. 18A:28-13 empowers the Commissioner to determine seniority upon the basis of service and experience within the several fields or categories of service as well as in the school system as a whole. Therefore even if the time spent illegally teaching without a proper certificate were creditable to seniority, it would have applied to the elementary teaching category and not secondary social studies.

Accordingly, having discovered that Intervenor Saulin at no time during his employment with respondent was certified to teach physical education full time in the elementary school, the Commissioner determines that Intervenor Saulin was not legally employed by respondent and the time so served cannot be counted as "employment" as intended in N.J.A.C. 6:3-1.10. The Commissioner further determines that Intervenor Saulin was properly certified and properly employed as a teacher of social studies from January 1973 to June 1977 and at that point was tenured with four years and six months of seniority in the secondary category.

Second is the matter of equating summer school teaching and academic year (hereinafter "regular") teaching and resolving the question as to whether or not the former qualifies a teaching staff member to claim residual entitlement to seniority in a category in which he had not otherwise taught.

Respondent argues that

> "***teaching in summer school in the employ of Respondent is clearly no less a responsibility than teaching during the regular school year. Students are supervised, given instruction and, if successful, given credit for completed courses. The teachers must prepare lessons, supervise, and give instruction. Teachers are supervised by administrators and have regular teaching duties and responsibilities. Teaching in summer school cannot be characterized as something less than that teaching experience necessary to qualify for seniority rights.***"
>
> (Respondent's Brief, at p. 2)

The Commissioner does not disagree that summer school teaching is an important and valuable service to the public. He is constrained to question, however, that if summer school teaching and regular teaching are equatable, why school boards generally pay summer school teachers in a different manner and on a scale considerably lower than that used to pay teachers during the regular school year. Summer school teachers not only do not normally receive equivalent hourly or weekly pay, they are not permitted to contribute toward a better pension including enhanced life insurance, accrue additional sick leave days, or receive other emoluments normally accorded regular teachers.

The Commissioner finds respondent's defense of its decision to equate summer school and regular teaching more philosophical than practical. It offers no support for its claim either in statutory or decisional law.

The Commissioner believes that more cogent arguments can be advanced for equating summer school teaching with part-time teaching. In both instances the teacher's duties are

restricted to part of the total school day or week. In both instances the teachers are certificated, employed on a clearly understood ad hoc basis and are required only to be in attendance when the job assigned has to be done.

In Joseph Capella et al. v. Board of Education of Camden County Vocational and Technical School, 145 N.J. Super. 209 (App. Div. 1976), the Court noted that the teacher involved was not paid at the rate established by the salary guide for a regular teacher but, rather, at a daily rate and that this distinction was an indication the time spent was not of such regular character as to count toward tenure.

Point Pleasant Beach Teachers Association et al. v. Dr. James Callam et al., decided by the Commissioner 1978, rev'd in part by the State Board of Education 1979, aff'd by New Jersey Superior Court, Appellate Division, March 27, 1980 is also relevant to the instant decision. There, the State Board held as follows:

> "When *** a local board in good faith hires a professional employee on a basis plainly understood to be temporary, such appointment does not give the employee the status of teaching staff member." (at _____)

The Court held, further, that whether a professional employee of a board of education qualifies as a teaching staff member eligible for tenure depends upon the nature of the employment tendered and accepted.

Therefore having examined the terms, conditions and duties of the employment tendered, the Commissioner finds that Intervenor Rainear's service for a single summer school session was part-time, temporary employment and as such is not within the intendment of N.J.S.A. 18A:28-5 or N.J.A.C. 6:3-1.10.

Further, N.J.S.A. 18A:28-13 gives the Commissioner discretionary authority

> "*** to determine seniority upon the basis of years of service and experience within such fields or categories of service as well as by the school system as a whole, or both."

Therefore, the Commissioner determines that summer school teaching, being temporary in nature and part time in principle, cannot negate the seniority of full-time teachers who have taught multiple years in the same category. Intervenor Rainear, tenured as he is and with considerable seniority in his original category with respondent does not pass the test of post-certification employment in the category entitling him to residual seniority in social studies. He neither held social

studies certification at the time of his initial employment in Bridgeton, nor was he employed in that category on a full-time basis after obtaining certification in that area prior to the filing of the instant Petition.

The Commissioner is aware, and points out, that the decisions above are at variance with the advisory opinions of April 1977 given pursuant to N.J.S.A. 18A:28-11. Such opinions, no matter how carefully prepared, are not binding on the Commissioner. This is rightfully so since the Commissioner must issue fair and impartial decisions based on all pertinent facts updated to the time of decision. Rules and regulations, as well as decisions involving statutory and administrative law, change frequently as conditions and needs in public education change. The Commissioner cannot be bound by opinions expressed, even by experts, months or perhaps years prior to a final decision.

For the reasons given above, the Commissioner concurs with the Petition of Appeal in which petitioners claim they were improperly denied proper ranking on the seniority list of the social studies department of Bridgeton High School in 1977. Respondent mistakenly and improperly credited certain years of service to the intervenors which, when subtracted from intervenors' total years of employment in Bridgeton, give intervenors less seniority in the social studies category than petitioners.

The Commissioner orders the Bridgeton Board of Education to review and revise its seniority list in secondary social studies as of June 1977 in light of the decisions above, and to place petitioners ahead of the intervenors thereon. The Bridgeton Board of Education is ordered further to offer petitioners their former positions as social studies teachers beginning September 1, 1980, with the same tenure and seniority rights they would have had if continuously employed by the Bridgeton Board of Education during the interim of litigation. Upon resumption of employment petitioners shall be placed at the salary level they would have attained had there been no break in service.

Each petitioner shall also be granted salary and other emoluments equal to that he/she would have received if employed by the Bridgeton Board of Education throughout the controverted period. Such benefits as ordered shall be mitigated by the amount of each petitioner's earnings in alternate employment, if any, during the academic years of 1977-78, 1978-79 and 1979-80. Petitioners shall have thirty (30) days after the date of this decision to notify the Bridgeton Board of Education in writing whether or not they accept reemployment. Failure to accept reemployment on these terms shall nullify petitioners' seniority standing with respondent and forfeit any rights to future employment in Bridgeton under N.J.S.A. 18A:28-11.

The intervenors shall be placed on a preferred eligible list for reemployment as social studies teachers in Bridgeton High School or in any other category of employment with the Bridgeton Board of Education for which they are properly certified. They shall be accorded all residual seniority rights earned in the manner prescribed by N.J.A.C. 6:3-1.10.

The cross-claim of the Bridgeton Board of Education that the intervenors indemnify and hold harmless the said Board from any monetary claims of petitioners is denied. The intervenors were acting in good faith and are not in any legal or ethical way responsible for decisions of respondent on personnel matters.

COMMISSIONER OF EDUCATION

July 21, 1980

Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

KATHY DYSON,	)	
Petitioner,	)	INITIAL DECISION
	)	**OAL DKT. NO. EDU 4357-79**
v.	)	AGENCY DKT. NO. 351-8/79A
BOARD OF EDUCATION OF THE BOROUGH OF MONTVALE, BERGEN COUNTY,	)	
Respondent.	)	

APPEARANCES:

Theodore M. Simon for petitioner
(Goldberg & Simon, attorneys)

Irving C. Evers for respondent
(Parisi, Evers & Greenfield, attorneys)

BEFORE THE HONORABLE **KEN R. SPRINGER**, A.L.J.:

This matter concerns whether a Board of Education may require a teacher to take an involuntary maternity leave at the beginning of the school year in order to preserve the continuity of education of its students. On August 29, 1979, petitioner Kathy Dyson ("Dyson"), a tenured elementary schoolteacher, filed a verified petition with the Commissioner of Education alleging that she was medically fit, able and willing to resume teaching duties at the commencement of the 1979-80 school year, but that the Board of Education of Montvale ("Board") illegally and arbitrarily refused to allow her to do so. She further alleged that such conduct by the Board constituted discrimination against her because she was pregnant, and she sought back pay for the days she would have worked if the Board had permitted her. In its answer filed on September 14, 1979, the Board admitted that it refused to allow Dyson to start teaching in September because her expected delivery date was in mid-October. It seeks to justify its action by reference to its policy of minimizing interruption of the education of children in the district.

At a prehearing conference held on December 13, 1979, the parties stipulated certain basic facts. They agreed that Dyson is a regularly employed teacher with the Board. By letter dated May 25, 1979 (Exhibit J-3), Dyson notified the Board that she was pregnant and expecting a child in mid-to-late October of 1979. Dyson also notified the Board that she desired to return to her teaching duties in September 1979 and to work until such time as she gave birth; thereafter, Dyson wanted to utilize her accumulated sick days until she resumed her teaching duties on or before January 2, 1980. The Board conceded that Dyson was medically fit and able to return to work on September 1, 1979. It was mutually agreed that she finally did return to full time work on January 2, 1980.

Two unresolved factual disputes remain to be determined at the hearing. First, was the Board's denial of Dyson's request made for a valid educational purpose? Second, did the Board treat Dyson's request in the same manner it would have treated an analogous request by a man or a non-pregnant woman? Moreover, Dyson contends as a matter of law that her right to bear children should prevail even if the Board can show it was motivated by a valid educational purpose.

A hearing was conducted on March 24, 1980. Both parties were given an opportunity to be heard and to cross-examine witnesses. Documents entered into evidence and considered in deciding this case are listed in the appendix. Proposed findings of fact and conclusions of law were received from the parties by April 24, 1980, and the record was closed as of that date.

Dyson testified that she had been employed by the Board as an elementary teacher for the past 11 years. She was informed by letter dated June 29, 1979 from the superintendent that the Board had turned down her request to return to teaching in September (Exhibit P-1). Instead, the Board wanted to place her on leave of absence effective September 1, 1979 through January 1, 1980. A resolution by the Board adopted on June 27, 1979 gave as the reason for the Board's action "the necessity of avoiding any disruption of the educational process." During such period of leave, Dyson would be credited for accumulated sick leave to the extent that a physician certified she was physically disabled due to her pregnancy (Exhibit R-3).

As previously indicated, the Board does not challenge that Dyson was physically capable of returning to work in September. According to Dyson, her treating

obstetrician, Dr. Michael Attardi, had no objection to her continuing at work until October 15, 1979 when her blood pressure began getting high. Her expected delivery date was October 18, 1979. She actually gave birth ten days later on October 28, 1979.

Several letters addressed to the superintendent of schools from Dyson's doctors dealt with the question of how long she could work prior to the birth of her baby. On June 11, 1979, Dr. Ronald Allen, an associate of Dr. Attardi, wrote to certify that Dyson was under his care for pregnancy and that her "estimated date of confinement" was October 18, 1979 (Exhibit R-5). Subsequently, it was established that the term "estimated date of confinement" was used in the same sense as anticipated "due date." (Exhibit P-2).

A second letter dated October 9, 1979 from Dr. Allen gave a revised due date of "the end of October 1979." Then the letter went on to state, "Assuming that the baby is born on time, Mrs. Dyson will be disabled four weeks prior to her delivery through six weeks after her delivery." (Exhibit J-2). If that medical advice were followed, Dyson would have to quit working sometime in late September. Dyson attempted to explain this inconsistency by saying that the letter of October 9th was merely a standardized form for women who want to stop working early. She further insisted that Dr. Attardi rather than Dr. Allen was primarily responsible for her care during pregnancy.

To correct any misunderstanding created by his letter of October 9th, Dr. Allen wrote a third letter dated October 18, 1979 in which he mentioned, "Her due date is the end of October and it was assumed she would begin sick pay benefits on October 18...". He added that, "Although disability can be granted 4 weeks prior to a patient's due date, if the patient is able to work, as in this case, she is eligible for unemployment compensation." (Exhibit R-4).

Yet another letter dated September 13, 1979 from Dr. Attardi to Dyson's attorney set forth: "We would have no objections, since she is doing well, to her working until at least the middle of October." (Exhibit J-1). Unlike Dr. Allen's letters, this last letter was not sent to the school administration and there has been no proof that its contents were ever communicated to the Board.

Sometime in June 1979, Dyson recalled, she met with the superintendent in his office and offered to work as a permanent substitute or teacher's aide from September

until mid-October. However, she was only willing to take such a position if her salary remained at her regular rate of at least $80 per day, compared to a substitute's salary of $30 per day or an aide's salary of $28 per day. That offer was never accepted by the Board. Instead, during this period Dyson worked part-time at the school helping other teachers on a volunteer basis. Although Dyson did not seek to utilize her sick leave benefits prior to October 18th, she nevertheless received and kept checks from the Board covering some 25 days of sick leave from October 3, 1979 through November 7, 1979 (Exhibit R-2).

With respect to potential disruption of the educational process, Dyson expressed her view that under her proposal the substitute could have attended her classes and learned her teaching routine prior to taking over responsibility. Since there were many school holidays in November and December anyway, Dyson felt that the disruptive effect of teacher turnover would be minimized. Even under the Board's plan, Dyson pointed out, she would be returning to her teaching duties in the middle of a marking period extending from November 1979 until February 1980.

Petitioner also called the Superintendent of the Montvale School District, Richard C. Rice, to testify about other leaves of absences occurring within the last five years. In his testimony, Rice drew a distinction between three types of pregnancy-related leaves: Disability or sick leave, in which a teacher uses her accumulated sick leave benefits during any period of temporary disability resulting from pregnancy or childbirth; maternity leave, which is an unpaid leave of absence for a period of up to one year for child-rearing purposes; and extended leave beyond maternity leave, which is also unpaid and requires additional Board approval. Rice verified the following instances where continuity of classroom instruction had been interrupted.

Linda Luth, a second grade teacher, used accumulated sick leave between the end of November, 1979 to January 14, 1980, and then took a maternity leave lasting until the end of the school year on June 30, 1980. Rice emphasized that Luth had not told him she was pregnant until after the school year had already begun. Originally she had informed him that she expected to work all the way through until January 14th. Only later did she inquire about her accumulated sick leave and decide to stop working in November.

As a result of Luth's absence, Marilyn Hoffman, an eighth grade teacher at the

commencement of the 1979-80 school year, was transferred in January 1980 to the second grade as a replacement teacher. Hoffman had been a second grade teacher in the preceding year. The decision was made to reassign Hoffman in the middle of the year rather than find an outside substitute for Luth, Rice indicated, because it was believed by school administrators that such a move would improve the educational process.

Rosemary Rovegno, a sixth grade teacher, exercised her accumulated sick leave between November 16, 1978 and December 1, 1979, and afterwards stayed out on maternity leave until June 30, 1979. Initially Rovegno had advised Rice that she wanted to work until December 1st, and then she changed her mind and asked to start her leave in November.

A teacher identified as Mr. Fitzpatrick was out on leave for 12 days in either February 1977 or February 1978.

Irene Hockstadt, a fourth grade teacher, took a maternity leave from March 21, 1977 through March 18, 1978, and then took an extended leave of absence for the remainder of the school year ending June 30, 1978.

Joanne Weiskopf, a fifth grade teacher, requested a maternity leave effective December 1, 1976 through September 1977, but when complications developed during pregnancy she actually stopped working on October 25, 1976.

Wendy Birnbaum, a librarian, took a maternity leave from January 3, 1978 to January 2, 1979 and thereafter took an extended leave of absence until June 30, 1979.

Sally Lewis, a second grade teacher, used accumulated sick leave from April 3, 1978 to April 21, 1978, took a maternity leave from April 24, 1978 to April 23, 1979 and finished out the school year on extended leave of absence lasting until June 30, 1979.

Lulu Pisarri was out for an entire year, on maternity leave from September 1, 1978 to January 26, 1979 and on extended leave from January 27, 1979 to the end of the school term.

Diana Reichstetter, a music teacher, used her accumulated sick leave from March 13, 1979 to March 18, 1979, and then took a maternity leave through June 30,

1979. Her substitute, Barbara Bacalakis, was involved in an automobile accident in April 1979 which caused her to miss 25 days.

Ruth Levy, a first grade teacher, underwent emergency surgery in November and December 1979 which caused her to miss 26 days.

Virginia Gallup, a second grade teacher, also was absent for two to three weeks during the current school year because of emergency surgery.

Rice knew of no other case besides Dyson in which a Montvale teacher intended to begin the school year in September, take a leave of absence sometime during October until early January, and then resume teaching. In his opinion as a professional educator, the practice of letting one teacher start teaching for several weeks at the commencement of the school year, stop teaching for a few months, and then start teaching again would be more disruptive to the children's education than if one teacher taught continuously until the Christmas break and another teacher took over in January. Over petitioner's objection, on cross-examination Rice testified that if a male teacher proposed to go for surgery in the middle of October and stay out until the beginning of January, Rice would also have recommended to the Board that he not be allowed to commence teaching in September.

Inasmuch as the Board's position was already fully developed on the record by Rice's testimony, respondent rested its case without calling additional witnesses of its own.

After careful review of the testimony and the documentary evidence, **I FIND** the following facts:

1. Kathy Dyson is a tenured teacher in the employ of the Board of Education of the Borough of Montvale.

2. By letter dated May 25, 1979, Dyson notified the Board that she was pregnant and expecting a child in mid-to-late October of 1979.

3. Dyson further notified the Board that she desired to return to her teaching duties in September of 1979 and to work until such time as she gave birth; thereafter, Dyson wanted to utilize her accumulated sick days until she resumed her teaching duties on or before January 2, 1980.

4. Dyson was medically fit and able to return to work at the commencement of the 1979-80 school year in September 1979.

5. Initially, Dyson's doctors estimated that her due date would be around October 18, 1979 and Dyson sought to continue working right up to that date. Later, Dyson's doctors pushed back their estimate of her due date to the end of October 1979.

6. Dyson remained physically capable of performing her teaching responsibilities without harm to herself or her baby until October 15, 1979, at which time Dyson's blood pressure began to rise above normal.

7. Dyson actually gave birth on October 28, 1979.

8. Dyson resumed her full-time teaching duties on January 2, 1980.

9. Respondent Board of Education denied Dyson's request to begin teaching in September, because of the necessity of avoiding any disruption of the educational process.

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

11. Proofs presented by petitioner failed to establish that Dyson was treated any differently than any man or non-pregnant woman would have been treated under similar circumstances. Instances cited by Dyson in support of her claim of unequal treatment are not genuinely comparable. Hoffman was transferred from the eighth grade to the second grade in the middle of the school year. Her transfer was based on a good faith decision by the Board that reassigning an experienced second grade teacher to that suddenly vacant position would improve the educational process. Emergency absences of Fitzpatrick, Bacalakis, Levy and Gallup during the course of the school year due to accidental injury or unexpected surgery are not comparable to the situation of a teacher who plans in advance to work just long enough for students to become accustomed to her teaching routine at the start of a new year and then plans to leave for an extended absence. The important factual distinction is between avoidable and unavoidable disruption to the continuity of the children's education.

12. Similarly, there has been no persuasive showing that Dyson has been treated differently than other pregnant women under comparable conditions. None of the pregnancy leaves cited by Dyson involved teachers who informed the Board prior to the commencement of the school year that they wanted to work only six weeks or so before taking a maternity leave. Rather, these other examples involved teachers who either irresponsibly neglected to give the Board advance notice, or who only learned of their pregnancy after the school year had already begun. In either case, the Board did not have any opportunity to apply its valid educational policy of reducing the number of times a different teacher is assigned to a given class.

13. Full credit has been given to Dyson for all accumulated sick leave days to which she is entitled by reason of temporary disability caused by pregnancy or childbirth.

Based on the facts adduced at the hearing and the applicable law, **I CONCLUDE** that the Board's action was taken in furtherance of a valid educational purpose, and that the Board was justified in refusing to allow any teacher who expects to take a substantial leave of absence shortly after the beginning of the school year from assuming teaching responsibilities which inevitably will be disrupted.

Continuity of instruction is a significant and legitimate educational goal. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974). As the Appellate Division observed in a factual context closely resembling the matter presently under review:

> We deem it a perfectly rational goal for the Board to be vitally interested in avoiding, where possible, the interruptions in the continuity of classroom instruction that would arise from teachers' absences. Moreover, we deem it to be nondiscriminatory treatment, if it be the Board's policy, not to renew the contract of any nontenured teacher, male or female, who gives the Board advance knowledge of an anticipated absence of substantial duration in the coming year for any reason. The avoidance of a detrimental interruption in the continuity of classroom instruction is an admirable goal whether the interruption be caused by pregnancy, laminectomy, orchiectomy, prostatectomy or any non-medical reason.
>
> Gilchrist v. Bd. of Educ. of Haddonfield, 155 N.J. Super. 358, 368 (App. Div. 1978)

Thus, the question is not whether the Board's ends are appropriate, but rather whether the

particular means chosen to achieve those objectives unduly infringe upon the teacher's important competing right to raise her own family and pursue her career. Cleveland Bd. of Educ. v. LaFleur, supra, 414 U.S. at 648; Castellano v. Linden Bd. of Educ., 79 N.J. 407, 412 (1979).

Arbitrary cutoff dates embodied in mandatory pregnancy leave rules have been held to be violative of due process because they bear no rational relationship to the valid state interest of preserving continuity of instruction. Cleveland Bd. of Educ. v. LaFleur, supra; Pocklington v. Duval Cty. School Bd., 345 F. Supp. 163 (M.D. Fla. 1972). Obviously, it defeats the very objective of maintaining continuity if an individual capable of working beyond the fourth or fifth month of pregnancy is forced to leave her job prematurely because of an overly rigid policy. Moreover, the goal of facilitating the orderly transition between teacher and substitute can just as easily be accomplished by a firm termination date fixed closer to confinement. Green v. Waterford Bd. of Educ., 473 F. 2d 629 (2d Cir. 1973).

It does not follow, however, that the teacher must be allowed to pick whatever date is personally most convenient for scheduling a leave of absence regardless of the effect upon the educational well-being of her students. After all, public school systems exist for the benefit of the pupils, parents and the community at large. Porcelli, et al. v. Titus, 108 N.J. Super. 301 (App. Div. 1969), certif. den. 55 N.J. 319 (1969). Indeed, in LaFleur the Supreme Court recognized that teachers on maternity leave may be prevented from returning to work until the beginning of the semester following delivery. Wherever possible, changes in teaching personnel should be made at the semester break or other logical dividing point. Richards v. Omaha Pub. Schools, 10 EPD Para. 10,557 (Sup. Ct. Neb. 1975). No alternative method can adequately guarantee that the degree of stability required for an effective learning experience will not be sacrificed. For the necessary rapport to grow between teacher and student, each must be exposed to the other for a sufficient length of time. Gradually, the student learns to trust and respect the teacher, while the teacher gains valuable insight into the student's particular academic strengths and weaknesses. Come-and-go teachers destroy this crucial process before it has an opportunity to mature.

Absent a rational basis for making such classification, pregnant women may not be singled out for special treatment to which men or non-pregnant women are not similarly subject. Green v. Waterford Bd. of Educ., supra. Nothing in the existing

record, however, overcomes the Board's insistence that its policy is intended to apply to men and women alike. Once more, the Appellate Division's comments in Gilchrist v. Bd. of Educ. of Haddonfield, supra, 155 N.J. Super. at 369, are extremely relevant:

> The testimony concerning the absences of other teachers should not have been used as a basis for a determination of disparate treatment toward complainant. In those cases the teachers' absences were brought to the attention of the Board within the academic year in which the absences occurred. It was a fait accompli; the Board had no opportunity to avoid interruption of the continuity of classroom instruction, and the affected teacher was guided and governed by the existent agreement concerning sick days and personal days. An absence mandated by physical infirmity occurring within the academic year is not to be compared with advice of a proposed absence in the next academic year.

For the foregoing reasons, it is **ORDERED THAT** the relief requested in the petition is **DENIED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if the head of the agency does not so act in forty-five (45) days and unless the operiod is extended as provided by statute, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 4357-79

I HEREBY FILE with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE, my Initial Decision in this matter and the record of these proceedings.

June 6, 1980
DATE

Ken R. Springer
KEN R. SPRINGER, A.L.J.

KATHY DYSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MONTVALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

Petitioner's first exception, inaccurately referenced to Finding of Fact #1 by Judge Ken R. Springer, ALJ, seemingly addresses Finding of Fact #11. Petitioner alleges that the distinction made between avoidable and unavoidable disruptions of the school year is an improper and nebulous standard. The Commissioner does not agree. Having examined Fact #11 carefully the Commissioner finds merit in the standard applied therein and clearly stated as follows:

> "Emergency absences *** due to accidental injury or unexpected surgery are not comparable to the situation of a teacher who plans in advance to work *** at the start of a new year and then plans for an extended absence."

Petitioner excepts to the apparent approbation by Judge Springer of petitioner's return in mid marking period without rendering equal approval to her leaving in the middle of one. The Commissioner does not agree. An initial leave during a marking period precipitates an initial interruption in the services of a teacher which may well culminate in a second interruption when the teacher returns.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

July 21, 1980 COMMISSIONER OF EDUCATION

Pending State Board of Education

JAMES AND JUDITH RAUCH, in behalf of their son, "T.R.",

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioners, McCarter & English (Lanny S. Kurzweil, Esq., of Counsel)

For the Respondent, Daniel C. Soriano, Jr., Esq.

Petitioners allege that T.R. has been improperly classified and placed and requests the Commissioner to place T.R. in an exclusive auditory-oral program with reimbursement for tuition and costs generated by the prior placement of T.R. in the Clarke School.

The Commissioner has reviewed the appeal of petitioners and its amendment, as well as respondent's answers.

Respondent district's request for dismissal of the appeal founded on laches and the time limitations of N.J.A.C. 6:24-1.2 is denied inasmuch as petitioners present new evidence not available to the classification officer at the time of the original decision but important, even if belated, to the educational well-being of T.R.

The Commissioner agrees with petitioners that T.R. appears to be progressing normally under the Clarke School program and should eventually meet the requirements for successful mainstreaming and be ready to return to the jurisdiction of respondent district.

Therefore the Commissioner orders that respondent accept the IEP of the Clarke School or through its CST establish one which will meet similar basic criteria. T.R. shall be continued in the Clarke School at respondent's expense mitigated by state and federal funds available until a suitable facility within the day-school area of accessibility can be found. Change of venue for T.R. shall not take place until submitted to, and approved by, the State Department's classification officer. Any reassignment of T.R. shall be accompanied by an updated IEP developed in consultation with T.R.'s parents and approved by the C.O.

Having resolved the issue of T.R.'s future placement, the Commissioner turns to petitioners' request for reimbursement of tuition, residential expenses, and private evaluation of T.R.

Inasmuch as petitioners voluntarily and unilaterally made the initial decision to place T.R. in the Clarke School in contravention of the CST recommendations, petitioners are not entitled to reimbursement of the residential expenses incurred prior to the rendering of the instant decision. It would be unfair to respondent to have to belatedly reimburse petitioners for expenses incurred simply because they disagreed with CST's judgment but failed to follow normal appeal channels. The Commissioner so holds.

On the other hand respondent's failure to advise petitioners of their right to obtain an independent educational evaluation at public expense as required by the All Handicapped Children Act of 1975, P.L. 94-142, and respondent's refusal to maintain T.R. in an auditory-oral program within the district in violation of the requirements of the Act, entitle petitioners to some compensation. Therefore, the Commissioner orders that respondent reimburse petitioners for expenses incurred in the private evaluation of T.R. and for tuition expenses incurred while T.R. was attending the Clarke School throughout the controverted period. Respondent district should, in turn, apply for any state and federal aid due it under the applicable statutes because of this mandate.

In summary the Commissioner reverses the Classification Officer's judgment that petitioners are entitled to no relief. Subsequent events support petitioners' appeal insofar as claims for tuition reimbursement and costs of private evaluation of their child are concerned.

Petitioners are also granted prospective relief herein to the extent that respondent cannot provide a viable IEP and adequate instruction for T.R. locally or within the state.

The Commissioner retains jurisdiction of this matter while T.R.'s constitutional right to enrollment in a free public school providing an adequate educational program is abridged. The matter is remanded to the classification officer for monitoring purposes.

COMMISSIONER OF EDUCATION

July 22, 1980

JANET HUTH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MORRIS PLAINS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Bangiola & Simon (Paul Bangiola, Esq., of Counsel)

Petitioner, an elementary teacher with a tenure status employed by the Board of Education of the Borough of Morris Plains, hereinafter "Board," alleges that she was wrongfully denied a salary increment for the 1977-78 school year and, further, that the Superintendent of Schools unlawfully transferred her from her assigned teaching position as a second grade teacher to that of permanent substitute. The Board admits the refusal to grant such salary increment and its assignment of petitioner to the position of permanent substitute teacher but denies that its action was improper or unlawful.

A hearing in the matter was conducted on October 21, 1977 at the office of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner of Education. Memorandum of Law and Briefs were filed subsequent to the hearing. The report of the hearing examiner follows:

The uncontroverted facts in the instant matter are these. Petitioner has been in the Board's employ as a second grade teacher for ten consecutive years. Petitioner's principal, who has been her immediate supervisor for the past five years, on December 13, 1976 executed a three page memorandum entitled "Notification of Unsatisfactory Evaluative Areas," and served the same upon petitioner. (R-2) On April 1, 1977, the principal submitted a Teacher Evaluation Report to petitioner which included, inter alia, an overall unsatisfactory rating of her teaching performance. (P-4) Subsequently, on April 16, 1977, petitioner filed a Statement of Rebuttal with regard to the previous evaluations of R-2 and P-4. (R-1) On April 13, 1977, the Superintendent informed petitioner that on the basis of the two evaluations he would recommend that the Board withhold her salary increment for the 1977-78 school year. (C-1) The minutes of the Board's regular monthly meeting held April 19, 1977 read in pertinent part as follows:

> "***Motion by [Board member], seconded by [Board member] that the board appoint tenured teachers as per the following listing for the 1977-78 school year from September 1, 1977 to June 30, 1978 at the salaries and step on the guide as listed.
>
> ***
>
> "J. Huth 17,910 (III-15)
>
> ***
>
> "On roll call voting in favor: [a list of seven Board members' names]. Motion carried.***" (R-3)

On April 26, 1977, the Board Secretary informed petitioner that the Board had set her 1977-78 salary at $17,910. (P-3) Subsequently, on May 11, 1977, the Superintendent sent a memorandum to all staff members in the school district which listed the professional staff assignments for the 1977-78 school year and included, inter alia, petitioner's assignment as permanent substitute. (P-2) Subsequent to the hearing in the instant matter, the Board on December 20, 1977 passed a resolution and ratified the staff assignments of May 11, 1977 as set forth in P-2. (C-2) The Board minutes show that it has employed and assigned various certificated personnel to serve in the capacity of permanent substitute teacher continuously since September 19, 1967. (R-4)

Petitioner testified that subsequent to her evaluation of April 1, 1977 (P-4) she had a conference with the Superintendent on April 13, 1977. Thereafter, on April 16, 1977, she testified, she wrote a statement of rebuttal in regard to her evaluations and sent it to the Superintendent. (Tr. 25-28; R-1) She testified that subsequent to the Superintendent's memorandum of May 11, 1977 which assigned her to the position of permanent substitute teacher for the 1977-78 school year, she had a conference with the Superintendent on June 23, 1977 and objected to such an assignment. Petitioner testified that she inquired of the Superintendent as to whether she had an option not to accept the assignment of permanent substitute and was informed that she had no choice in the matter. (Tr. 4-8, 18, 40-42; P-2)

Petitioner complains of several violations and failure of the Board to conform to statutory prescription with regard to her transfer. She argues that the instant matter has been rendered stare decisis by the Commissioner in the matter of Marjorie S. Payne v. Board of Education of the Village of Ridgewood, 1976 S.L.D. 605. She further contends it has been held to be illegal for a board of education to transfer a teacher

for punitive purposes. Gregory Cordano v. Board of Education of the City of Weehawken, 1974 S.L.D. 316 (Petitioner's Brief, at pp. 2-3)

Petitioner testified that she protested the April 13, 1977 letter of the Superintendent wherein he informed her that he would recommend to the Board the withholding of her salary increment for the 1977-78 school year. She could not recall, however, when she voiced her protest to the Superintendent, nor could she recall voicing any objection or protest subsequent to her receipt of the Board Secretary's letter of April 26, 1977 informing her of the Board's action to retain her 1977-78 salary at the same level as she was paid during the 1976-77 school year. (Tr. 19-24; C-1; P-3) She testified that she understood that her salary would remain at the same level and that it came as no surprise to her. (Tr. 23) Petitioner contends that the Board's action and subsequent letter, which did not set forth "its reasons" to withhold her salary increment, was illegal. Anna Gill v. Board of Education of the City of Passaic, 1976 S.L.D. 661, aff'd State Board of Education 666, aff'd Docket No. A-912-76 New Jersey Superior Court, Appellate Division, December 7, 1977

The principal testified that he evaluated petitioner during the 1976-77 school year and reported that he found her deficient in the areas of techniques of instruction, specifically, a failure to stimulate interest in prescribed learning areas, selection of appropriate teaching strategies and adaptation of material to pupil needs and abilities. He testified that his report was communicated to petitioner on April 1, 1977 and that she acknowledged receipt of same on April 14, 1977. He testified that there was no conference with regard to his evaluation; however, a subsequent conference was held with petitioner, the Superintendent, the president of the Teachers' Association, the chairperson of the Association's grievance committee and himself. The principal testified that the discussion at that conference was with regard to petitioner's evaluation and her change in assignment for the 1977-78 school year and did not include any discussion of the withholding of her salary increment. He testified further that he was informed by the Superintendent that it was the Superintendent's recommendation to withhold petitioner's salary increment. He testified that although he did not recommend such action to the Superintendent, he agreed that it was proper. (Tr. 57-65, 73-75; P-4)

The Superintendent testified, and it was stipulated on the record by the parties, that he communicated to petitioner by letter dated April 13, 1977 that it was his intention to recommend to the Board the withholding of her salary increment for the 1977-78 school year. The Superintendent's letter to petitioner stated, inter alia, as follows:

> "***On the basis of your evaluations of 12/13/76 and 4/1/77, I cannot recommend you for this increment. I believe that the reasons for this action are well set forth in the evaluations themselves, but if you would like to review these with me, I am available to meet at your convenience." (C-1)

The Superintendent testified that the Board considered his recommendation to withhold petitioner's salary increment for the 1977-78 school year in a closed executive conference session and subsequently adopted a motion by a vote of 7-0 to retain petitioner at the 1976-77 step on its salary guide for the 1977-78 school year at its regular public meeting held April 19, 1977. (R-3) He testified that on April 26, 1977 the Board Secretary informed petitioner of the Board's action by letter. (P-3) The Superintendent testified further that the Board had a similar experience with petitioner the previous school year whereby it withheld her salary increment for the 1976-77 school year. (Tr. 84-87)

The Superintendent testified that the position of permanent substitute teacher had been in continuous existence since September 1969 and that the Board considered such assignment as one of a regular teacher for the purposes of tenure status. (R-4) He testified that the previous permanent substitute had retired and that the Board was faced with a reduction in force; therefore, petitioner was assigned to the position. He testified that he held a meeting in late June 1977 with petitioner, the principal, the president of the Teachers' Association and the grievance chairperson where petitioner's 1977-78 assignment was discussed and that no objections were raised by petitioner or her representative. (Tr. 87-98)

The Superintendent testified that although the Board reviewed his recommendation to assign petitioner to the position of permanent substitute teacher, there was no formal resolution adopted by the Board. He testified that petitioner's assignment was entirely an administrative action on his part and that he was not aware of the applicable statute when he made the assignment. N.J.S.A. 18A:25-1 The hearing examiner observes, however, that subsequently on December 20, 1977 the Board affirmed the Superintendent's action. (C-2; Tr. 102-103)

The Superintendent testified that to his knowledge the County Superintendent of Schools did not approve the position of permanent substitute teacher when the Board established the position in 1969. He testified further tht he assigned petitioner to the position because he believed that she was inadequate as a regular classroom teacher. (Tr. 105, 110)

The Board asserts that it has the authority to transfer a tenured staff member to a comparable position and cites the matter of Thelma Bradley v. Board of Education of the Borough of Freehold, 1976 S.L.D. 590, where the Commissioner held:

> "***A board of education may transfer teaching staff members pursuant to N.J.S.A. 18A:25-1. Such a transfer may be based upon the Board's determination that the teaching staff member, or the individual school, or the entire community or a combination thereof may individually or collectively benefit by such a transfer. For a teaching staff member who is transferred to establish that the underlying reasons for such an action are improper or illegal requires substantial proof that the board acted in a manner which was illegal, or improper, and to the exclusion of all other bona fide reasons.***"
> (at 600)

The Board contends that it has had ten years' experience with its established position of permanent substitute teaching staff member and that petitioner alleged no facts to conclude that her interests toward tenure and seniority were threatened. It argues further that it acted in good faith when it transferred petitioner from a classroom assignment to that of permanent substitute teacher, contrary to Payne, supra. (Board's Brief, at pp. 8-11)

The Board contends that those duties and responsibilities assigned to its permanent substitute teaching staff member were comparable to those similarly assigned to other professional staff members. Carmine Giannino v. Board of Education of the City of Paterson, 1968 S.L.D. 160 (Board's Brief, at pp. 14-16)

In regard to its action to withhold petitioner's salary increment, the Board contends that petitioner's reliance upon the matter in Gill, supra, is not apposite to the instant matter. It argues that, unlike Gill, there was evidence in this matter that petitioner knew the reasons for the Superintendent's recommendation to the Board to withhold her salary increment. (Board's Brief, at pp. 17-19; C-1)

The hearing examiner has carefully reviewed such testimony and documentary evidence in the context of petitioner's allegations and applicable law with respect to the withholding of her salary increment and her teaching assignment transfer. The primary question for decision is whether or not such testimony and evidence refutes or supports a judgment that the Board acted reasonably and with justification.

The parameters of the responsibility of the Commissioner with respect to the question of increment withholding were set forth by the Court in Kopera v. Board of Education of West Orange, 1958-59 S.L.D. 96, aff'd State Board of Education 98, rem. to Commissioner 60 N.J. Super. 288 (App. Div. 1960), decision on remand 1960-61 S.L.D. 57, aff'd Docket No. A-632-58 New Jersey Superior Court, Appellate Division, January 10, 1963 (1961-62 S.L.D. 223). In its remand to the Commissioner the Court specifically defined the Commissioner's role in the review of decisions by local boards of education to withhold salary increments. The Court said, in quoting with approval a Brief by the Attorney General:

> "***Under this view of the substantive law, the Commissioner could not properly redetermine for himself whether petitioner had in fact been unsatisfactory as a teacher; that issue would be irrelevant as a matter of law. The only question open for review by the Commissioner would be whether the Board had a reasonable basis for its factual conclusion.***" (60 N.J. Super. at 295)

In his decision on remand in Kopera, supra, the Commissioner added a further dimension of consideration in such matters when he stated:

> "***To withhold an increment on such a salary schedule, it is not necessary to show shortcomings on the part of a teacher sufficient to justify dismissal under the Teachers' Tenure Act.***" (1960-61 S.L.D. at 62)

The hearing examiner finds that the Board did not comply with the applicable statute, N.J.S.A. 18A:29-14, when it failed to adopt a specific resolution to withhold petitioner's employment increment for the 1977-78 school year and also when it failed to give written notice of its action "***together with the reasons therefor***." The evidence is quite clear, however, that petitioner indeed knew that the Superintendent intended to recommend to the Board that her salary increment be withheld and the reasons for such a recommendation. Petitioner testified that the Board's action to withhold her salary increment came as no surprise to her. (Tr. 23)

In a similar matter the Commissioner held in Ralph Marshall v. Board of Education of the Southern Ocean County Regional High School District, 1978 S.L.D. 593 that:

> "***The Commissioner observes that petitioner was in receipt of the Superintendent's evaluation and was well aware that the Superintendent had recommended that the Board

> withhold his increment. *** To argue that the Board failed '***to give written notice of such action, together with the reasons therefor***' in the Commissioner's judgment places form over substance. Petitioner was aware '***of such action, together with the reasons***.' N.J.S.A. 18A:29-14***"
>
> (at 596)

In such a context the hearing examiner finds no reason to hold that the Board acted herein in an arbitrary, unreasonable or capricious manner or in contravention of any of the rights of petitioner. The conduct of petitioner was scrutinized by the Board and its administrative staff during the period of 1976-77. The hearing examiner finds sufficient reason in the findings, ante, to provide necessary support of the action of the Board to withhold petitioner's salary increment for the 1977-78 school year. The hearing examiner recommends that claim with regard to her increment withholding be dismissed.

The hearing examiner finds that when the Superintendent transferred petitioner from a second grade classroom assignment to the position of permanent substitute the Board failed to comply with the provisions of N.J.S.A. 18A:25-1 which states as follows:

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

The hearing examiner observes that the Board took action on December 20, 1977 to affirm the Superintendent's transfer of petitioner and, further, that petitioner served the full 1977-78 school year in the position of permanent substitute. The hearing examiner knows of no relief that could be granted petitioner and, therefore, recommends that that portion of the Petition be dismissed. William S. Humen v. Board of Education of the City of Bayonne, 1977 S.L.D. 795, aff'd State Board of Education 807

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in the matter herein controverted including the hearing examiner's report.

The Commissioner notes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 6:24-1.17(b). Petitioner takes exception to the hearing examiner's conclusion that she knew, or should have known, of the intent to withhold her increment and the reasons thereof despite respondent's failure to strictly adhere to the provisions of N.J.S.A. 18A:29-14. Petitioner places great reliance upon the semantic distinction between the circumstances in Ralph Marshall v. Board of Education of the Southern Ocean County Regional School District, Ocean County, 1978 S.L.D. ___ (decided July 10, 1978) wherein the Superintendent had recommended the withholding of an increment and the instant matter wherein the Superintendent intended to recommend the withholding of an increment. The Commissioner finds this to be a "distinction without a difference" since in both circumstances the final authority for such determination rests with the Board and not the Superintendent. While the Commissioner deplores the Board's failure to strictly adhere to the procedural format as prescribed by statute, he nevertheless agrees with the hearing examiner's conclusion that petitioner knew, or should have known, of the Board action in regard to withholding of her increment and the reasons for said action.

Therefore, the Commissioner affirms the findings of the hearing examiner relative to the withholding of petitioner's increment and adopts them as his own.

Petitioner further takes exception to the hearing examiner's determination that no relief exists regarding the Board's original failure to comply with N.J.S.A. 18A:25-1 which states as follows:

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

Insofar as the Board took action on December 20, 1977 to affirm petitioner's transfer and insofar as petitioner has served since the 1977-78 school year in the capacity of permanent substitute, the Commissioner agrees with the findings of the hearing examiner that no relief exists for time already served in such position. William S. Humen v. Board of Education of the City of Bayonne, Hudson County, 1977 S.L.D. 795, aff'd State Board 807, aff'd Docket No. A-1137-77 New Jersey Superior Court, Appellate Division, February 21, 1979 The Commissioner does, however, note that petitioner is not without recourse or relief from such future assignment.

The Commissioner observes that the power of boards of education to transfer teaching staff members has been firmly established by the courts and his own decisions. In Wilton D. Greenway v. Board of Education of the City of Camden, 129 N.J.L. 461 (E. & A. 1942) the Court held:

> "***The district boards are expressly invested with authority to transfer principals and teachers.***The exercise of the power rests in sound discretion***."
> (at 465)

See also John C. McGrath v. Board of Education of the Town of West New York, 1965 S.L.D. 88; James Mosselle v. Board of Education of the City of Newark, 1973 S.L.D. 197; Dorothy Agress et al. v. Board of Education of the Township of Hamilton, 1975 S.L.D. 984.

The Commissioner, therefore, observes that boards have the clear authority to transfer teaching staff members to comparable positions within a school district. They may not, however, do so in a manner which abuses that discretion.

In a case directly on point, Majorie S. Payne v. Board of Education of the Village of Ridgewood, 1976 S.L.D. 605, the Commissioner stated:

> "***In the instant matter, however, the Board violated not only the provisions of statutory law, N.J.S.A. 18A:25-1 and N.J.S.A. 18A:28-9 et seq., in its attempt to either transfer, reassign, and/or abolish the position of general teacher to which petitioner had been assigned, but it also violated petitioner's expectation to be assigned as a teaching staff member. The assignment of petitioner as a substitute teacher is clearly not an assignment as a teaching staff member. A substitute teacher is not a teacher within the contemplation of N.J.S.A. 18A:1-1. Zielenski v. Board of Education of Guttenberg, Hudson County, 1970 S.L.D. 202, reversed State Board of Education 1971 S.L.D. 664, aff'd Superior Court of New Jersey 1972 S.L.D. 692***"
> (at 610)

The Commissioner points out as he did in Payne, supra, at 610:

> "***Petitioner is a certificated teacher who, as a teaching staff member with a tenure status, enjoy the benefit of tenure protection. N.J.S.A. 18A:28-5. Petitioner

> may not be assigned responsibilities less than those responsibilities similarly assigned to other teaching staff members employed by the Board."

While the Commissioner takes notice of the Board's position that petitioner's assignment as a permanent substitute was not a disciplinary action based upon her poor performance in the classroom but merely the filling of a long-standing position in the district with an experienced teacher, he finds such argument to be without merit, particularly in light of the Board's action in withholding petitioner's increment.

The Commissioner is further constrained to point out to boards and their agents that statutorily valid means exist for the addressing of problems relating to instructional "inefficiency" or "incapacity" without resort to actions which do not provide an affected teaching staff member with the opportunity to improve nor the board the opportunity for final resolution.

Accordingly, the Commissioner finds and determines that the assignment of Janet Huth to the position of permanent substitute teacher for the 1977-78 school year and any subsequent years in which she may have been so assigned is ultra vires and is hereby set aside. The Board is further directed to assign Janet Huth within the scope of her certificate to a position commensurate with and comparable to that of other teaching staff members it employs.

Having so determined, the Commissioner directs that the hearing examiner's report relative only to the matter of petitioner's assignment as a permanent substitute be set aside. It is so ordered.

COMMISSIONER OF EDUCATION

July 28, 1980

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

REBA LIPPINCOTT, PETITIONER, V. BOARD OF EDUCATION OF WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY, RESPONDENT.	)	INITIAL DECISION OAL DOCKET NO. EDU 2506-79 AGENCY DOCKET NO. 230-6/79A

APPEARANCES:

Stephen E. Klausner for petitioner

William S. Jeremiah for respondent
(Buttermore, Mullen and Jeremiah, attorneys)

BEFORE THE HONORABLE BRUCE R. CAMPBELL, A.L.J.

DOCUMENTS IN EVIDENCE

J-1	Watchung Hills Regional High School job description, Media Technician
P-1	Petitioner's School Librarian certificate recorded in Office of County Superintendent 4/7/76
P-2	Petitioner's Educational Media Specialist certificate recorded in Office of County Superintendent 8/31/76
P-3	Transcript, Rutgers School of Library Services showing petitioner's course work and diploma dated 1/20/76
P-4	pp. 463-552, A-V Instruction 4th ed., 1973
P-5	Spaghetti City Video Manual, 1973, 116 pp.
P-6	3 pp. course handout, "Television Camera Utilization"
P-7	14 pp. course handout, "Administration"
P-8	15 pp. course outline, Rutgers University School of Library Services
P-9	3 pp. assignments for A-V laboratory course
P-10	Instructional Materials Center report 4/2/79 - 4/30/79
P-11	Checklist supplied at workshop - undated
P-12	Media Center Report, May 1978
P-13	Media Center Report, January 1979
P-14	Media Center Report, October 1977

P-15		Media Center Report, November 1976
P-16		Media Center Report, December 1976
P-17		Media Center Report, January 1977
P-18		Media Center Report, February 1977
P-19		Media Center Report, March 1977
P-20		Media Center Report, April 1977
P-21		Media Center Report, May 1977
P-22		Media Center Report, September 1977
P-23		Media Center Report, November 1977
P-24		Media Center Report, December 1977
P-25		Media Center Report, January 1978
P-26		Media Center Report, February 1978
P-27		Media Center Report, March 1978
P-28		Media Center Report, April 1978
P-29		Media Center Report, June 1978
P-30		Media Center Report, September 1978
P-31		Media Center Report, October 1978
P-32		Media Center Report, November 1978
P-33		Media Center Report, December 1978
P-34		Media Center Report, February 1979
P-35		Media Center Report, March 1979
P-36	10/11/76	Board agenda excerpt
P-37	11/8/76	Board agenda excerpt
P-38	3/9/77	Board agenda excerpt
P-39	6/12/78	Board agenda excerpt
P-40	3/22/79	Observation of petitioner
P-41	5/10/76	Initial employment contract of petitioner
P-42	11/10/79	Advertisement in Courier-News
P-43	9/21/78	1978-79 Annual Report of Persons Employed in School Aide Positions MIS #12D010
P-44	3/28/79	Evaluation summary of petitioner
R-1	4/12/79	Watchung Hills Regional High School job description, Educational Media Specialist
R-2	3/12/79	4 pp. Board minutes excerpt

Petitioner, formerly a tenured teaching staff member in the employ of the Watchung Hills Regional High School Board of Education (Board), alleges that the Board improperly abolished the position of educational media specialist which she held. She seeks an order reinstating her to a full-time position in accord with her certifications and seniority rights and awarding her full back pay.

The Board avers it has acted properly in all respects and that there is no relief to which petitioner is entitled. The Board asks that the petition of appeal be dismissed.

The matter was opened by the filing of a verified petition of appeal before the Commissioner of Education on June 11, 1979. Thereafter the matter was transferred to the Office of Administrative Law pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. Hearing was held on January 11 and 18, 1979 at the Office of Administrative Law, Trenton. Both parties filed posthearing submissions, the time for which was extended by the undersigned for good cause shown. The

record was closed and the matter ready for disposition on April 29, 1980.

Petitioner was employed by the Board on April 1, 1976 and served until June 30, 1979 as an educational media specialist. In the course of her employment she acquired a tenure status. Petitioner holds a valid school librarian certificate and a valid educational media specialist certificate, both issued by the New Jersey State Board of Examiners. On or about March 12, 1979, the Board by resolution duly adopted and pursuant to the provisions of N.J.S.A. 18A: 28-9 effected a reduction in force of five (5) full-time and four (4) part-time positions for the 1979-80 school year. Petitioner's position was one of the full-time positions eliminated. She was so advised by letter dated March 14, 1979.

It is not controverted that petitioner was the educational media specialist with least seniority at the time of the reduction in force (RIF).

In support of her contention that the RIF of her position was improper, petitioner states that classroom teachers have been assigned to supervise pupils in the school library as have volunteer, nonprofessional members of the community. While not disputing the right of the Board to so assign teachers and so to use volunteers, petitioner argues that these persons may not perform many of her former duties while an educational media specialist position has been abolished.

Petitioner also asserts that she is entitled to perform all educational media services now being performed by any and all noncertificated persons working in the school's media program. Related to this assertion, petitioner states that an educational media technician presently is employed in violation of certification requirements. This, in petitioner's view, requires the Board to realign certain duties and assign them to a properly certificated and tenured educational media specialist, namely herself.

Where certificated teaching staff members are assigned nonteaching supervision of pupils, be it in lunch rooms, study halls, play areas or libraries, there is no question of impropriety so long as such assignments are equitably distributed and all such staff are provided a duty-free lunch period of at least 30 minutes. (N.J.A.C. 6:3-1.15.) See Long Branch Education Assn. v. Long Branch Bd. of Ed., 1974 S.L.D. 1191, aff'd St. Bd. 1975 S.L.D. 1098, aff'd App. Div. 1976 S.L.D. 1149. Incidental teaching and other forms of assistance to pupils during such periods are both inevitable and desirable. I cannot see how such assistance to pupils in any way affects petitioner's claim. Likewise, the involvement of volunteers from the community is desirable so long as under the direct supervision of a certificated teaching staff member. Weehawken Education Assn. v. Bd. of Ed. of Weehawken, 1978 S.L.D. ____. Whether petitioner was employed and present or not, the Board would have the power thus to assign teachers and use volunteers. That the Board has done so following the elimination of petitioner's position attests to its determination to provide the fullest possible educational program while appropriately paying attention to economic and pupil population conditions in the district.

Petitioner does not claim she has the right to occupy the existing media technician position but advances the argument that certain duties now are performed by the technician that should be performed by a certificated specialist and that she should be reinstated to perform those duties among others.

A careful review of the record does not lend support to this argument. Much testimony was adduced as to the duties of the technician. It appears the technician maintains equipment, repairs equipment or causes it to be repaired, informally instructs pupils in the use of equipment so that they in turn may assist teachers in the classroom, recommends purchases of media and equipment and performs many other duties of a clerical or technical nature.

There is little doubt that petitioner could do substantially all of these tasks. A thorough examination of N.J.A.C. 6:11-12.21, 12.22, 12.23 and 12.24 dealing with certification of media specialists and the policies governing such certification reveals that a school media specialist should be able to do these things and more. That same examination does not reveal any express or implied requirement that a certificated media specialist must do these things. There obviously are areas where the technician's duties overlap those of professional staff. Equally obviously, there are many more areas where they do not. It cannot require a certificate, in my opinion, for a person to engrave equipment with identification numbers, for example.

That petitioner, a certificated school media specialist, can do substantially all of these tasks is no bar to the Board's use of a technician to do them absent some legal requirement to the contrary. It is noticed that there is no contention the media technician is involved in such activities as identifying learning strategies of pupils, evaluation of learners' instructional media requirements or developing individual and group processes in the media program. Where the technician and certificated staff do have similar responsibilities, there is a discernable difference as to the degree of responsibility given each, the responsibilities of certificated personnel being much greater. (J-1, R-1.)

Petitioner asserts the educational media technician presently is employed in violation of certification requirements. No evidence has been adduced that convinces me this is so. It is apparent from the testimony of the superintendent of schools that a job description for the educational media technician was not submitted to the county superintendent of schools, a possible violation of N.J.A.C. 6:11-4.9. (Tr. II, 62-64.) The Commissioner may wish to speak to this. The question is not properly before me here.

Upon a complete review of the whole record in this matter, I FIND:

1. Petitioner is certificated as a school librarian and as a school media specialist.

2. The Board eliminated petitioner's position, among others, for the 1979-80 school year pursuant to the provisions of N.J.S.A. 18A:28-9.

3. Petitioner was the school media specialist with the least seniority at the time her position was eliminated.

4. The Board uses community volunteer assistance in its media center.

5. Nothing of record indicates that the Board's use of community volunteers is in any way improper.

6. The Board regularly assigns teaching staff personnel to supervise pupils in, among other places, its media center.

7. Nothing of record indicates that those assignments are in any way improper.

8. The Board employs a school media technician whose duties are primarily of a technical and clerical nature and some of whose duties parallel some of the duties of professional staff.

9. Those duties of the technician that parallel some of those of professional staff are of a lesser degree of responsibility than those assigned to professional staff and as such may properly be described as assisting professional staff.

10. Nothing of record indicates that any of the technician's duties are improperly assigned.

11. Nothing exists in Title 6 of the New Jersey Administrative Code that would require a board of education to employ as a media technician a person holding a media specialist or associate media specialist certificate.

Based upon the foregoing, I CONCLUDE that petitioner has failed to carry the burden of pursuasion in this matter. The action of the Board in eliminating petitioner's position, among others, has not been shown to be in any manner improper.

Absent any finding of illegality or evidence of bad faith, I cannot substitute my judgment for that of the local board of education whose determination is entitled to a presumption of correctness. Boult and Harris v. Passaic Bd. of Ed., 135 N.J.L. 521 (E. & A. 1948). Therefore, the petition is without merit.

Accordingly, the petition IS DISMISSED.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the Commissioner does not so act in forty-five (45) days and unless such time limit is otherwise extended this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1, et seq.

OAL DOCKET NO. EDU 2506-79

I HEREBY FILE with Fred G. Burke, Commissioner of Education, my Initial Decision in this matter and the record in these proceedings.

10 JUNE 1980
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, A.L.J.

REBA LIPPINCOTT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

The Commissioner notes the observation made by Judge Bruce R. Campbell, ALJ at page 4 of the initial decision that the Board has not submitted the job detail of the position of educational media technician to the county superintendent of schools. N.J.A.C. 6:11-4.9 entitled "Paraprofessional Approval" is herewith set down in full:

> " (a) School aides and/or classroom aides, assisting in the supervision of pupil activities under the direction of a principal, teacher or other designated certified professional personnel, shall be approved in accordance with regulations and procedures adopted by the State Board of Education in February, 1968. Copies of these procedures are available from the Bureau of Teacher Education and Academic Credentials or the offices of county superintendent of schools.
>
> "(b) Current regulations require school districts employing aides to develop job descriptions and standards for appointment. These descriptions and standards should be based on study of local needs. The nature of the job descriptions will dictate the qualifications to be met, the proficiency standards needed, and the pay to be received.

"(c) The locally developed descriptions and standards adopted by the board of education shall be submitted by the superintendent of schools or chief administrative officer to the county superintendent for approval, in accordance with the regulations outlined below:

1. Any board of education employing school aides or classroom aides shall submit to the county superintendent of schools a job description for each type of aide to be employed, setting forth the duties to be performed, the types of proficiency needed, the qualifications to be required and the arrangement for supervision of the aides. The qualifications shall include proof of good moral character.

2. The county superintendent of schools shall review the job descriptions and the qualifications proposed for positions for the various types of supervisory or classroom aides. If he finds that the descriptions and qualifications are in accord with the policies of the State Board of Education, and conform to sound educational practice, he shall approve them, and notify the school board of his approval in writing.

3. At least once each year, and at such other times as the county superintendent may require, the superintendent of schools or chief administrative officer shall submit to the county superintendent the names of the persons employed as aides, and a statement certifying that the persons appointed meet the qualifications approved by the county superintendent of schools and are being supervised in accordance with the approved plan. The local superintendent and the county superintendent shall keep appropriate records of the individuals so approved."

Accordingly, prior to the start of the 1980-81 school year the Board, if it plans to continue the services of the educational media technician, must submit to the county superintendent for his approval a job description of that position in accordance with the above referenced rule.

The Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

July 28, 1980

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

IN RE:	)	INITIAL DECISION
CAMILLE BERKOWICZ et als,	)	**OAL DKT. NO. E.D.U. 3931-79**
vs.	)	AGENCY DKT. NO. 314-8/79A
BOARD OF EDUCATION OF	)	
SCOTCH PLAINS-FANWOOD	)	

APPEARANCES:

Gerald M. Goldberg, Esq.
Goldberg & Simon, Esqs.
for Petitioners, **Camille Berkowicz**, et als

Casper P. Boehm, Jr., Esq.
for Respondent, **Board of Education of Scotch Plains-Fanwood**

BEFORE THE HONORABLE **SYBIL R. MOSES**, A.L.J.:

This matter was brought before the Court as the result of a Petition filed pursuant to N.J.S.A. 18A:6-9, which vests the Commissioner of Education with jurisdiction to hear and determine all controversies and disputes arising under the school laws. The case was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A Prehearing Conference was held on December 7, 1979. Counsel stipulated that the hearing be bifurcated in that the legal and factual issues would be decided first.

Remedies and relief, if necessary, will be determined after the Initial Decision is rendered on the factual and legal issues in dispute. Counsel agreed that if said remedies and relief were needed they would be worked out within a strict time limit immediately upon their receipt of the Initial Decision. This agreement is without prejudice to their right to file exceptions to the Initial Decision.

A Prehearing Order was issued, which delineated the following legal issues to be decided:

1. Did the Respondent, Board of Education of Scotch Plains-Fanwood, (hereinafter Board), act properly and in accordance with N.J.S.A. 18A:28-10 and any other pertinent statutes, and the regulations promulgated thereby, in counting unpaid voluntary leaves of absence for seniority credit? (This issue is raised by all three Petitioners and is to be determined in regard to all three Petitioners).

2. Did the Board act properly and in accordance with N.J.S.A. 18A:28-10 and any other pertinent statutes, and the regulations promulgated thereby, by granting one-half year seniority credit to Petitioner Berkowicz for the full year said Petitioner was employed as a half time kindergarten teacher in 1974-75?

3. Count Three of the Petition concerns Petitioner Castaldo solely. The following issues have been raised in that regard:

   A. Was there a duty or responsibility on the part of Respondent Board to process Petitioner Castaldo's application for endorsement in Spanish?

   B. If such a duty exists, was said duty violated by Respondent Board's refusal to recognize Petitioner's Spanish endorsement for seniority purposes, from the time she first applied for a permanent certificate?

C. If the duty was so violated, what is the effect of said violation on Petitioner Castaldo's placement on the Secondary Foreign Language Seniority list?

D. Did Petitioner act reasonably in regard to her application for a permanent certificate as a teacher of Spanish, or did she contribute in any way to a delay of certification?

Counsel have stipulated to all relevant and pertinent facts concerning Counts One, Two and Four. Said stipulations have been submitted, in writing, to the Court. The Court finds them to be true facts and they are incorporated by reference as if set forth herein at length. Said stipulations are appended to this Decision and include the following items:

Exhibit A - Employment record- Camille Berkowicz

Exhibit B - Employment record- Joan Eilbacher

Exhibit C - Employment record- Robert Zaremba

Exhibit D - Employment record- Barbara Cole-Kelly

Exhibit E - Employment record-Katherine Intrabartolo

Exhibit F - Employment record- Katherine Milton

Exhibit G - Seniority list for elementary teachers

Exhibit H - Employment record- Harry Novak

Exhibit I - Employment record- John Hartmann

Exhibit J - Employment record- Beverly Kuchar

Exhibit K - Seniority list for all secondary teachers and special teachers in the district, which includes the seniority list for science teachers in the secondary school, and the seniority list for foreign language teachers on the secondary level.

Exhibit L - Pages 764 and 765 from the official Board of Education minutes of June 27, 1974, hiring Petitioner, Geraldine Castaldo, as a high school teacher in French.

Exhibit M - Employment record- Geraldine Castaldo

Exhibit N - Employment record- Marie Zehner

Exhibit O - Employment record- Jo Ann Kaesur

Exhibit R - copy of minutes of the regular public meeting of Respondent Board of Education of April 19, 1979 in which positions were abolished and reduction in forces was taken, at page 5.

Exhibit S - list of positions abolished at the April 19, 1979 Board of Education meeting.

Exhibit T - Two page list of positions abolished by the Board of Education with particular reference to Job Category L, Foreign Language and Job Category D, Science.

The parties add, by reference as part of the general stipulations of fact, all allegations contained in the Verified Petition filed herein which had been admitted in the Answer filed with the Court.

There was no stipulation of facts in regard to Count Three of the Verified Petition, which alleges that Geraldine Gail Castaldo was improperly deprived, not only of her teaching position, but also of her seniority rights, due to Respondent's acts of

negligence and/or inadvertence in failing to properly process her application for certification in Spanish, thereby causing a delay in said certification until April, 1979. Testimony was heard in regard to the above disputed facts on Wednesday, March 19, 1979 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. Appearances are noted above.

Geraldine Gail Castaldo testified on her own behalf. She began teaching for the Respondent Board in September 1974 as a French teacher in the high school. She was certified in French in 1974, having received her Bachelor of Arts at St. Peter's College and having taken education courses at Kean College. Ms. Castaldo taught French full-time for two years. In 1976-77 she taught three French and two Spanish classes at the high school. The Board filed for an emergency certificate in Spanish for Petitioner Castaldo for the 1976-77 school year. Counsel stipulated that the emergency certificate issued in November, 1976 and expired in July of 1977.

In August of 1976 Ms. Castaldo received a telephone call from the Board's Director of Personnel, asking for her transcripts from St. Peter's College. She personally went to the College, got a sealed transcript and handed it into the office. In addition, in order to comply with all requirements for the emergency certificate, Ms. Castaldo took two additional courses at Kean College.

In the spring of 1977 she proceeded to file for her permanent certificate. She went through the Board office, by getting her transcripts and giving them to the office, along with check #557 for $10, written on March 8, 1977. In the fall of 1977, she was assigned to the junior high school to teach Spanish and French.

Petitioner testified she received no further communication until October, 1977, when she got a phone call from the secretary at the Board office that another check was needed as the March 8th check was stale. Ms. Castaldo thereupon wrote a second check, #2004, on October 18, 1977. Neither check has ever cleared through her bank account. She never received any further notification in regard to the application for permanent certification.

Ms. Castaldo testified she was very upset in October, 1977, when notified that no certification was in the immediate offing. However, Mrs. Hobbie, a secretary, told

her it was "no problem", and just to issue another $10 check. Ms. Castaldo testified she was teaching four Spanish courses and two French in the 1977-78 school year when she sent in her second check, and she taught seven Spanish courses in 1978-79. As far as she knew, the Board never filed for a second emergency certificate. Petitioner testified that there had been changes in the personnel office and that Mrs. Hobbie had to come back just to help out. Ms. Castaldo received no communication from either the Board or the State Office of Education, and the school principal never raised the issue of certification with her.

In January, 1979 Dr. Nolan, the new Director of Personnel, told Ms. Castaldo he had not received her certification and would have to refile. She testified that, because she was rehired in April, 1978 as a full-time teacher of Spanish, she thought the certification procedure was still in progress. Ms. Castaldo was not concerned with the amount of time that had passed because she knew it was a lengthy process, and when a problem had arisen, she had been informed. Upon notice from Dr. Nolan, she immediately ordered a new transcript. She also called the Commissioner's office, whereupon she found out the fee was now $20, not $10 as she had been originally told. She received her certification on May 1, 1979 at her home, and immediately brought it to school. Although she tried to get confirmation of her prior requests for transcripts from St. Peter's, the college does not keep a record of requests for transcripts made prior to October of 1979.

Cross-examination tried to point out discrepancies in Petitioner's actions, as between the procedures followed when she applied for her French certificate and those followed when she applied for her Spanish certificate. Notwithstanding said questioning, this Court found the witness candid and honest and her testimony deserves great credence.

Dr. John Nolan testified on behalf of the Board. He has been Director of Personnel since August 16, 1978 and he became familiar with Ms. Castaldo's record as a result of a review of her file. There are no communications from Petitioner in the file in regard to her Spanish certification nor is the original application in the file. Dr. Nolan personally received a communication from the Union County Superintendent of Schools in December, 1978, to follow up on Ms. Castaldo's application for permanent certification

in Spanish. That communication, R-2, in evidence, showed that the County needed an official transcript and a fee of $10. Dr. Nolan contacted Petitioner in January, 1979, after he realized she had no Spanish certificate, emergency or permanent. He testified that in March, 1977 and October, 1977 the fee for issuance of a second certificate in a language was $10. All certificates now cost $20. as of August, 1978.

Cross-examination revealed that there was nothing in the Board's file to indicate that the communication from the Union County Superintendent of Schools had ever been delivered to Ms. Castaldo, nor did that communication have a date which would indicate when the County Superintendent sent it to the Board or when it was received by them. There was nothing in the file to indicate receipt of the two $10 checks which Petitioner had written. The file did not have a transmittal letter covering the application being sent to the County office. The file had nothing to show that P-1, a letter to Petitioner telling her that a transcript was needed, was ever sent to Ms. Castaldo.

The following items were marked as exhibits during the hearing and relate only to Count Three.

P-1 For identification - copy of memo to County Superintendent of Schools in regard to Ms. Castaldo, August 29, 1976.

P-2 In evidence - check register of Ms. Castaldo, March 1977.

P-3 In evidence - check register of Ms. Castaldo, October of 1977.

R-1 In evidence - letter of May 23, 1978 to Petitioner Castaldo from Respondent's Personnel Department.

R-2 In evidence - attachment to said letter.

Prehearing briefs were filed by both counsel in regard to Issues A and B, supra. Post hearing letter memoranda were filed by both counsel addressing the legal and factual

issues brought out during the hearing on Count Three. Counsel also filed letter memoranda specifically directed to the case of Aslanian v. Board of Education of the Borough of Ft. Lee, 1979 S.L.D. _____, decided October 15, 1979 (appeal pending, State Board of Education). The record of the case was closed on May 9, 1980.

In regard to the question of whether or not the Board acted properly in granting seniority credit for unpaid leaves of absence, Petitioners argue that the crucial issue is what type of leave of absence is described by the language of N.J.A.C. 6:3-1.10(b), which states:

> "(b) Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fractions thereof, as the case may be, in the school district in specific categories as hereinafter provided. Seniority status shall not be affected by occasional absences and leave of absence."

Petitioners urge the Court to resolve any ambiguity contained therein by reading this Departmentof Education regulation in pari materia with the New Jersey Civil Service statutes and regulations promulgated thereby. Counsel refers to N.J.S.A. 11:21-9 and N.J.A.C. 4:1-17.1 et seq, which authorize a deduction from seniority credit for any leaves of absence without pay, unless a leave falls within certain specified exceptions listed in the statute. See In re Fidek, 76 N.J. 340, 344 (1978). Petitioners also rely on the case of Stachelski v. Board of Education of the Borough of Oaklyn, 1979 S.L.D._____, decided June 21, 1979 (aff'd State Board of Education, 1979 S.L.D. ___, decided November 8, 1979), because Stachelski held that an upaid voluntary leave of absence is not counted toward the acquisition of tenure. However, Stachelski also decided that service in the employ of a Board of Education shall be considered seamless, even when there is an unpaid leave of absence in the middle of it. Therefore Petitioner Stachelski had to be granted tenure on the day after the three academic years within a period of any four consecutive academic years in which she was in service of the Respondent Board of Education, notwithstanding the fact that during one of those four consecutive academic years she was on leave of absence without pay.

Respondent Board argues that N.J.A.C. 6:3-1.10(b) clearly shows an intention by the Commissioner that the words "not be affected" mean that seniority status dates back to the original date of employment and that the failure to include the Civil Service type of exclusion of unpaid leave in determining seniority, either by statute or regulation, was an express omission by the Legislature and the Commissioner and therefore cannot be read into the statute.

The Board's position is buttressed by the fact that Stachelski, 1979 S.L.D. at p. 9 of slip opinion, clearly held that the unpaid leave of absence should be included as part of Petitioner's service in the district, thus enabling her to receive tenure after serving the required time in the classroom and not forcing her to begin her service all over again after returning from an unpaid leave of absence. Respondent's argument that granting of the Petition in this matter would lead to serious injustice to members of the teaching staff in Respondent's school district, who are not parties to this action, is also well taken. It is very clear that if a staff member had been aware that he or she could lose a year's seniority credit if he or she took a voluntary unpaid leave of absence, it would be likely and possible that such a leave would not be taken.

This Court concludes that the Board of Education acted properly in counting unpaid leaves of absence for seniority credit. Since neither N.J.S.A. 18A:28-10 nor N.J.S.A. 18A:28-13 specifically speak to this issue, N.J.A.C. 6:3-1.10(b) is controlling. This tribunal interprets the language, ". . . seniority status shall not be affected by occasional absences and leaves of absence," (emphasis added), to mean exactly what it states. This Court will interpret and enforce the administrative regulations as written, giving full force and effect to every word, sentence and clause, in order to effectuate the clearly expressed administrative policy. Cf. Cobb v. Waddington, 154 N.J. Super. 11, 17 (App. Div. 1977); Gabin v. Skyline Cabana Club, 54 N.J. 550, 555 (1969) and Hoffman v. Hock, 8 N.J. 397, 406 (1952), all cases which deal with a court's duty to enforce the legislative will as written. This duty is seen as an example for this Court to follow; to enforce the administrative policies, as written, so long as they are not arbitrary and unreasonable.

For all the above stated reasons, the Petition asking for a denial of seniority credit for unpaid leaves of absence will be dismissed.

In regard to the question of whether or not the Board acted properly by granting one half year seniority credit to Petitioner Berkowicz for a full year she was employed in 1974-75 as a half time kindergarten teacher, Petitioner Berkowicz relies on Aslanian 1979 S.L.D. _____, and that portion of N.J.A.C. 6:3-1.10(b) which states that seniority shall be determined according to the number of academic or calendar years of employment or fraction thereof, for the proposition that years of service, not fractions of full time employment, are the determining factor to be considered when arriving at the amount of seniority credit for a particular individual.

Respondent argues that Petitioner's position is illogical, in that, if it is upheld, a half time kindergarten teacher (one session a day for ten years), would have seniority over a full time kindergarten teacher, (two sessions a day), who has taught for nine years. Respondent also cites Aslanian in support of his position, stating that the Commissioner gave Petitioner Aslanian partial credit for the full year in which she taught on a part time basis. He asserts this is exactly what the instant Board did in regard to Petitioner Berkowicz. Counsel for Petitioner Berkowicz responded to this analysis by asserting that she has obtained tenure as a full time teacher, and that tenure status mandates that she receive a full year's credit for the one year she taught half time.

The Court has carefully reviewed the Aslanian decision, which it considers controlling on this issue, and upon which both counsel rely. In this Judge's opinion, the Commissioner in Aslanian clearly intended that a teacher receive partial seniority credit for a year in which she or he taught the full year on a part time basis. The Commissioner finds Rule N.J.A.C. 6:3-1.10(b) clear on its face in that regard. The fact that the instant Petitioner has tenure as a full time teacher does not detract from the conclusion that she should receive part time credit for the year in which she taught part time, since the Commissioner has ruled that a part time teacher is not barred from having his or her seniority of employment determined on a full time equivalency basis with other persons similarly situated, whose employment is being continued by the Board, following an action to abolish a position. See Aslanian, 1979 S.L.D., at p. 5 of slip opinion.

The Court therefore concludes that the Board of Education acted properly when it granted Petitioner Berkowicz a half year seniority credit for the full year she taught on a half time basis. That Count of the Petition will be dismissed.

After having reviewed and considered the testimony and transcript in regard to Count Three and Petitioner Castaldo, and after having considered the evidence, and after having considered the demeanor and credibility of the witnesses, and after having reviewed the letter memoranda filed by counsel specifically relating to Count Three, and having considered their arguments and reviewed the applicable law, the Court makes the following findings of fact:

1. Petitioner Castaldo began her employment with the Board of Education in September 1974, possessing an instructional certificate with an endorsement as a teacher of French.

2. The following are Petitioner Castaldo's teaching assignments from 1974 to 1979.

   A. French - full-time 1974-75

   B. French - full-time 1975-76

   C. Three French Classes, two Spanish classes - 1976-77.

   D. Two French classes, four Spanish classes - 1977-78

   E. Seven Spanish classes - 1978-79

3. When Petitioner was assigned to teach Spanish in 1976, she did not hold an endorsement as a teacher of Spanish. The Board secured an emergency certificate to cover her assignment, which certificate ran from November 1976 to July 1977.

4. In the interim Petitioner Castaldo completed course requirements for permanent certification and applied for said certification to the Board's Personnel Office in March of 1977. She filed a copy of her transcript from St. Peter's

College and a check, #557, in the amount of $10, on March 8, 1977.

5. In October 1977, Petitioner Castaldo received a telephone call from a part-time secretary at the Board office, requesting a substitute check in the amount of $10. Petitioner Castaldo was concerned about her application and position being put in jeopardy and was assured there would be "no problem". She thereupon submitted a second check, #2004, for $10 on October 18, 1977.

6. Petitioner Castaldo heard nothing between October, 1977 and January, 1979, when Dr. Nolan, the new Director of Personnel, told her she still did not have a permanent endorsement in Spanish.

7. Petitioner Castaldo was not negligent and did not contribute to the delay in processing her application. Her actions are found to be reasonable because:

   A. She knew the certification process was lengthy.

   B. The Board had previously raised a problem concerning the need for a second check. Therefore it was reasonable for her to assume that any other problems which might arise would be conveyed to her.

   C. She was rehired as a full-time Spanish teacher in April of 1978, and was never notified of certification problems at that time.

   D. She never received any communication whatsoever from the Board or the State Department of Education.

8. There were some personnel problems at the Board in 1977 and 1978, in that one Director of Personnel left, another was hired and part-time secretaries were used during that period.

9. There is nothing in Ms. Castaldo's file at the Board which would confirm their allegation that they notified her, in writing, of the correspondence received from the Union County Superintendent of Schools concerning her certification, or of any other problems which arose in regard to the certification.

10. Petitioner Castaldo, in fact, took it upon herself to order a new transcript from St. Peter's College and personally discovered that the fee involved was $20, not $10, as she had been told by the Personnel Officer. This resolved the filing fee problem and Petitioner Castaldo received her permanent certificate on May 1, 1979.

11. The manner in which the Board maintained its records, transmitted applications for teacher certification and notified teachers of problems arising in regard to said certification was somewhat slipshod.

Petitioner correctly points out that her emergency certificate was issued specifically at the request of the Board and that applications for regular certificates or endorsements in foreign language are made through the County Superintendent, acting upon the request of the local board. She points out that the Board certainly knew of her application for a permanent certificate in Spanish as early as March, 1977. Petitioner relies on two school law decisions, Givens v. Board of Education of the City of Newark, 1974 S.L.D. 906 and Smith et al v. Board of Education of the Borough of Sayreville, 1974 S.L.D. 1095, in support of her contention that the Board was responsible for any delay and therefore she should not suffer a loss of seniority credit.

Respondent urges the Court to find that Petitioner Castaldo was remiss in not inquiring as to what happened to her checks and in failing to supply a missing transcript until 1979. He alleges she should thus not receive seniority credit for the period of time the application was pending. He does not cite any school law decisions or reported cases.

Since this tribunal has found that Petitioner Castaldo was a credible and honest witness whose testimony should be given great credence, and since Dr. Nolan did not arrive in the school district until after the questioned actions had taken place, and since the Court has found the Board was slipshod in its actions in regard to Petitioner Castaldo's application for certification, it must follow, ineluctably, that the Board was responsible for part or all of the delay in Ms. Castaldo's receipt of permanent certification with an endorsement in Spanish.

The Court finds the Commissioner's reasoning in Smith, 1974 S.L.D. at 1099, persuasive, when he said,

> " In the instant matter it is clear that Petitioner made application for a standard certificate as a teacher prior to the close of the 1972-73 academic year. It is also clear that this application was made through the school administrators office so that agents of the Board were aware of its existence. This being so, Petitioner may not be barred from tenure by administrative delay in the issuance of the standard certificate."

The Commissioner cited Givens, which held that "fairness alone dictates that such teachers ought not to be penalized by the administrative delay which necessarily exists in processing great numbers of applications for certificates by teachers. . . ." 1974 S.L.D. at 908.

Therefore the Court concludes that the Board had a duty to properly process Petitoner's application for endorsement in Spanish, which was violated when the Board told her there was no problem, asked for a second check, hired her to teach Spanish full time in 1978, and, in fact, did not notify her until January of 1979 that her certification had not been received. This Petitioner may not be barred from getting seniority credit

from October 1977, the date she made application through the Board of Education school administrator's office for her endorsement in Spanish. The effect of the violation of the Board's duty to properly process said application will be to place Petitioner Castaldo higher up on the seniority list than if it were to date her seniority from May 1, 1979, (or even a few months prior to that, as suggested by Respondent's counsel). Her seniority is to date from the time she received her emergency certification, as mandated by N.J.A.C. 6:3-1.10(d).

Based upon the aforementioned stipulations and findings of fact, and the analysis of the applicable law, the Court concludes that the Board of Education of Scotch Plains-Fanwood acted properly in granting seniority credit for unpaid leaves of absence. The Court further concludes that the Board of Education acted properly in granting Petitioner Berkowicz one-half year seniority credit for the 1974-75 school year, when she taught the full year as a half time teacher. The Court further concludes that the Board of Education did not act properly in refusing to recognize Petitioner Castaldo's Spanish endorsement from the time she first applied for a permanent certificate, for seniority purposes, because there was a duty or responsiblity on the part of the Respondent Board to properly process said application, which it did not fulfill.

Therefore, it is **HEREBY ORDERED** that Count One, Count Two and Count Four of the Verified Petition, insofar as they refer to a request to deny seniority credit for unpaid leaves of absence, shall be **DISMISSED**; and

It is further **ORDERED** that Count One of the Verified Petition, insofar as it refers to Petitioner Berkowicz's request to receive one full year seniority credit for the full year she taught half-time, shall be **DISMISSED**; and

It is further **ORDERED** that Count Three of the Verified Petition, which incorporates Petitioner Castaldo's request to receive seniority credit from the time she first applied for a permanent certificate with an endorsement in Spanish, shall be **GRANTED**.

The effect of the granting of Count Three of the Verified Petition will be to nge Petitioner Castaldo's placement on Respondent's foreign language seniority list at secondary level. Therefore, pursuant to the agreement reached at the Prehearing nference, it is hereby **ORDERED** that counsel establish and set forth Petitioner staldo's relief immediately upon receipt of this Initial Decision.

This recommended decision may be affirmed, modified, or rejected by the **MMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law empowered to make a final decision in this matter. However, if the Director of the partment of Education does not so act in forty-five (45) days and unless such time limit otherwise extended, this recommended decision shall become a final decision in cordance with N.J.S.A. 52:14B-1, et seq.

I HEREBY FILE with the Commissioner of the Department of Education, ed G. Burke, my Initial Decision in this matter in these proceedings.

ay 30 1980
ATE

SYBIL R. MOSES, A.L.J.

CAMILLE BERKOWICZ, HARRY NOVAK AND GERALDINE GAIL CASTALDO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of the instant matter including the initial decision rendered by Sybil R. Moses, ALJ and petitioners' exceptions filed subsequent thereto dated June 20, 1980. The Commissioner observes that no exceptions were filed by the Board.

Petitioners take exception to that part of Judge Moses' decision which reaches the following conclusions pertaining to the matter herein controverted:

> "(a)the respondent Board acted properly in granting seniority credit [to teaching staff members] for unpaid leaves of absence; and
>
> "(b)the respondent Board acted properly in granting Petitioner Berkowicz one-half year seniority credit for the 1974-75 school year, when she taught the full year as a half time teacher."
>
> (Petitioners' Exceptions, at p. 1)

The Commissioner observes that petitioners, as part of their exceptions, have incorporated by reference herein the pertinent arguments advanced before Judge Moses by way of Brief dated February 19, 1980 and a letter Memorandum dated March 14, 1980. The Commissioner, for the purpose of this final determination, will address each of petitioners' exceptions separately.

In the first instance petitioners reject the conclusion reached by Judge Moses which held that the Board acted properly in granting seniority credit to teaching staff members who were in the same categories as petitioners for voluntary unpaid leaves of absence. Petitioners argue that the Board was without authority to grant seniority credit for this purpose in accordance with the provisions of N.J.A.C. 6:3-1.10(b) which reads:

> "Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. Seniority status shall not be affected by occasional absences and leaves of absence." (Emphasis supplied.) (Petitioners' Brief, at p.3)

Petitioners maintain that the underscored language in N.J.A.C. 6:3-1.10(b) which was promulgated by the Commissioner and approved by the State Board of Education pursuant to N.J.S.A. 18A:28-10 has never been the subject of prior school law decisions addressed by the Commissioner wherein he construed the particular language of the above regulation. Petitioners assert that an ambiguity exists in the underscored language which must be resolved by the Commissioner with respect to what types of leaves of absence may be applied as service credit toward seniority accrual.

Petitioners categorically reject the conclusion reached by Judge Moses which holds that local boards of education may grant service credit toward seniority to teaching staff members who were granted voluntary unpaid leaves of absence. In this regard petitioners request that the standards for determining seniority as developed by the Commissioner with respect to leaves of absence be read in pari materia with the New Jersey Civil Service Statutes, N.J.S.A. 11:21-9, which read in pertinent part:

> "Coincident with, and subsequent to, the adoption of this subtitle, the seniority rights of officers and employees shall be based upon the length of their respective prior and continuous services, and such additional and continuous services as they may render.
>
> "In computing the length of service of officers and employees for the purposes of determining their seniority rights under this section, all time hereinafter during which they shall be absent from duty on leave, without pay, shall be deducted therefrom; provided however, that if an officer or employee shall be absent on leave, without pay, pursuant to assignment by or approval of the appointing authority and for further education or training directly related in character to the employment from which he is on leave and designed to improve his compe-

> tence or increase his capacity therein, the time so spent shall not be deducted under this paragraph." (Emphasis added.)
> (Petitioners' Brief, at pp. 4-5)

Petitioners rely on the language of the New Jersey Supreme Court In re Fidek, 76 N.J. 340 (1978) wherein the Court in commenting upon the application of N.J.S.A. 11:21-9 and the rules (N.J.A.C. 4:1-17.1 et seq.) promulgated subsequent thereto by the Civil Service Commission held in part that:

> "***[T]he Commission is justly concerned that if seniority credit were obtained with every approved leave, those who have remained at work developing their skills would suffer unfairly when promotional and layoff decisions are made. Such a result would not be in accord with the salutary objectives of the Civil Service System." (76 N.J. at 344)
> (Petitioners' Brief, at p. 5)

Petitioners argue that the logic and ruling of the Court in Fidek, supra, are also applicable herein. Thus, petitioner asserts there is no logic in the interpretation given to N.J.A.C. 6:3-1.10(b) by Judge Moses that voluntary unpaid leaves of absence granted by the Board may be counted for the purpose of seniority credit as a result of a reduction in force. Petitioners concede that N.J.A.C. 6:3-1.10(b) does preserve the seniority status of teaching staff members for the periods of service rendered prior to and after such leaves of absence without pay have occurred, thereby allowing their total seniority to remain intact, notwithstanding the fact that such leaves of absence granted without pay occurred during their intervening periods of employment service.

Petitioners reason that this is, in fact, the construction to be given to N.J.A.C. 6:3-1.10(b) which states in part that:

> "***Seniority status shall not be affected by occasional absences and leaves of absence." (Emphasis in text.) (Petitioner's Brief, at p. 6)

In support of this position petitioners rely on Stachelski v. Board of Education of the Borough of Oaklyn, 1979 S.L.D. ____ (decided June 21, 1979), aff'd State Board of Education November 8, 1979 to establish that seniority rights, incumbent upon the acquisition of tenure pursuant to N.J.S.A. 18A:28-5 et seq., may not be ignored for those same reasons expressed therein by the Commissioner regarding Petitioner Stachelski's claim to tenure by attempting to attach an unpaid maternity leave of absence granted to her by her employing board, for the purpose of acquiring tenure status.

Petitioners point out that the Commissioner specifically held as follows in Stachelski, supra:

> "***Time spent by a probationary teaching staff member on approved [unpaid] leave shall not be counted toward the acquisition of tenure. Neither shall it be considered in the calculation of service necessary to fulfillment of the requirements of N.J.S.A. 18A:28-5, when, as herein, the parties have entered voluntarily into a leave agreement, the terms of agreement have been honored by both parties and the employee has resumed active service.***"

The Commissioner observes that the statutory provisions governing the tenure acquisition, reduction in force and the seniority rights of teaching staff members as defined in N.J.S.A. 18A:1-1, are embodied in the applicable sections of law set forth in N.J.S.A. 18A:28-1 et seq. A review of these statutes, as well as those prior cases decided by the Commissioner and the courts, establishes those conditions under which a tenure status and seniority protection are acquired by teaching staff members in the employ of local boards of education. It is well settled that teaching staff members may not lay claim to a tenure status or seniority protection unless they have served the requisite time with proper certification while in the employ of a local board of education. It is significant to point out at this juncture that N.J.S.A. 18A:28-2 exempts civil service employees from the provisions of N.J.S.A. 18A:28-1 et seq.

Thus it is clear that the Commissioner in resolving controversies and disputes arising under school law is not bound by those rulings of the Civil Service Commission or the Court in Fidek, supra, upon which petitioners herein rely. However, the Commissioner is constrained not to ignore the language of the Court in the above-cited case as it pertains to the fair and equitable treatment which is to be accorded not only to civil service employees but to tenured teaching staff members as well in determining their seniority rights and protection pursuant to applicable education laws and State Board regulations.

The specific language of the Court in Fidek, supra, upon which the Commissioner relies reads in pertinent part:

> "***[I]f seniority credit were obtained with every approved leave, those who have remained at work developing their skills would suffer unfairly when***layoff decisions are made." (at 344)

Thus, in the Commissioner's judgment when local boards of education are faced with a reduction in force which affects the continued employment of tenured teaching staff members pursuant to N.J.S.A. 18A:28-9, they must thereafter comply with the provisions of N.J.S.A. 18A:28-11-13 as well as those regulations promulgated by the State Board of Education in accordance with N.J.A.C. 6:3-1.10 et seq.

It is observed that petitioners' specific exception herein is grounded upon the interpretation given to N.J.A.C. 6:3-1.10(b) by Judge Moses which states in pertinent part that:

> "***Seniority status [of tenured teaching staff members] shall not be affected by occasional absences or leaves of absence."

The Commissioner, in interpreting the provisions of this section of the regulations, must recognize those previous school law decisions which hold that the acquisition of tenure and seniority protection by teaching staff members is to be considered seamless with respect to intervening leaves of absence granted by local boards of education pursuant to N.J.S.A. 18A:30-1 et seq. The Commissioner, however, is constrained herein to find and determine that as a matter of fundamental fairness and equitable treatment to all those tenured teaching staff members who are affected by reductions in force, the aforementioned section of the seniority regulations may not be construed to afford seniority credit to tenured teaching staff members who were granted voluntary leaves of absence without pay by local boards of education. Local boards of education, in fact, have the discretionary authority pursuant to the provisions of N.J.S.A. 18A:30-7 to grant additional sick leaves or other leaves of absence to teaching staff members and other school employees, with or without pay, either by board rule or individual consideration. It is observed, however, from the language of the Court in applying the specific provisions of N.J.A.C. 6:3-1.10(b) to R.S. 18:13-19 (now N.J.S.A. 18A:28-10) in Lascari v. Board of Education of the Borough of Lodi, 36 N.J. Super. 426 (App. Div. 1955) that while an intervening two year leave of absence for personal illness was granted by the Lodi Board to one of its employees, such leave was not counted toward his total seniority.

The Commissioner concludes that while local boards may grant such voluntary unpaid leaves of absence to teaching staff members pursuant to N.J.S.A. 18A:30-7, it must be presumed that boards do not contemplate that such periods of leave will contribute toward the total work experience creditable to said employees within the specific categories in which employment service is to be rendered by teaching staff members. The Commissioner so holds.

The Commissioner finds no merit in petitioners' second exception to this initial decision that the Board acted improperly in granting one-half year seniority credit to Petitioner Berkowicz for the 1974-75 school year when she was employed as a half-time teacher.

The Commissioner concurs with the determination reached by Judge Moses that Petitioner Castaldo's periods of employment were improperly computed by the Board for seniority purposes.

Accordingly, for the reasons expressed in the Commissioner's findings and determination herein, this matter is remanded to Judge Sybil R. Moses for a further finding of fact with respect to the appropriate seniority entitlements of petitioners, as well as the other tenured teaching staff members affected by the action of the Board controverted herein.

The Commissioner hereby retains jurisdiction in this matter.

COMMISSIONER OF EDUCATION

July 29, 1980

IN THE MATTER OF THE TENURE :
HEARING OF NICHOLAS KAGDIS, :
SCHOOL DISTRICT OF THE CITY : COMMISSIONER OF EDUCATION
OF PLAINFIELD, UNION COUNTY. : DECISION
:

For the Complainant Board, King, King & Goldsack
(Victor E.D. King, Esq., of Counsel)

For the Respondent, Stephen E. Klausner, Esq.

This matter has been opened before the Commissioner of Education by the Board of Education of the City of Plainfield, hereinafter "Board," through the certification of tenure charges of inefficiency and other just cause against respondent, a teaching staff member in the Board's employ. These charges were filed with the Commissioner on August 28, 1979.

Thereafter, respondent filed a Motion to Dismiss the tenure charges against him, with supporting Brief and exhibits, on September 28, 1979. The Board filed its reply Brief with exhibits on November 19, 1979 opposing respondent's Motion. The record of this matter is now before the Commissioner for his determination.

The chronology of events giving rise to the Board's charges against respondent as they appear in the Board exhibits attached to its Brief is as follows:

1. On January 10, 1979, Board counsel advised the Superintendent that the high school principal and the department chairperson had determined that there was sufficient documentation in respondent's file to justify recommending to the Board that charges of inefficiency be filed against him. This letter further advised the Superintendent that said recommendation would be issued by way of a letter to one of the Assistant Superintendents, who would then formulate a recommendation to be forwarded to the Superintendent so that he could recommend action to the Board at its next regularly scheduled work/study meeting. (C-1)

2. Board counsel also sent a letter dated January 10, 1979, to the Board Secretary requesting that he place this matter on the Board agenda for the next regularly scheduled business meeting in order to seek formal approval to issue a 90 day notice of inefficiency to respondent. (C-2)

3. Thereafter Board members received hand-delivered letters dated January 12, 1979 from Board counsel which read in pertinent part:

> "***On January 10, 1979 I met with Mr. Thompson [high school principal] and Mrs. Grandey (Head of Guidance) regarding Mr. Kagdis. All avenues of assistance appear to have been exhausted by the principal and the department chairperson. Sufficient documentation is present in the file. It is my understanding that Mr. Thompson and Mrs. Grandey will meet with Mr. Kagdis to discuss a letter signed by Mr. Thompson recommending disciplinary action by way of charges of inefficiency. After that conference Mr. Lattimore [Assistant Superintendent] and I intend to meet and discuss the same subject. We anticipate that all this will be accomplished by the evening of January 16, 1979 [time of Board meeting]. Accordingly, I would recommend the adoption of the resolution to facilitate this process." (C-3)

4. The Board Secretary caused the following letter with attachments dated February 2, 1979 to be sent to respondent notifying him of the Board's action of January 16, 1979 and of the charges of inefficiency which were preferred against him:

> "In accordance with Mr. Thompson's [high school principal] letter of January 18, 1979 and the resolution of the Board of Education dated January 16, 1979, I now serve you with charges of inefficiency pursuant to N.J.S.A. 18A:6-10.
>
> "You are allowed ninety (90) days to correct these inefficiencies to the satisfaction of your building principal and department chairperson. The specific character of these inefficiencies is contained in the 16 attachments to this letter. If such inefficiencies are not corrected, a recommendation will be made to the Board to certify these charges to the Commissioner of Education.
>
> "You can expect to be formally evaluated periodically during the ninety day period which officially begins the day you receive this letter." (C-4)

5. Thereafter respondent sent the following letter dated February 8, 1979 to the Board Secretary.

> "With reference to your letter of February 2, 1979, regarding charges of inefficiency placed against me, please advise me as to whether or not the ninety days designated are school days or calendar days." (C-5)

6. The Board Secretary's letter dated February 14, 1979 advised respondent that the ninety (90) days were computed as calendar days. (C-6)

7. On June 14, 1979, the high school principal and the department chairperson caused the following letter memorandum to be sent to the Assistant Superintendent with copies to the Board Secretary and Board counsel.

> "Please be advised that we have reviewed the charges which were forwarded to Mr. Kagdis on February 2, 1979. We have also reviewed Mr. Kagdis' performance during the ninety-day period and since the conclusion of the ninety-day period.
>
> "It is our joint opinion that sufficient improvement in the performance of this individual has not occurred. It is also our joint opinion that none of the written charges of alleged inefficiency have been corrected.
>
> "Accordingly, we recommend that the next appropriate step be taken." (C-7)

8. By way of a letter memorandum dated June 15, 1979, the Assistant Superintendent advised the Board Secretary/Assistant Superintendent that:

> "***I am in receipt of a letter [C-7] from Mr. Henry Thompson and Mrs. Dorothy Grandey stating that none of the charges of inefficiency have been corrected.
>
> "A decision is now required by the Board to certify to the Commissioner, and to deal with the issue of possible suspension.
>
> "Be advised that there is no recommendation to suspend Mr. Kagdis during the proceedings which would go before the Commissioner.
>
> "Mr. King [Board counsel] suggested that this matter be placed on the agenda of the Work Study Meeting preceding the July Business Meeting of the Board. He further suggests

> that as the Board agrees, that the matter be placed as the Board's agenda for the regular Business Meeting in July." (C-8)

9. Board counsel informed the Board President by way of a letter dated July 12, 1979 that the Board would take action at its July meeting to direct the school administrators to notify respondent that none of the charges of inefficiency against him had been corrected within the required ninety (90) day period. (C-9)

10. However, the Commissioner observes that it was Board counsel who formally notified respondent also on July 12, 1979 by certified mail of the following:

> "In accordance with the guidelines for implementation of the tenure employees hearing law the Board of Education has determined on the advice of its administrative staff that none of the charges of inefficiency delivered to you on February 2, 1979, have been corrected.
>
> "Accordingly you now have fifteen days from receipt of this letter in which to sign a sworn statement in opposition to the charges of inefficiency together with a statement of evidence executed under oath.
>
> "Upon receipt of the sworn statement and statement of evidence the Board will determine whether the charges shall be certified to the Commissioner of Education."
>
> (C-10)

The Commissioner observes that respondent received the above referenced letter by certified mail on July 13, 1979 (C-10).

11. A letter from Board counsel to the Superintendent dated July 26, 1979 (C-11) reveals that the Superintendent was requested to have the matter with respect to the tenure charges against respondent placed on the Board agenda for its work/study meeting of August 14, 1979. The letter further indicates that the time for respondent to have filed his reply with the Board would expire on July 27, 1979.

12. Board counsel on August 28, 1979 filed a letter with the Commissioner accompanied by the tenure charges against respondent and the Board's resolution to that effect which was acted upon on August 21, 1979, according to the Certificate of Determination contained therein. (C-12)

The Commissioner observes that respondent was not suspended from his teaching duties as of the date the tenure charges were filed against him by the Board.

Respondent argues in his Brief in Support of his Motion that the facts of this matter clearly establish that the Board, in certifying charges of inefficiency against him, ignored the basic requirements of law pursuant to the provisions of N.J.S.A. 18A:6-10 et seq.

The provisions of the above-referenced statute read as follows:

> "Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination. Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency. The consideration and actions of the board as to any charge shall not take place at a public meeting."

Respondent argues that the Board was required to serve him with its notification of the inefficiency charges against him and the evidence in support thereof within seventy-two hours of the date it resolved to take such action on January 16, 1979. Instead respondent maintains that he was not noticed by the Board until February 2, 1979 and by virtue of such notification, he was given ninety calendar days thereafter to overcome such alleged inefficiencies which expired thereafter on May 2, 1979. Respondent reasons the Board then had three days (or 72 hours) to notify him of its determination with respect to those charges of inefficiency, if any, which were not corrected after which he should have been granted fifteen (15) additional days to respond in writing to any of the remaining charges.

Respondent further contends that, at the expiration of the eighteen days computed above, the Board would then have 45 days pursuant to N.J.S.A. 18A:6-13 to invoke the provisions of N.J.S.A. 18A:6-11 in certifying tenure charges to the Commissioner.

Given the total cumulative time period of sixty-three days from May 2, 1979 as computed by respondent above, he argues that the Board was required to reach its determination no later than July 6, 1979.

Respondent maintains that the Board's action in determining to certify tenure charges against him to the Commissioner as late as August 21, 1979 is fatal to the instant proceedings for the reasons set forth above.

The Board rejects respondent's argument in the instant matter and maintains that its actions with respect to the certification of inefficiency charges were in all ways proper and legally correct. The Board relies on the Commissioner's ruling in re: In the Matter of the Tenure Hearing of Marilyn Feitel, School District of the City of Newark, 1977 S.L.D. 451, aff'd State Board of Education 458 wherein the Commissioner set forth those requirements with respect to the time periods afforded local boards and affected employees regarding the certification of tenure charges as they were to be construed in accordance with N.J.S.A. 18A:6-11, as amended.

The salient points regarding the periods of time in which tenure charges would be considered in compliance with N.J.S.A. 18A:6-11, as amended, are again recited herein by the Commissioner in pertinent part:

> 1. "N.J.S.A. 18A:6-11, as amended, is clear and unequivocal that the board alone shall notify the employee of charges of inefficiency and afford a ninety day

period for improvement. Thus, charges of inefficiency must, in the first instance, be filed with the board secretary along with a statement of evidence in support thereof executed under oath. The board, through its board secretary, shall direct that a copy of those charges and a written statement of evidence in support thereof be served on the employee within a seventy-two hour period. The board shall direct that the employee be informed that, unless such inefficiencies are corrected within ninety days, the board intends to certify those charges of inefficiency to the Commissioner pursuant to N.J.S.A. 18A:6-11.

2. "Upon the completion of the ninety day period for improvement, the board shall determine whether the employee has corrected all the originally stated inefficiences. If all the originally stated inefficiences have been corrected to the satisfaction of the board, the board shall advise the affected teaching staff member that the charges are withdrawn. If, however, the board has reason to believe that any or all inefficiencies have not been corrected, it shall notify the employee in writing of an opportunity to respond within fifteen days to the charges of inefficiency by filing a statement of evidence, under oath, in opposition to those charges. When such statement expires, the board shall within the next forty-five days consider such statement and determine whether to certify charges of inefficiency to the Commissioner. In the event that the board determines to certify such charges, it shall forward them to the Commissioner accompanied by a copy of the original charges of inefficiency, the sworn statement of evidence in support thereof, and a statement of the basis upon which the board relied to determine that the alleged deficiencies were not corrected. Those charges which are certified, with accompanying documentation, shall also be served on the tenured employee."
(Feitel at 456-7)

The Board's position in this regard is that respondent was notified on July 13, 1979 that none of the charges of inefficiency had been corrected. The Board reasons that respondent had fifteen days thereafter in which to file his reply, or until July 28, 1979, after which the Board then had 45 days to reach a determination with respect to its certification of inefficiency charges to the Commissioner. The last day on which the Board believed it could take action against respondent was September 10, 1979 and the Board argues that its action on August 21, 1979 in reaching its determination to certify charges of inefficiency against respondent to the Commissioner was well within the time parameters N.J.S.A. 18A:6-11 (amended), as expressed by the Commissioner in Feitel, supra.

The Commissioner has reviewed the record of the instant matter developed thus far including the Briefs and exhibits filed by the parties in regard to respondent's Motion.

The Commissioner concurs with the Board's position that Feitel, supra, is applicable in arriving at a determination herein with respect to the inefficiency charges pending against respondent. In applying the time parameters therein the Commissioner finds and determines as follows:

1. As indicated in the letter of February 2, 1979 (C-4) from the Board Secretary to respondent, the Board resolved to serve notice of inefficiency charges with a statement of evidence on January 16, 1979.

2. Respondent should have received notification of the inefficiency charges and the evidence in support thereof within seventy-two (72) hours, or not later than January 19, 1979.

3. Respondent then had ninety (90) calendar days, according to the Board's determination, to overcome his alleged inefficiencies. The Commissioner finds that such period of time would have expired on April 19, 1979.

4. Assuming, arguendo, that the Board attempted to comply with the Commissioner's ruling in Feitel, supra, which holds that "***[u]pon the completion of the ninety day period for improvement, the Board shall determine whether the employee [respondent] has corrected all the originally stated inefficiencies***", the Commissioner is constrained to observe that, according to the Board's timetable, the responsible school officials did not apprise the Board of the status of the inefficiency charges against respondent upon the completion of the ninety day period (May 9, 1979) but rather said report was issued by the high school principal and department chairperson on June 14, 1979, thirty-six calendar days thereafter. The Commissioner considers such delay without justification and fatally

defective to these instant proceedings. It is not unreasonable to expect that said school officials should have reported their findings to the Board within a seventy-two (72) hour period after the expiration of the 90 calendar days (May 9, 1979).

Absent specific language set forth in either N.J.S.A. 18A:6-11 as amended or Feitel, supra, regarding what constitutes reasonable time parameters for (1) school officials to report their findings of inefficient behavior to the board upon completion of the ninety (90) day period, and (2) the Board to advise the affected employee of the remaining charges, if any, of inefficiency, the Commissioner herein holds that such time periods may not exceed seventy-two hours in each instance or a total of six working days.

In applying these time periods set forth above to the Board's timetable, the June 14, 1979 report from the high school principal and the department chairperson should have been filed with the Board Secretary no later than May 14, 1979.

5. The Board should then have notified respondent within seventy-two (72) hours of its receipt of the report of the remaining charges of inefficiency against respondent, accompanied by a statement of evidence in support thereof. Respondent should have received such notification from the Board no later than May 17, 1979. (See Feitel, supra.)

6. Respondent should have been permitted fifteen days to file his reply to the inefficiency charges accompanied by his own statement of evidence. The time period for such reply from respondent to the Board would have expired not later than June 1, 1979.

7. Thus, the forty-five (45) days as set forth in N.J.S.A. 18A:6-13 for the Board to reach a determination with respect to the certification of inefficiency charges would have expired not later than July 16, 1979.

The Commissioner, in reviewing the record of this matter, is constrained to observe as in Feitel, supra, that the legislative intent of N.J.S.A. 18A:6-11 as amended, as well as N.J.S.A. 18A:6-13, is to be read as a harmonious whole in providing adequate assurances and safeguards to local boards of education and those affected employees against whom tenure charges are preferred that no procedural due process delays would ensue in the implementation of the tenure hearing process. The Commissioner so holds.

In summary, the Commissioner finds and determines that the Board and its responsible school officials violated the provisions of N.J.S.A. 18A:6-11, as amended, and N.J.S.A. 18A:6-13 by failing to provide respondent with a timely notice of

the original charges of inefficiency and evidence against him, as well as the remaining charges. The inordinate delay which resulted is therefore fatal to the Board's certification of tenure charges against respondent herein.

Accordingly, for the reasons set forth in the Commissioner's findings and determination herein, respondent's Motion to Dismiss the Board's tenure charges of inefficiency against him is hereby granted without prejudice.

COMMISSIONER OF EDUCATION

July 30, 1980

MARY E. HONAKER V. BOARD OF EDUCATION OF THE BOROUGH OF HILLSDALE, BERGEN COUNTY	:	INITIAL DECISION EDU DKT #434-12/78

APPEARANCES:

For the Petitioner, Goldberg & Simon
(Louis P. Bucceri, Esq., of Counsel)

For the Respondent, Robert A. Maikis, Esq.

BEFORE THE HONORABLE ERIC G. ERRICKSON, A.L.J.

DOCUMENTS IN EVIDENCE:

J-1 Stipulation of Facts

R-1 Negotiated Agreement for 1975-76

Petitioner, a teaching staff member employed by the Hillsdale Board of Education, hereinafter "Board," prays for an order of the Commissioner of Education setting aside the Board's June 1978 action establishing her salary at step seven of the salary guide for the ensuing school year. Conversely, the Board contends that its action setting her 1978-79 salary was a lawful exercise of its discretionary authority under prevailing education law.

PROCEDURAL HISTORY

Subsequent to the delineation of issues and procedures at a conference of counsel conducted on March 20, 1979 by a hearing examiner at the Department of Education, Trenton, the matter was transferred on July 2, 1979 to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A Stipulation of Facts was entered August 3, 1979 and a plenary hearing conducted at Wood-Ridge on March 5, 1980. Post-hearing Briefs were filed.

UNCONTROVERTED FACTS

I FIND the following to be the uncontroverted relevant facts which, as set forth in the Stipulation or remain uncontested in the documentary or parol evidence, reveal the contextual setting of the dispute:

1. Petitioner, who had taught previously for four (4) years for the Board, was paid during 1975-76 at the annual rate of $12,770 as provided by the fifth step of the Board's B plus 30 column of the teachers' salary guide. (J-1 Exhibit A)

2. Twice during the autumn of 1975 petitioner requested a leave of absence without pay to complete work for a masters degree as a media specialist. This request for educational leave without pay was granted by the Board on December 15, 1975, effective from January 15 through June 30, 1976 with the conditional proviso spread on the Board's minutes that:

> "***the period of such leave shall not count toward longevity in the district nor toward the accrual of benefits." (J-1 Exhibit C)

3. The Board's policy on unpaid leave as revised on November 11, 1974 stated:

> "It is the policy of the Board to grant leaves of absence without pay to employees serving the Government in the Armed Forces or in volunteer aid programs such as the American Red Cross, Action, etc. Experience credit of one year for each year in military service up to four years, and up to two years for nonmilitary service shall be granted upon reemployment; tenure and pension rights will be preserved according to statute.
>
> The Board also reserves the right to grant unpaid leave following consideration of other individual case/s/. However, when an employee is granted a leave of absence for any reason other than those enumerated above, he in turn forfeits all benefits for that period of time. This means that the period of time granted for leave of absence does not /~count~/ towards the attainment of tenure, accumulation of pension, and vacation rights nor the vertical advancement on any salary guide. Job tenure will not be maintained beyond two years." (J-1 Exhibit D)

The Superintendent's notice to petitioner on December 17, 1975 of the Board's action approving her leave stated, inter alia, that:

> "***This leave was granted with the understanding that you will not receive credit for this partial year of service as credit toward the salary guide. Therefore, you will again be placed on the fifth step of the salary guide for the 1976-77 school year.***" (J-1 Exhibit F)

4. During April 1976 the Board, which had not at that time concluded negotiations with its teachers, voted to employ petitioner for the ensuing year. In its consideration of this action, the Board relied on a master list of instructional salaries listing petitioner at the sixth step of the guide for 1976-77. This master list, prepared in September 1975 and updated in November 1975, had not been revised by the Board's office staff to reflect the Board's December 15 resolution containing the conditional proviso that the period of her leave would not count toward the accrual of benefits. (J-1 Exhibits G, H)

5. Upon completion of the negotiated agreement the Board's administrative and clerical staff prepared a schedule of instructional salaries on which petitioner was listed at step six at $14,148 on the M.A. column. (J-1 Exhibits I, J) Petitioner was, in fact, paid $14,148 for the 1976-77 school year. (J-1 at p. 6) No discussion of this placement between petitioner, the Board or its agents ensued during that year.

6. A schedule of instructional salaries was prepared for the year 1977-78 listing petitioner at step seven on the M.A. column. It was at this step calling for $15,100 that petitioner was paid for the 1977-78 school year. No discussion of that placement ensued until December 1977. (J-1 Exhibits L, M, N)

7. During December 1977 it was discovered and made known to the Board that petitioner had, in error, been advanced one step on the salary guide for the 1975-76 school year for which she had been notified that she would not be granted credit. The Board, thereupon, invited her to attend its discussion of the fixing of her salary for 1978-79 and ensuing years. (J-1 Exhibits Q, R)

8. At the Board's meeting on June 26, 1978 the matter was discussed for over one hour. Petitioner and her N.J.E.A. representative were granted the right to speak on her behalf. (J-1 Exhibit S)

9. On that same date the Board resolved, as follows:

> "RESOLVED, that this Board finds that a clerical error in the Hillsdale School District has resulted in the payment to Miss Mary Honaker for the 1976-77 school year of a salary equivalent to Guide Step 6 rather than

> Guide Step 5 of the 'MA' Column of the Teachers' Salary Guide for the 1976-77 school year and that a repetition of this error has resulted in the payment to Miss Honaker for the 1977-78 school year of a salary equivalent to Guide Step 7 rather than Guide Step 6 of the 'MA' Column of the Teachers' Salary Guide for the 1977-78 school year; and
>
> BE IT FURTHER RESOLVED that in order to prevent repetition of the aforesaid errors in guide step placement for the 1978-79 school year, the salary established for Miss Mary Honaker for the 1978-79 school year shall be the salary set forth for Guide Step 7 of the 'MA' Column of the Teachers' Salary Guide for the 1978-79 school year.***"

10. Petitioner's attempt to grieve and arbitrate the matter was dropped in favor of the Board's suggestion that she seek relief before the Commissioner. (J-1 Exhibits T, U)

SUMMARY OF RELEVANT TESTIMONY

Petitioner testified that she advised the Superintendent in December 1975, as follows, concerning the Board's decision not to grant her service credit for the 1975-76 school year:

> "***I recall stating (to the Superintendent) that I was not happy with the decision because I had done the entire year's paper work, even though I was presently there for five months and this was something ***I felt I would have to fight.***" (Tr. 7-8)

She testified also that she had expressed her displeasure with the Board's decision to her principal as follows:

> "***I just felt that I had done a full year's work, and I was trying to better my education, and I thought everybody else was going to benefit from it, and I was really in a quandry, my back was against the wall, there was nothing else I could do, and I said I really felt like filing a grievance on it, and I guess you could say he was really trying to calm me down ***" (Tr. 9)

Petitioner testified that she did not grieve the matter in December 1975, not only because she was apprehensive that the Board might cancel her leave should she do so, but also because she would not be present after January 12 to process the grievance. (Tr. 20) She testified also that she did not grieve

the matter when she returned in September 1976 since she believed all issues had been resolved when her paycheck reflected that she was being paid at the sixth, rather than the fifth, level. (Tr. 14)

The Superintendent testified that he recalled no discussion or expression by petitioner of her displeasure or announced intent to file a grievance after the Board's decision not to grant her service credit for 1975-76. (Tr. 25-27)

The Board Secretary testified that she had never received in the Board's mail any communication or grievance from petitioner expressing dissatisfaction with the Board's December 15, 1975 decision. (Tr. 28-30)

Having carefully considered all of the testimony at the hearing and the documents in evidence, I FIND there is a preponderance of credible evidence which establishes the following additional facts which together, with the uncontroverted facts, ante, are relevant to the determination of the matter:

1. Petitioner in December 1975 did express orally to the Board's administrative agents her displeasure over the Board's decision not to grant her service credit for salary step placement for the 1975-76 school year. She did not, however, formally address a protest to the Board.

2. When petitioner received her salary check in September 1976, she was misled by the inadvertent error of the Board's agents into believing the Board had determined to grant her service credit for the 1975-76 school year.

3. When that inadvertent error was belatedly discovered in December 1979, petitioner, in timely manner, sought redress of what she perceived to be unfair treatment by seeking to grieve and arbitrate the matter. At the Board's suggestion, however, she in the alternative filed the within Petition of Appeal.

CONCLUSIONS AND DETERMINATION

I CONCLUDE from the findings, ante, that the Board's intent when granting her a leave for educational purposes was not to allow petitioner service credit for the 1975-76 school year during which she worked a period of four and one-half months. This action was wholly consistent with its stated policies. I further CONCLUDE that the Board thereafter neither considered rescinding nor did rescind its conditional proviso that service credit for 1975-76 would not be granted to petitioner. Rather, it was inadvertent clerical error that caused her salary to be fixed for the 1976-77 and 1977-78 school years one step higher than was the Board's intent which had been made known to petitioner in clear language.

The record reveals no attempt on the part of the Board to recoup or withhold any of the salary it had voted for petitioner during 1976-78. Any such attempt under existing case law would have been ultra vires. Agnes Galop v. Board of Education of the Township of Hanover, 1975 S.L.D. 358

In Galop, supra, wherein a Board because of inadvertant clerical error had authorized a teacher to be paid at higher step on the salary scale, the Commissioner stated, inter alia:

> "***(T)he Board is not entitled to recover any portion of the salary paid to petitioner during the months of July 1973 through February 1974. Nor was it legally entitled to reduce her monthly rate of payment thereafter through June 1974. The Commissioner so holds and directs the Board of Education of the Township of Hanover to compensate petitioner the appropriate sum of moneys in accordance with this determination.
>
> "Petitioner has no residual entitlement to such a favored position beyond the end of her 1973-74 contract and is to be paid for the 1974-75 school year, and thereafter, as provided by her proper step and level on the Board's negotiated salary guide and authorized by the Board's official action.
>
> "The Commissioner is constrained to caution all local boards of education and their administrative officers to examine in minute detail those documents which are submitted for official resolution authorizing contractual salaries of the numerous employees of school districts. In every instance such matter should be thoroughly scrutinized prior to official action. By so doing, boards will avoid the payment of unnecessary sums, as herein, and avoid the disharmony and necessary litigation occasioned by careless and inadvertent error.***" (at pp. 364-365)

The Board clearly advised petitioner, herein, that her requested leave would result in no service credit for 1975-76. When the Board realized that through error she had been placed at a higher step than intended, it gave petitioner and her chosen representative an audience and, after serious discussion, gave notice of corrective action effective September 1978. I CONCLUDE that the Board's corrective action in this matter was not only consistent with its own stated policy but also consistent with its discharge of its fiduciary responsibility of operating its schools evenhandedly in the interest of the taxpayers and its other employees. That petitioner was paid a higher amount for two years than was the intent of the Board members is stipulated. This worked to her temporary advantage. (J-1 at pp. 7-8) However, the Board has no legal obligation, within the factual

context presented herein, to continue that unintended salary discrepancy beyond the 1977-78 school year. At no time did the Board either reduce petitioner's salary or withhold an increment to which she was legally entitled. It was, however, within its authority to correct its prior error when fixing her salary for 1978-79 by holding her at the same step on the guide which she had attained for 1977-78. Galop, supra; Kiefer Shriner v. Board of Education of the Town of Boonton, 1975 S.L.D. 939 The Board was not, as is argued in petitioner's Brief, precluded from taking the corrective action it effected by reason of application of the equitable doctrine of laches, estoppel, or the reliance she may have placed on the Board's fixing of her 1976-77 salaries one step higher than the placement contemplated by the December 15, 1975 resolution, ante. Nor was the Board, within this factual context presented, as petitioner suggests, precluded from taking corrective action because of changing conditions in the job market, a factor totally without the Board's control.

Accordingly, it is ORDERED that petitioner's prayer for relief in the form of placement at step eight on the salary guide with commensurate additional salary benefits from September 1978 be and is DENIED. The Petition of Appeal is DISMISSED.

This recommended decision may be affirmed, modified or rejected by the head of agency, Fred G. Burke, Commissioner of Education, who by law is empowered to make a final decision in this matter. However, if the head of the agency does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with Fred G. Burke, Commissioner of Education my Initial Decision in this matter and the record in these proceedings.

June 19, 1979
DATE

Eric G. Errickson
ERIC G. ERRICKSON, A.L.J.

MARY HONAKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HILLSDALE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 6:24-1.17 (b).

Petitioner excepts to the determination of Judge Eric G. Errickson, ALJ that the Board had the authority to correct its previous error. The Commissioner does not agree. Petitioner is not being punished by the action of the Board nor has her salary been reduced nor her increment withheld. Petitioner knew, or should have known, the intent of the Board by the notice to her from the Superintendent on December 17, 1975 wherein is clearly stated "*** you will not receive credit for this partial year of service as credit toward the salary guide.***." (J-1, Exhibit E)

There is nothing in the record to show that petitioner protested this in writing; in fact petitioner's testimony indicates that she filed no grievance but talked about it with her principal. (Tr. 9, 20) She did not question the apparent reversal in Board policy when she received a check in September 1976 placing her at the next higher salary level.

The Board's exceptions are generally supportive of the initial decision while correcting the date of the finding of the error in petitioner's salary from December 1979, as stated in additional finding of fact No. 3, to December 1977.

The Commissioner has said in Elizabeth Stiles et al. v. Board of Education of the Borough of Ringwood, 1974 S.L.D. 1170 that salaries once established, albeit in error, by a board of education may not later be reduced by rescinding the previous action of the board. The Commissioner therein further observed that the board was not required to continue its error, that while not reducing their salaries, they were frozen at a salary rate unitl time and their years of experience caught up to them and entitled them to receive the next increment. In the present case, at no time did the Board reduce petitioner's salary or withhold an increment. N.J.S.A. 18A:29-14 Galop, supra

The Court, in Board of Education of Passaic et al. v. Board of Education of Township of Wayne et al., 120 N.J. Super. 155, 163-164 (Law Div. 1972) has stated:

> "***The general rule is that such payments made by municipal corporations or agents thereof under mistake of law are recoverable.
>
> ***
>
> "In dealing with the issue of whether the government could recover erroneous refunds, the court in United States v. Hart, 12 F.Supp. 596, 597 (E.D. Pa. 1935), aff'd 90 F.2d 987 (3 Cir. 1937), held that 'it is well settled that in case of the government, states, and even municipalities, money paid by mistake may be recovered.'
>
> ***
>
> "The reasoning behind such a decision is that this court does not feel that a municipality or subdivision thereof, as the instrument of the people, should be bound by a misinterpretation of the law by the authorities in charge.***"

The Board, in the matter herein contested, properly moved to correct its prior error by holding petitioner at the same step of the guide which she had previously attained.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

August 7, 1980

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

IN RE:	)	INITIAL DECISION
JOHN HOSTETTER,	)	**OAL DKT. NO. E.D.U. 2905/79**
PETITIONER	)	
vs.	)	AGENCY DKT. NO. 247-6/79A
BOARD OF EDUCATION OF UNION COUNTY	)	
REGIONAL HIGH SCHOOL, UNION COUNTY	)	
RESPONDENT	)	

APPEARANCES:

Stephen E. Klausner, Esq., Attorney for Petitioner

Irwin Weinberg, Esq., Weinberg, Manoff & Dietz, Attorneys for Respondent

BEFORE THE HONORABLE **JACK BERMAN,** A.L.J.:

On June 22, 1979, John Hostetter (Petitioner) filed with the Commissioner of Education a Petition of Appeal pursuant to the authority of the Commissioner to hear and determine controversies under N.J.S.A. 18A:6-9. In his petition, petitioner appeals the determination of the Board of Education of Union County Regional High School, Union County (Respondent) to withhold payment to him of salary increment and adjustment for the 1979/1980 school term.

This matter was then transmitted to the Office of Administrative Law for a hearing pursuant to the provisions of N.J.S.A. 52:14F-1 et seq.

On November 5, 1979, a prehearing conference was held wherein the issue to be determined at the hearing was identified as follows in a prehearing order of that date:

Was the Board's resolution of April 16, 1979 in violation of N.J.S.A. 18A:29-14.

The hearing was held on April 14, 15 and 16, 1980. The following persons testified:

John H. Hostetter the petitioner

Ronald Nash - teacher employed by respondent

Wendy Whitford - student at Johnathan Dayton Regional High School

Dorothea Hooper - Coordinator of Social Studies of respondent's School System

Dr. Martin Siegel - Director of Instruction of respondent's School System

Dr. Donald Merachnik - Superintendent of respondent's schools

At the hearing 24 exhibits were received in evidence. A list of the exhibits appear in the appendix.

This controversy centers around petitioner's distribution of review sheets (P-1) to his students. Respondent claims that the review sheets contained "substantially all of the questions and answers to the standardized test for his students prior to the test being given. . ." (Respondent's Resolution J-1). The effect respondent asserts, "seriously impaire[d] the validity of the Standardized Test . . ." and resulted in respondent denying petitioner "an employment salary increment and a salary adjustment increment for the school year 1979-1980, . . ."(J-1).

Petitioner does not dispute that he distributed the review sheets to his students, but is of the belief that it did not contain "substantially all of the questions and

answers to the standardized test." (J-1).

Petitioner also claims that respondent had no policy concerning standard testing and that the determination by respondent denying him a salary increment and a salary adjustment was "unfounded, not based upon any evidence presented at any meeting in which Petitioner had notice and an opportunity to be heard. . ." (¶.5 of Petition of Appeal).

With respect to "notice and an opportunity to be heard," Dr. Donald Merachnik, Superintendent of respondent's schools, wrote to petitioner on April 9, 1979, inviting him and his association representative to meet with him on April 10. "The purpose of this conference will be to satisfy the requirement of Article II, section E of the Agreement Between the Board of Education and the Teachers Association... prior to any recommendation to the Board of Education which could affect your 'rank, salary adjustment, and/or increment or position' " (R-10). Dr. Merachnik testified that this meeting never took place as petitioner's representative was unavailable on April 10 and also April 11. Dr. Merachnik offered to meet with them on April 16, but petitioner was unavailable. On April 17, 1979, respondent Board met and passed the resolution previously discussed.

In February 1978, the respondent Board, according to Dr. Merachnik, discussed favorably the idea of implementing a Standard Test. The Superintendent's Bulletin of September 7, 1978 (R-1), which was sent to the entire staff then informed the staff that "The development of standard testing for all subjects will be completed during the first semester. In January, the first complete standard testing examinations will be administered to all students" (R-1 ¶. 4 (2)). Dr. Martin Siegel, respondent's Director of Instruction, had the responsibility of setting up and implementing the Standard Test.

Dorothea Hooper, respondent's Social Studies Coordinator, testified, that she was directed by Superintendent Merachnik, to prepare the Standard Test for Social Studies. She said, the Standard Test was developed for a particular course of study for purposes of evaluation. She called a meeting of the Social Studies staff, in April of 1978, and divided them into committees based on their expertise. The committees were to develope exam questions and formats including preparation of alternate exams for absentee students. According to Miss Hooper petitioner was assigned to two committees: 1) Diplomacy and 2) U. S. Survey. The exams for the Survey course were completed in

November 1978, in rough draft. She turned the exam over to Dr. Siegel then for typing, reproduction and delivery and did not see a final copy of the exam until January 22 or 23 1979.

On January 17, 1979 she made a routine observation of petitioner's class. She observed, when she entered the classroom, petitioner distributing his review sheets to the students. She sat down and waited to receive a copy of it. Petitioner who was still distributing the sheets, bypassed her, whereupon she requested from him a copy, which he then gave to her. She observed that the review sheets were close to the questions on the final form of examination.

The next day she prepared her Observation Report and attached to it her copy of petitioner's review sheets. (R-3). In the report she wrote "Examination of the review sheets attached and the examinations for Survey indicate that the teacher used most of the identical material with students during review. I am hard put to find anything on the review sheet that is not directly from the exam. In the same vein, what is not on the exam does not seem to be on the review sheets. I strongly question the ethics of this type of review and the professionalism of the staff member involved." Under "Supervisor's suggestions" she wrote "I would suggest that the teacher . . .refrain from distributing review sheets that include most of the exam questions."

On January 22 or 23, 1979, when she received the final copy of the Survey Standard Test, she crossed checked the review sheet with the exam and confirmed her suspicion. (R-11 (a) - (d)). Following this she immediately asked petitioner to meet with her and Miss Romano, the principle of the Jonathan Dayton High School on January 23, 1979, for the purpose of discussing petitioner's review sheet. Petitioner on that day was presented a copy of Miss Hooper's Observation Report and as customary, asked to place his signature on the line provided for staff members. When petitioner signed it he said that his "mistake was putting it into print," which Miss Hooper interpreted as having been caught.

On January 24, 1979, petitioner informed Miss Hooper that he had also given out review sheets in his Diplomacy classes. Miss Hooper prepared a Conference Report that day (R-5) in which it is noted that members of the Social Studies Department at Jonathan Dayton complained about test results in their courses, citing as an example a student who received 4.0 on the Standard Exam stating that "she had gotten hold of one of

Dr. Hostetter's review sheets and that enabled her to get a good grade. She further stated that Dr. Hostetter told his students that the reason he was giving them the data was because he did not believe in standard exams."

Miss Hooper on the same day, prepared a memorandum to Superintendent Merachnik listing a "chronology of events" with respect to petitioner and the standard examination (R-6) and that "Dr. Hostetter has indicated that he gave review sheets to U.S. Survey 100 and 101 and American Diplomacy 118 and 119 at Jonathan Dayton. He also gave review sheets to American Diplomacy 118 at Arthur L. Johnson. Both Miss Romano and Mr. DeRosa have been informed that test scores for these classes will not be valid."

In fact the test scores were not formerly declared invalid. Superintendent Merachnik testified, that although it was in his power to stop the exam, he determined not to because he did not want to jeopardize students who had prepared for it. This determination was confirmed by the testimony of Dr. Siegel.

On January 26, 1979, petitioner met with Superintendent Merachnik who informed him how serious his mistake was. At this meeting, petitioner again stated that his "mistake was putting it into writing."

On April 17, 1979, Superintendent Merachnik recommended to the respondent Board that petitioner be denied a salary increment.

Petitioner, a tenured Social Studies teacher in respondent's school district, testified that he prepared the review sheets, by taking materials from both exams (Survey 100 and 101) and lumped them together. In fact, he gave the finished product to a fellow Social Studies teacher with whom he shared a classroom, a Mr. Nash. Mr. Nash testified that he used part of petitioner's review sheets to make up his own review sheets.

Petitioner's review sheets did not contain matching or multiple choice. It contained blocks of information to help his students study for the exam. The review sheets also contained a map which was identical to the map included with the test exam except for certain blackened and numbered areas. (See P-4).

According to petitioner, the results of his students' test scores compared to

their average grades for two marking periods, showed no substantial deviation with the exception of a couple of students.

Petitioner testified that he never saw any written policy, nor heard any oral policy relating to review materials although Superintendent Merachnik testified that petitioner violated the oral policy established by respondent Board in February 1978, with respect to Standard Testing. Petitioner further testified that another Social Studies teacher, Clare Mason, also distributed review sheets to her Survey 100 students. (see P-7). Although Ms. Mason's review sheets merely present a list of names and topical events, a student of hers testified that Ms. Mason when reviewing the review sheets with her class, provided information regarding each item on the list. Petitioner thus attempted to demonstrate that Ms. Mason's review sheets together with the information she supplied her class, contained at least as much information that appeared on the Standard Test as did his review sheets.

Petitioner readily admitted that if students memorized his review sheets, there was sufficient information on it for them to take the Standard Test (P-2, P-3). This he felt was consistant with his objectivity of a test, which in his opinion, was a series of questions designed to determine knowledge or intelligence obtained through study.

There is no dispute that the same tests were given to different classes over a period of at least a week, and the students who took the test first, could reveal to subsequent students taking the same tests, the questions. Notwithstanding this, Miss Hooper and Dr. Siegel testified that it was petitioner's students in the Survey 100 Class who received the highest averaged test scores. Ms. Mason's class received the second highest averaged test scores. Irrespective of the test results, Superintendent Merachnik concluded, that by giving the students review sheets, the opportunity existed for them to do exceedingly well, makes in his opinion, the exam invalid. The purpose of the Standard Test, according to Dr. Siegel, was violated as one could not accumulate objective data of the students. A total of 1100 students took the examination

Based on the foregoing the **COURT FINDS:**

1. The foregoing discussion is incorporated herein by reference.

2. Petitioner is a tenured Social Studies teacher in respondent's

school district.

3. On January 17, 1979, petitioner distributed review sheets to his students which substantially contained all of the questions and answers to a Standard Test prior to the test being given, which had the effect of seriously impairing the validity of the Standard Test.

4. In doing so, petitioner violated respondent's policy with respect to the purpose and objective of the Standard Test.

5. Respondent on April 17, 1979, resolved to deny petitioner a salary increment and a salary adjustment.

6. Respondent, prior to its resolution, gave petitioner notice and an opportunity to be heard which could affect petitioner's "rank, salary adjustment and/or increment ..." (R-10).

7. Respondent Board's resolution of April 16, 1979 was not in violation of N.J.S.A. 18A:29-14.

N.J.S.A. 18A:25-7 states:

"Whenever any teaching staff member is required to appear before the board of education or any committee or member thereof concerning any matter which could adversely affect the continuation of that teaching staff member in his office, position or employment or the salary or any increments pertaining thereto, then he shall be given prior written notice of the reasons for such meeting or interview and shall be entitled to have a person of his own choosing present to advise and represent him during such meeting or interview."

I find that petitioner was given" prior written notice of the reasons for such meeting or interview" and was afforded the opportunity to have a representative present at the meeting or interview. Respondent's letter of April 9, 1979 inviting petitioner and

an association representative to meet with respondent concerning petitioner's "rank, salary, adjustment and/or increment or position" (R-10) satisfied the statutory requirement fully.

N.J.S.A. 18A:29-14 states in relevant part:

> "Any board of education may withhold for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education."

The sole issue agreed upon by the parties for the Court to determine is whether respondent Board's resolution of April 16, 1979 was in violation of this statute.

The portions of the Resolution that petitioner claims respondent failed to prove appear in the Whereas clauses of the Resolution. These petitioner takes issue with:

> "WHEREAS, the aforesaid John Hostetter has specifically stated his opposition to the Board policy concerning standardized testing, and
>
> WHEREAS, in deliberate violation of Board policy the said John Hostetter gave out substantially all of the questions and answers to the standardized test to his students prior to the test being given, and
>
> WHEREAS, the effect of violating Board policy was to seriously impair the validity of the standardized test."

Although the Court does not consider the recitation in a "Whereas" clause of a resolution denying an increment in salary as controlling, nonetheless this Court is convinced by the evidence rendered in this matter that respondent has substantiated its recitation completely.

The Court does find from petitioner's own testimony that he was opposed to the standard test and had answered a student's inquiry in class as to what he thought about

the exam by publicly stating "I don't like them."

Petitioner asserts that he could not violate Board policy as there was no board policy with respect to giving out substantially all the questions and answers to the test. However, Superintendent Merachnik testified that petitioner violated the oral policy established by respondent Board in February 1978 with respect to Standard Testing. Moreover, the respondent Board is justified in its expectation that an exam review be conducted in conformity with commonly accepted standards of teacher professionalism. The fact that there was no written policy does not excuse petitioner's behavior. As was stated in Talarsky et al v. Edison Township Board of Education, 1977 S.L.D. 862, 868-869:

> "That an unwritten policy of a board may exist in a school district has on numerous occasions been recognized by the Commissioner in his quasijudicial capacity as a determiner of disputes arising under school law. (Citations omitted). This principle was similarly enunciated in Bertha A. Gebhart v. Hopewell Township Board of Education, 1938 S.L.D. 570 (1927); aff'd. State Board of Education 576 (1928) wherein the Commissioner quoted with favor from Voorhees' "The Law of Public Schools", p. 214, par. 85, as follows:
>
> "***The power to make rules does not imply that all the rules, orders and regulations for the discipline, government and management of the schools shall be made a matter of record by the school board, or that every act, order or direction affecting the conduct of such schools shall be authorized or confirmed by a formal vote. ***No system of rules however carefully prepared can provide for every possible emergency or meet every requirement. In consequence much must necessarily be left to the individual members of the school board, and to the superintendents of and the teachers in the several schools. It follows that any reasonable rule adopted by a superintendent, or a teacher merely, not inconsistent with some statute or some other rule prescribed by higher authority, is binding upon the pupils.***"
>
> It may similarly be stated that such rules are binding upon teachers.

The test was seriously impaired as a result of petitioner's action. The Court accepts the criteria applied by respondent that the test was impaired in that the opportunity existed for the students to do exceedingly well. Neither this Court or the Commissioner can "substitute his judgment for that of the board members on matters which are by statute delegated to the local boards." Boult and Harris v. Board of Education of Passaic, 1939-49 S.L.D. 7 at 13; aff'd. State Board of Education 15, aff'd. 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E & A 1918).

It is, therefore, **CONCLUDED:** that the Board's resolution of April 16, 1979 did not violate N.J.S.A. 18A:29-14; and respondent Board's actions were not arbitrary, capricious or unreasonable.

It is, therefore, **ORDERED** that respondent's action in denying petitioner an employment salary increment and a salary adjustment increment for the school year 1979-1980 is hereby **AFFIRMED,** and it is further **ORDERED** that petitioner receive the same salary for the 1979-1980 school year as he received in the 1978-1979 school year in accordance with the Salary Guide in effect for the 1978-1979 school year, and it is further **ORDERED** that any reports, or evaluations prepared by any Administrator or Supervisor related to the incident hereinabove referred to shall be forwarded to petitioner but shall otherwise be deemed confidential and it is further **ORDERED** that the petition is hereby **DISMISSED.**

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

I HEREBY FILE my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

June 23, 1980
DATE

Jack Berman
JACK BERMAN, A.L.J.

JOHN HOSTETTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed in a timely fashion by petitioner pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

Petitioner's exceptions address the alleged violation of his constitutional rights. His statements amongst others include "Not one Board witness testified that Dr. Hostetter articulated his opposition to the standardized test." (Exceptions, at p. 2) The Commissioner finds no relevance in this argument. Petitioner's own testimony showed his objection to standardized testing and that he knew of the Board's consideration of such a testing program. (Tr. I-63)

Petitioner argues that the Board has no written policy relating to review materials and that therefore the record is barren of evidence showing that he violated any such policy. The Commissioner does not feel that the Board must or should have developed a policy governing review materials used by teachers in the normal course of events in their classroom teaching.

It is axiomatic that teachers, over the years, have claimed the right as professional educators to use teaching materials and methods appropriate to the development of their determined goals. Such claims have encompassed course content materials, testing devices and instructional and review procedures. The Commissioner does not negate the importance of such a professional stance but observes that such claims invariably include a standard of ethics properly attributed to the professionally certificated classroom teacher. Included in such ethical values is the proscription of the device of teaching to a test for the sole purpose of raising the percentile of correct answers.

In the present case petitioner admits to taking the materials from the questions for two courses, Survey 100 and Survey 101 and "just lumping it together." (Tr. I-25) Such material was subsequently distributed by petitioner to his classes and a copy was given to a fellow social studies teacher. The Commissioner cannot agree with the propriety of such a procedure.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

The action of the Board in withholding from petitioner a salary increment and salary adjustment for the school year 1979-80 is affirmed.

The Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

August 7, 1980

PATRICK HENISSE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

For the Respondent, Golden, Shore & Paley
(Philip H. Shore, Esq., of Counsel)

Petitioner, formerly employed as a teaching staff member by the Board of Education of the Borough of Spotswood, hereinafter "Board," alleges that the Board violated his constitutional protection of free speech with respect to his nonreemployment for the 1977-78 academic year and that the Board failed to give him an adequate informal opportunity to be heard as required by law. The Board denies the allegations and asserts that its actions with respect to petitioner's nonreemployment is in all respects proper and legal.

A hearing was conducted in the matter on July 19, 1978 at the Middlesex County Court House by a hearing examiner appointed by the Commissioner of Education. The Board, at the conclusion of petitioner's proofs, moved to dismiss the complaint on the grounds that petitioner failed to establish that it violated his constitutional protection of free speech or that it afforded him an inadequate informal opportunity to be heard. The hearing examiner directed the Board to file a letter memorandum in support of its Motion to Dismiss. Petitioner's letter memorandum in opposition to the Board's Motion has also been filed. The report of the hearing examiner is as follows:

Petitioner was first employed by the Board as a consultant during February 1976 in anticipation of the opening of its new high school in September 1976. On August 1, 1976 petitioner began full time duties in the Board's employ in his regular position of coordinator of humanities, in which his employment was not renewed.

Petitioner testified that his duties as the coordinator of humanities included the organization and curriculum development of the junior and senior high school program for the social sciences, in addition to the music and art program, in coopera-

tion with the high school principal. Petitioner testified that he, together with five other staff members, created and implemented the process of recruitment, screening, and interviewing of teacher applicants for recommendation to the principal, Superintendent and, finally, to the Board.

Petitioner received three written evaluations during the 1976-77 academic year prepared by the high school principal. (P-3-5) Petitioner asserts that each of the three formal evaluations prepared on his performance are laudatory in appraising his contributions to the total school program.

Petitioner testified that on April 4, 1977 the principal recommended him and other nontenure teaching staff members to the Board for continued employment for the 1977-78 academic year. (P-2) Petitioner asserts that of the nontenure teaching staff recommended to the Board for reemployment by the principal, the Board approved all recommendations except with respect to him. Petitioner testified that he was informed by the principal on April 27, 1977 that the Board had determined not to offer him reemployment for 1977-78. (Tr. 56)

Petitioner testified he requested from the Board written reasons upon which it based its determination not to reemploy him. Petitioner received the written reasons from the Board, through the Acting Superintendent, by letter dated May 26, 1977. (P-1) The Board grounded its determination not to reemploy petitioner upon the following five reasons:

> ***
>
> "(1) The Board of Education believes that it can obtain an individual to fill the position which you presently occupy, who will have leadership, coordination and innovative abilities superior to those which you have evidenced.
>
> "(2) You have not maintained as high a level of performance in your position as the Board believes should be maintained.
>
> "(3) You have demonstrated weak supervisory and evaluation procedures and skills.
>
> "(4) You permitted, without Board permission or knowledge, indiscriminate and possibly improper use of school video tape materials.

> "(5) You have evidenced a lack of ability to maintain good communications and good relations with the public." (P-1)

Petitioner contends that the written evaluations (P-3-5) of his performance establish that he has demonstrated leadership, creativity and effective coordination of the Board's curricular program of humanities. Petitioner asserts that his formal evaluations establish his performance to be of a high level; that his formal evaluations establish he demonstrated strong supervisory and evaluative procedures and skills; that although he used the Board's video equipment for school purposes it was not used improperly; and that he maintained effective communication and relations with the public.

Petitioner testified that he requested and was granted an informal opportunity to be heard by the Board on June 24, 1977 with respect to its determination not to reemploy him. Petitioner testified that this meeting which was conducted publicly at his request lasted approximately three hours and he was represented by a member of the New Jersey Education Association. Petitioner produced twelve persons who spoke to the Board on his behalf.

Petitioner complains that the informal opportunity to be heard by the Board was not adequate because the Board asked no questions, made no statements or, in any fashion, participated in the meeting. Petitioner testified that immediately following the presentation on his behalf, the Board, without adjourning to a private session to discuss what it heard from his twelve persons, moved to affirm its original determination not to reemploy him for 1977-78. The motion was approved by the Board.

Petitioner contends that the real reason his employment was not continued is because during January 1977 he video-taped the twelve hour program, "Roots," which was televised by the American Broadcasting Company, hereinafter "ABC." Petitioner testified that as the coordinator of humanities he would from time to time video record selected television programs for use by teachers in the humanities. Petitioner explained he taped "Roots" which was then used by teachers not only in the humanities but in other areas as well. Petitioner testified that "Roots" was popular in the school with teachers and with pupils.

Petitioner testified that the high school principal informed him of a letter received by the Superintendent from the legal department of the ABC television network. Petitioner theorizes that someone reported his taping of "Roots" to ABC who, in turn, sent a letter requesting that the tape of the program be destroyed. The record does not disclose whether petitioner did destroy the tape. Petitioner testified that he never before secured prior approval of any television network to tape any program off the air because no one told him to do so. (Tr. 43)

Petitioner, in support of his argument that the Board violated his constitutional right to free speech when it determined not to reemploy him because he used Roots in the curriculum, testified that he attended most public meetings of the Board. Petitioner testified that at the March 1977 Board meeting, a citizen objected to the use of "Roots" in the curriculum on the grounds that the community is all white. (Tr. 55) Petitioner could not identify the citizen.

Petitioner testified that, subsequent to the time he learned his employment was not being continued, he met with the Board President in the vice-principal's office. Petitioner explained he asked the Board President why his employment was not being continued to which the Board President responded by citing several reasons. (Tr. 80) One of the reasons, petitioner testified, was the use of the program "Roots" in the curriculum which had raised questions in the community.

Petitioner admits to having an altercation with the Board President at a private meeting on May 20, 1977 because, petitioner states, the Board President called him a liar (Tr. 72); that he made presentations to the Board at the public meetings he attended; that from time to time he would be questioned by the Board and by the public at those meetings; that he was questioned at one or more Board meetings in regard to the use of available textbooks and the use of tapes in classes, without discussion, for two consecutive weeks. (Tr. 78-79) Petitioner testified he denied that anyone in the humanities used video-tapes, without discussion, for two consecutive weeks.

Petitioner concludes from the circumstances that his constitutional protection of free speech was violated by the action of the Board not reemploying him because he used the program "Roots" in the Board's humanities program.

The Board, to the contrary, asserts that petitioner has failed to establish, by way of proofs, that it violated his constitutional rights in any fashion. The Board contends that it alone has the authority to determine those of its nontenure teaching staff members who shall continue in its employ. The Board argues that, regardless of the evaluations of petitioner's performance and the subjective statements therein by the principal, it made its own independent judgment of petitioner's performance, determined not to renew his employment and gave him the bases for such action when he requested them.

The hearing examiner has considered petitioner's testimony and documentary evidence offered with respect to his claim of constitutional infringement by the Board and finds such a claim to be without merit.

Firstly, the three written evaluations (P-3-5), which according to petitioner are laudatory in all respects, set forth more positive than negative comments.

The principal observed on November 22, 1976 that petitioner was performing in a positive manner and proffered three suggestions for future development. (P-3) On February 10, 1977 the principal generally commends petitioner's performance but also identifies as a weakness petitioner's

> "***[f]ailure to establish with staff outside his department an understanding of his purpose, direction, goals and insights into the educational process in general." (P-4)

The principal on March 30, 1977 evaluates petitioner's performance in a generally positive fashion but simultaneously addresses the following concern:

> "***I am well aware that [petitioner] at times questions Spotswood's understanding of the social sciences as compared to the teaching of history.***" (P-5)

After affirming the approach used by petitioner, the principal then states:

> "***[Petitioner's] energy should be spent in terms of how he can best educate Spotswood in relationship to his program, not in terms of whether he should change it or it should take a different direction.***" (P-5)

In the same evaluation, the principal recommends petitioner be reemployed for the 1977-78 academic year.

The hearing examiner acknowledges that it is true that the three evaluations of petitioner's performance by the principal are generally commendable. But, when an action of a board of education not to renew the employment of a nontenure teacher is challenged and the evaluations are used in support of that challenge, then the evaluations must be viewed in a more discerning light than the general characterization of "laudatory" to mean generally more positive.

The hearing examiner finds no proof to support the allegation that petitioner's use of "Roots" in the humanities is the reason for his nonrenewal of employment. Petitioner's own testimony establishes that he used video recording equipment to tape the program without permission from ABC and that their attorneys requested the Superintendent to have the tape destroyed. Questions which may have been raised in the community with respect to the use of the program in the curriculum cannot be the basis to call the Board to task.

Furthermore, petitioner testified that teachers, other than those in the humanities, used the program "Roots" in their classes. The Board may have become concerned when counsel for

ABC notified the Superintendent of their request. And if it did become concerned, petitioner's freedom of expression has not been violated.

In the hearing examiner's view, petitioner's testimony that he attended most public Board meetings, that he made presentations at these Board meetings and that he responded to various questions raised establishes that the Board itself had the opportunity to arrive at an independent judgment whether to continue petitioner's employment. Petitioner has failed to establish that his use of "Roots" as a classroom teaching tool is the main cause of the Board's controverted action.

Petitioner next argues that the informal opportunity afforded him by the Board was nothing more than a sham because the Board refused to participate in the meeting, choosing only to listen to him. Petitioner complains that the New Jersey Supreme Court, in Nicoletta v. North Jersey District Water Supply Commission of the State of New Jersey et al., 77 N.J. 145 (1978) laid down the elements necessary in a pre or post termination hearing which involves a public employee.

The hearing examiner finds no need to discuss those elements here because petitioner was not terminated, as was Nicoletta. Petitioner's employment was not renewed. Petitioner, as a nontenure employee, has no claim to continuing employment with the Board. It is at the Board's discretion whether to continue any nontenure employee.

The New Jersey Supreme Court in Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974) set forth the responsibilities of a local board which chooses not to continue the employment of nontenure teachers. The Commissioner, in Barbara Hicks v. Board of Education of the Township of Pemberton, 1975 S.L.D. 332 and Sallie Gorny v. Board of Education of the City of Northfield et al., 1975 S.L.D. 669 set forth procedural guidelines for boards to follow to implement their Donaldson responsibilities. And, in fact, the State Board of Education adopted the rulings of the Commissioner as its rules and codified the rules for the conduct of informal appearances at N.J.A.C. 6:3-1 et seq.

Petitioner's testimony and evidence failed to establish that the Board violated the ruling of the New Jersey Supreme Court in Donaldson, supra, the Commissioner's decision in Hicks or Gorny, supra, or N.J.A.C. 6:3-1 et seq.

The hearing examiner finds that petitioner has failed to establish a prima facie case that the Board acted illegally or improperly in any fashion with respect to his nonreemployment. The hearing examiner recommends that the Board's Motion to Dismiss be granted.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the matter controverted herein including the report of the hearing examiner.

The Commissioner observes no exceptions were filed by either of the parties.

The Commissioner affirms the findings and determinations as rendered in the hearing examiner report and adopts them as his own.

Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

August 7, 1980

BOARD OF EDUCATION OF THE TOWNSHIP OF DELANCO, BURLINGTON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
"K.M.", by his parents and guardians,	:	DECISION
RESPONDENTS.	:	

For the Petitioner, Parker, McCay and Criscuolo
(Stephen J. Mushinski, Esq., of Counsel)

For the Respondents, Fluharty, Freeman, Gerstein & Mintz (Robert D. Mintz, Esq., of Counsel)

The above-captioned matter now before the Commissioner is on appeal from a decision of classification officer Carol Fineblum on February 11, 1980, entitled "K.M." v. Board of Education of Delanco, Burlington County, which resulted from an April 17, 1979 decision of Chief Classification Officer Kenneth A. Koehly granting respondents an independent evaluation of K.M. from a clinic approved by the Branch of Special Education and Pupil Personnel Services at the Board's expense.

The Board contends that the decision of Classification Officer Fineblum contains factual errors and an erroneous classification and seeks to have the decision set aside.

Respondents' answer affirms the propriety of Classification Officer Fineblum's decision and further seeks relief in the form of reimbursement from the Board for costs and expenses incurred.

The Kingsway Evaluation Center found K.M. to be perceptually impaired/emotionally disturbed. The Board's child study team, hereinafter "CST," using the documentation provided in the Kingsway report, attempted to classify K.M. as only emotionally disturbed and prepared to place him in a special education class in Mount Holly. Respondents exercised their rights under N.J.A.C. 6:28-1.10 to appeal the recommended action of the CST.

Classification Officer Fineblum determined that the CST did not comprehensively evaluate all of the information regarding K.M.'s educational traits and needs before reaching a decision and ordered that K.M. be classified as primarily perceptually impaired and emotionally disturbed, secondarily. She further

ordered the CST to prepare a listing of potential placements of PI/ED pupils and to develop an IEP for K.M. based on this classification.

The Board appeals the Fineblum decision averring that important factual errors exist in the decision and that the category of classification does not exist. The Board, however, provides no evidence of the "factual errors" in the decision. For failure to substantiate this charge, it must be dismissed. The Commissioner so orders.

As to the Board's claim that the category of classification, PI/ED, does not exist, the Commissioner cannot agree. Under N.J.A.C. 6:28-1.7(b)(6) there is a category "multiply handicapped" which is defined in N.J.A.C. 6:28-1.2 as "***the presence of two or more educationally handicapping conditions which interact and result in problems so complex that placement in programs designed for a single handicapping condition will not result in signficantly meaningful educational growth and achievement.***" The Commissioner accordingly finds the charge of misclassification unsubstantiable and orders it likewise dismissed.

There being no other relief sought by, or available to, the Board, the instant Petition is dismissed. The Board is ordered to immediately comply fully with the classification officer's decision of February 11, 1980.

There remains one other matter in the controversy to adjudicate. In their response to the Petition of Appeal, respondents sought reimbursement for costs of all medical examinations, treatment and reports, as well as therapy sessions, and for reasonable compensation for the time, effort and expense of counsel and supportive staff in the preparation and conduct of their response to the appeal. The Commissioner has no power to do so. The law makes no provision for reimbursing litigants for self-incurred expenses relevant to matters brought before the Commissioner for adjudication. Finding no relief available, the Commissioner dismisses this claim as being unwarranted.

COMMISSIONER OF EDUCATION

August 7, 1980

BOARD OF EDUCATION OF THE TOWNSHIP OF DELANCO, BURLINGTON COUNTY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
"K.M." BY HIS PARENTS AND GUARDIANS,	:	DECISION
RESPONDENTS-APPELLEES.	:	

Decided by the Commissioner of Education, August 7, 1980

For the Petitioner-Appellant, Parker, McCay & Criscuolo (Stephen J. Mushinski, Esq., of Counsel)

For the Respondents-Appellees, Fluharty, Freeman, Gerstein & Mintz (Robert D. Mintz, Esq., of Counsel)

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein. Request for oral argument is denied.

November 5, 1980

Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE TENURE HEARING OF **DAVID HERBST**, SCHOOL DISTRICT OF TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY)	)))	INITIAL DECISION **OAL DKT. NO. EDU 4359-79** **AGENCY DKT. NO. 368-9/79A**

APPEARANCES:

Frank J. Rubin, Esq., for Petitioner, School District of the Township of East Brunswick

Nancy Iris Oxfeld, Esq., for Respondent, David Herbst

WITNESSES:

For Petitioner:

Ms. Renee Schnabel
Dr. Jack Lubowsky
Ms. Carrie Kassan
Ms. Ellen Band
Mr. Charles M. King
Mr. Philip Hauser

For Respondent:

Mr. David Herbst

EXHIBITS ADMITTED INTO EVIDENCE:

See attached list.

BEFORE THE HONORABLE **BEATRICE S. TYLUTKI,** A.L.J.:

Written charges against David Herbst, a teacher with tenured status, were made on July 26, 1979 and certified to the Commissioner of Education by Resolution of

the School District of East Brunswick Township, dated September 12, 1979. The Respondent filed an answer with the Commissioner of Education on September 20, 1979.

The matter was transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. The Prehearing Conference was held on January 17, 1980. In the Prehearing Order, the issue was stated as:

> "Whether the charges brought against the Respondent pursuant to N.J.S.A. 18A:6-10 are sufficient to remove him from his tenured position."

At the Conference and by letter, Ms. Oxfeld moved to amend the answer to add the following affirmative defense:

> "Each charge against respondent constitutes inefficiency of which petitioner was required to have given respondent 90 days notice in which to correct such inefficiencies."

I denied Respondent's request to amend the answer and also to change the statement of the issue.

The hearing in this matter took place on March 17 and 18, 1980 at the Middlesex County Court House, New Brunswick, New Jersey. At the conclusion of the hearing, Ms. Oxfeld requested that the statement of the issue be revised. Mr. Rubin argued in opposition to any change. I stated that I would review the matter and advise the parties. By letter dated March 28, 1980, I informed the parties that I would not change the statement of the issue. The parties were to submit briefs, concurrently, within thirty (30) days from receipt of the March 28, 1980 letter, and any reply brief was due within seven (7) days thereafter. I received a legal memorandum from Mr. Rubin on May 1, 1980 and a letter brief from Ms. Oxfeld on May 8, 1980. The record in this matter was closed on May 15, 1980.

At the hearing, four parents testified that they attended a gym exhibition presented by Mr. Herbst at the Warnsdorfer School on May 21, 1979. They all stated that the program was disorganized and that Mr. Herbst was unable to control the children. Ms. Kassan testified that Mr. Hauser tried to control the children and asked her to assist him. The letters written to Mr. Hauser about the gym exhibition by those witnesses were introduced into evidence as P-1 through P-4.

Charles M. King testified that he is the Supervisor of health-physical education, driver's education and athletics for the schools in East Brunswick and his responsibilities include the evaluations of teachers and curriculum development for these programs. He stated that his evaluation procedure was to discuss his observations with the teacher, prepare a written evaluation and discuss the written evaluation with the teacher. Mr. King identified the evaluations of Mr. Herbst which he prepared and they were admitted into evidence as P-5 through P-8.

The first evaluation, P-5, was prepared by Mr. King on October 24, 1973 and was generally favorable of the performance of Mr. Herbst at Smith School. In 1977, Mr. Herbst was transferred to Warnsdorfer School. Mr. King stated it was hoped that the change would improve his performance (Transcript, Vol. I, p. 68).

Mr. King stated that he evaluated Mr. Herbst on three occasions at the Warnsdorfer School. He stated that Mr. Herbst lacked organization and enthusiasm. On January 18, 1979, he approved the variety of activities but criticized the time wasted setting up the equipment, the fact that some children climbed folded tables in the room and wore heavy sweaters during class (P-6). On January 23, 1979, Mr. King stated he noted improvements in Mr. Herbst's performance but criticized the spacing of students, the presence of an insufficient number of mats, and children wearing heavy sweaters during class (P-7).

On February 9, 1979, Mr. King testified that he arrived approximately 1 p.m. and found Mr. Herbst asleep at his desk (Transcript, Vol. I, p. 54). About ten minutes later, Mr. King stated he went to the all-purpose room to observe Mr. Herbst's class. He testified that the room was unsafe for gym activities. Mr. Herbst told him that the custodian failed to remove the risers, folding tables and chairs. Mr. Herbst conducted the class and, in the evaluation, Mr. King criticized his lack of concern about the safety of the students (P-8). Mr. King stated that, upon reflection, he should have stopped the class (Transcript, Vol. I, p. 59).

Mr. King testified that he felt Mr. Herbst lacked the three ingredients necessary for a good teacher, which are organization, knowledge and enthusiasm (Transcript, Vol. I, p. 61).

Mr. King testified that he offered Mr. Herbst assistance in planning the gym exhibition scheduled for May 21, 1979 (Transcript, Vol. I, p. 62). He stated that he stressed the importance of this program to Mr. Herbst and that the failure of the program was the "straw that broke the camel's back" (Transcript, Vol. I, p. 64, line 20). After the exhibition, Mr. King wrote Mr. Herbst and stated that he had either purposely failed to meet his responsibilities or was incapable of successfully performing his duties (P-9).

On cross-examination, Mr. King stated that Mr. Herbst did not follow some phases of the curriculum guide for physical education (Transcript, Vol. I, p. 78). Mr. King stated that Mr. Herbst participated in a track meet and that he wrote a letter thanking Mr. Herbst for his cooperation (R-1).

Mr. King was recalled as a witness and stated that he considered Mr. Herbst's plan book as adequate but it needed to be more specific (Transcript, Vol. II, p. 136).

Philip Hauser, Principal of Warnsdorfer School, testified that among his responsibilities is the evaluation of teachers. His evaluations of Mr. Herbst were introduced into evidence as P-10 through P-13, P-15 through P-19, and P-21 through P-25. Mr. Hauser stated that his procedure was to prepare the written evaluation and give it to the teacher. The teacher could then submit written comments or meet with him.

Mr. Hauser testified that he wrote a letter to David Herbst on March 14, 1978, in which he expressed his concern about the physical education program (P-14). In the letter he stated:

"These concerns were based primarily on:

1. Lack of continuity.
2. Selection of activities to develop children's skills.
3. Adherence to the Physical Education Curriculum Guide.
4. Creativity in the instructional process.
5. Preparation and plans."

Thereafter, in the yearly evaluation, he recommended Mr. Herbst for a salary increase for the 1978-79 school year and made a number of suggestions for the improvement of his performance (P-15).

On September 25, 1978, Mr. Hauser testified that he observed Mr. Herbst's class and saw children standing too close to the batter (P-16). He testified that this was a dangerous situation and a child was hit by the bat. Also, he stated there was a skirmish among the students on that date due to improper supervision by Mr. Herbst. A potential safety problem relating to skateboards was mentioned in the January 26, 1979 evaluation prepared by Mr. Hauser (P-22).

In the evaluations prepared by Mr. Hauser during the 1978-79 school year, he sometimes made favorable comments about the programs and, in each, he criticized the method used by Mr. Hauser to instruct the students. He stated that Mr. Hauser presented the prepared material without regard to the needs of the class (Transcript, Vol. I, p. 103). He stated that Mr. Herbst failed to involve all the students in the activities (Transcript, Vol. I, p. 130) and was having discipline problems due to the fact that the students were not interested in the program (P-17). Mr. Hauser testified that Mr. Herbst was game oriented and that he did not give sufficient time to develop the skills of the students (Transcript, Vol. I, p. 131).

Due to his concern about Mr. Herbst's performance, Mr. Hauser testified that he asked to see Mr. Herbst's plan book each Friday and the Respondent frequently failed to give him the book (Transcript, Vol. I, p. 125). He stated that he had meetings with Mr. Herbst about his observations.

Mr. Hauser wrote a letter to Respondent on May 19, 1978 criticizing Mr. Herbst's arrival and departure time (P-26). He testified that it was his impression that Mr. Herbst arrived exactly on time and never stayed late, and was late picking up his classes (Transcript, Vol. I, p. 117). Mr. Hauser wrote two letters regarding Mr. Herbst's failure to appear at lunch time assignments (P-32 and P-33).

In his evaluations, Mr. Hauser stated that Mr. Herbst lacked creativity (P-14, P-15, P-16, P-17 and P-25). He stated that Mr. Hauser was either not interested or not receptive to his suggestions for improvements (Transcript, Vol. I, p. 107).

Mr. Hauser did not recommend Mr. Herbst for a salary increase for the 1978-79 school year (P-25). In this yearly evaluation report, Mr. Hauser questioned whether Mr. Herbst cared about the children or teaching and he was critical of his instructional methods and approaches. Mr. Hauser testified that:

> "Physical education, as I mentioned earlier, should be a very active one, children should be excited and involved and I observed a physical education program where children basically were standing around, not really involved and not really too much interested in the kinds of things that they were doing. And, over all I indicated that Mr. Herbst's program was an ineffective one." (Transcript, Vol. I, p. 158, lines 5-12)

The gym exhibition held on May 21, 1979, was requested by Mr. Hauser (Transcript, Vol. I, p. 158). He stated that he offered to help the Respondent in preparing and supervising the program. Mr Herbst was asked to prepare an announcement regarding the program and Mr. Hauser stated that he had to rewrite it (Transcript, Vol. I, p. 165). On May 21, 1979, Mr. Hauser testified that he arrived at the school at 7 p.m. and that the children began to arrive shortly thereafter. The program was scheduled to start at 7:30 p.m. and Mr. Herbst arrived at 7:25 p.m. Mr. Hauser testified that the Respondent was unable to control the children and there was confusion and a lot of noise. He stated that on several occasions he tried control of the children and asked two members of the PTA to help supervise the children (Transcript, Vol. I, p. 170). Mr. Hauser stated that he ended the program before its conclusion because of the noise and lack of organization. He stated the program was a disgrace to the school.

In Mr. Hauser's opinion, Mr. Herbst is not competent to teach physical education and can not relate to the children (Transcript, Vol. I, p. 176).

On cross-examination, Mr. Hauser testified that Mr. Herbst's attitude changed by the end of his first year at Warnsdorfer School and he became less receptive to suggestions for improvement (Transcript, Vol. II, p. 3). He stated that Mr. Herbst did not completely follow the curriculum guide for physical education (Transcript, Vol. II, p. 7).

On his own behalf, Mr. Herbst testified that he has been employed by the East Brunswick school system since 1961 (Transcript, Vol. II, p. 33). Initially, he was a math teacher and later became a physical education instructor. He stated that he was transferred to the Warnsdorfer School in 1977.

On January 18, 1979, Mr. Herbst stated that several children wore sweaters because it was cold in the room, however, none of the students wore coats. Also on that day, several students climbed on tables that had not been removed by the janitor. On February 9, 1978, Mr. Herbst stated that he told Mr. King, prior to the class, that the room was not safe since the janitor had failed to remove the risers, tables and chairs (Transcript, Vol. II, p. 48).

Mr. Herbst denied that any child was hit by a bat on September 25, 1978 (Transcript, Vol. II, p. 58). He stated that he felt that safety was an important factor and that he was very careful in conducting his classes. He did not recall a skirmish occuring on that date.

Mr. Herbst testified that he disagreed with comments made by Mr. Hauser in the 1978-79 yearly evaluation (P-25). He stated that he followed the curriculum plan for physical education. He did not understand what Mr. Hauser meant by the word "creativity" and was unable to get a satisfactory definition from Mr. Hauser (Transcript, Vol. II, p. 69).

As to the gym exhibition, Mr. Herbst testified that he was offered assistance by Mr. Hauser and Mr. King. Mr. Herbst stated he briefly spoke to the two teachers suggested by Mr. King, however, he felt his program would be substantially different since he wanted to involve a large number of students. He recognized that he made a mistake in judgment and that there were too many children involved and not enough supervision (Transcript, Vol. II, p. 78).

On cross-examination, Mr. Herbst stated that he disagreed with many of the criticisms contained in the evaluations of Mr. King and Mr. Hauser, and often did not submit his objections in writing.

The charge filed against Mr. Herbst is incompetence and eight sub-charges are listed. The eight sub-charges are hereinafter set forth with pertinent findings of fact and conclusions.

1. Inadequate and inappropriate long and short-range planning for students.

Mr. King stated that Mr. Herbst's classes were disorganized and that the Respondent's plan book was adequate. Mr. Hauser was not satisfied with Mr. Herbst's plan book and asked to see it every Friday. The Respondent did not submit it every Friday. Mr. King and Mr. Hauser stated that the Respondent did not completely follow the Physical Education Curriculum Guide. The gym exhibition of May 21, 1979 was a failure due to poor planning by Mr. Herbst.

The Petitioner has presented credible evidence that the Respondent has prepared inadequate long and short-range plans for his classes.

2. Inadequate classroom management and techniques.

Mr. King testified that Mr. Herbst lacked organization and enthusiasm in the conduct of his classes. Mr. Hauser criticized Respondent's classes stating that he did not involve all the students and did not place sufficient emphasis on the development of the children's skills. Mr. Hauser stated that Mr. Herbst lacked creativity and was not receptive to suggestions. Both Mr. King and Mr. Hauser testified that they observed situations that may have endangered the safety of the children.

Although some of the criticism expressed by Mr. King and Mr. Hauser seem to be due to a difference in educational philosophy, creditable evidence has been presented to show that Respondent's classroom management was not adequate and that he did not respond to suggestions for improvement.

3. Lack of ability to provide for individual needs of students.

Mr. King and Mr. Hauser stated that Mr. Herbst did not spend enough time in the development of the children's skill. Respondent was game oriented and permitted children to stand around and not participate. Mr. Herbst was criticized on a number of occasions regarding the

non-involvement of all the students and the lack of attention to correcting the skills of individuals.

At the hearing, credible testimony was presented that the Respondent was criticized on several occasions for not providing for the individual needs of the students and failed to follow many of the suggestions made to him by Mr. Hauser and Mr. King.

4. Lack of creativity within school program.

Mr. Hauser stated that Mr. Herbst lacked creativity. Respondent stated that he could get Mr. Hauser to explain what he meant by this word. Mr. Hauser testified that the children were not interested or enthusiastic about the physical education program, and blamed this on the type and variation in the classroom activities planned by the Respondent.

The charge of lack of creativity is a nebulous criticism and the evidence does not show that Mr. Hauser understood what corrective action was expected of him in this regard. This change has not been proven by the evidence.

5. Lack of sensitivity regarding potential safety hazards.

Mr. King testified about his concern about the safety of the children in Mr. Herbst class. He stated that the children were permitted to participate in gym activities in improper clothes. Mr. King stated that on February 9, 1979, Mr. Herbst conducted a class in an unsafe room and admitted that he should have stopped the class. Mr. Herbst admitted the room was not safe for the class. Mr. Hauser also testified that on several occasions he was concerned about the safety of the children.

The credible testimony in this matter has showed that the Respondent did not give sufficient attention to the safety of the children.

6. Lack of maintenance regarding school schedule.

Mr. Hauser wrote a letter criticizing Mr. Herbst's arrival and departure times and two letters about his failure to appear at lunch time assignments. Mr. Hauser had the impression that Mr. Herbst was often tardy in arriving at school and in picking up his classes.

Mr. Hauser testified that he knew that Mr. Herbst failed to maintain the school schedule on several occasions. The other incidents referred to by Mr. Hauser were not documented at the hearing. The credible testimony has not shown that the Respondent has a pattern of not maintaining the school schedule.

7. Overall inadequate instruction due to lack of adherence to administrative and supervisory recommendations.

In each evaluation presented by Mr. King and Mr. Hauser there were a number of suggestions for improvement. On a number of occasions, these witnesses testified that, in the next observation, Mr. Herbst had shown an improvement. Mr. King and Mr. Hauser also testified that Mr. Herbst had not followed some of their suggestions relating to classroom management, planning, and safety. Mr. King and Mr. Hauser offered their assistance in the planning of the gym exhibition. Mr. Herbst decided to plan the program himself and thought he could supervise the entire exhibition. The program was a failure due to poor planning and lack of sufficient persons to supervise the large number of students.

The credible testimony has shown that the Respondent made minimal effort to follow the supervisory recommendations which were intended to improve his performance as a teacher. These suggestions were given to Mr. Herbst over an approximate two year period of time.

8. Consistent dissatisfaction and complaints from parents.

Four parents testified that the gym exhibition was disorganized and that Mr. Herbst could not control the children. Their letters to Mr. Hauser were introduced into evidence. No evidence was introduced to show any other complaints by parents.

The credible evidence does not show a consistent dissatisfaction and complaints from parents.

I CONCLUDE that there is insufficient evidence to prove subcharges No. 4, 6 and 8 and they are dismissed. **I CONCLUDE** that subcharges 1, 2, 3, 5 and 7 have been demonstrated by the evidence. The issue is whether the subcharges, which have been demonstrated, warrant the removal of Mr. Herbst for incompetence. In her brief, Ms. Oxfeld argued that the Petitioner has not shown incompetency but may have established inefficiency. I disagree.

The examples of disorganized classes, inadequate plans, insufficient attention to safety and failure to take all the corrective action recommended by supervisors, during an approximate two year period of time, show that Mr. Herbst is unfit to continue as a teacher. The Supreme Court, in Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd by 131 N.J.L. 326 (E&A 1944), stated:

> "Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but is also might be shown by many incidents."

I CONCLUDE that the Petitioner has shown that the Respondent is incompetent in the performance of his job. See, In the Matter of the Tenure Hearing of Inez McRae, 1977 S.L.D. 572, aff'd State Bd. of Ed. 584, and In the Matter of the Tenure Hearing of Leo Haspel, 1964 S.L.D. 17, aff'd State Bd. of Ed. 31, aff'd Docket No. A160-64 (N.J. Super. June 10, 1965).

I CONCLUDE that David Herbst be dismissed from his position as teacher in the employment of the Board of Education of the School District of the Township of Middlesex County as of the date of his suspension.

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

DATE

BEATRICE S. TYLUTKI, A.L.J.

IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID HERBST,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF EAST BRUNSWICK,	:	DECISION
MIDDLESEX COUNTY.	:	
	:	

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

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

It is directed that respondent be dismissed from his position as a teacher in the School District of the Township of East Brunswick, Middlesex County as of the date of his suspension by the Board of Education.

COMMISSIONER OF EDUCATION

August 8, 1980

Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

RICHARD GINCEL, PETITIONER	)	INITIAL DECISION
v.	)	
BOARD OF EDUCATION OF	)	**OAL DKT. NO. EDU 5468-79**
THE TOWNSHIP OF EDISON,	)	
MIDDLESEX COUNTY, RESPONDENT	)	**AGENCY DKT. NO. 401-10/79A**

APPEARANCES:

For Petitioner, **George W. Conk, Esq.**

For Respondent, **R. Joseph Ferenczi, Esq.**

BEFORE THE HONORABLE **ERIC G. ERRICKSON,** A.L.J.:

EXHIBITS IN EVIDENCE

Exhibit A	3/19/79 Principals' Employment Data
Exhibit B	5/30/79 Wysoker to Boyle
Exhibit C	6/27/79 Wysoker to AAA
Exhibit D	2/26/80 Gincel to Boyle
Exhibit E	4/10/79 Bradshaw to Gincel
Exhibit F	5/10/79 Statement of Grievance
Exhibit G	10/30/79 Hunter to Ferenczi
Exhibit H	8/9/76 Board Minutes
Exhibit I	5/29/79 Bradshaw to Gincel

PROCEDURAL RECITATION:

Petitioner, a tenured teaching staff member appeals from an action of the Edison Board of Education, hereinafter "Board", on April 9, 1979 abolishing his position as vice-principal effective June 30, 1979 and thereafter reassigning him as a fifth grade teacher for the 1979-80 school year. Petitioner, who claims entitlement to reassignment as a principal, alleges that his involuntary reassignment as an elementary teacher violated his tenure and seniority rights.

The Board, conversely, asserts that its action was consistent with its discretionary authority under prevailing education law and that the Petition of Appeal was untimely filed.

After the matter was transferred by the Commissioner of Education to the Offi of Administrative Law as a contested case pursuant to the provisions of N.J.S.A. 52:14F-1, et seq., the parties filed Cross Motions for Summary Judgment together with affidavits and Briefs. There being no relevant controverted facts necessitating a plenary hearing, the matter is ripe for determination in the form of the pleadings, exhibits in evidence, and Briefs of counsel and the record of Oral Argument conducted at the Office of Administrative Law.

RELEVANT FACTS AND ISSUES:

I FIND the following to be the relevant facts:

1. Petitioner was employed by the Board prior to September 1976 as follows:

   a. 1955-1962 Elementa teacher
   b. 1962-August 1976 Elementary School Principal

2. Effective September 1, 1976, petitioner was transferred at his request to an elementary school vice-principalship in which he served until June 30, 1979. (Exhibits D, H, I)

3. The Board voted on April 9, 1979 to abolish petitioner's position of vice-principal, together with three other such positions, effective September 1, 1979. (Exhibit E) Thereafter, petitioner was reassigned as an elementary teacher. (Exhibit I)

4. At least twelve principals employed in the district in March 1979 had served less time in their positions than petitioner, who had served as a principal for fourteen years between 1962 and 1976. (Exhibit A)

5. Petitioner was joined by the Edison Principal's Association in requesting an arbitration proceeding as the final step of the grievance which petitioner filed. When the Board filed before PERC a scope of negotiations petition seeking to enjoin the arbitration, petitioner dropped the demand to arbitrate the matter and filed the within Petition of

Appeal before the Commissioner on or about October 5, 1979. (Exhibits B, C, F, G)

6. Vacancies have occurred in elementary principalships since September 1979.

At issue are whether petitioner's filing of the matter was out of time and whether petitioner was and is entitled to reassignment as a principal with attendant salary and benefits.

APPLICABLE EDUCATION LAW AND CONCLUSIONS:

A. TIMELINESS OF FILING:

N.J.A.C. 6:24-1.2 speaks to the filing of a Petition of Appeal before the Commissioner as follows:

> "*** Such petition must be filed within 90 days after receipt of the notice by petitioner of the order, ruling or other action concerning which the hearing is requested. ***"

N.J.A.C. 6:24-1.19 provides that

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

In the instant matter the Board was made aware in timely fashion that petitioner was asserting a right to reassignment as a principal when he filed the grievance and sought to move it to arbitration. Accordingly, **I CONCLUDE** that petitioner did not sleep on a known right to the prejudice of his employer. I also **CONCLUDE**, however, that petitioner in pursuing a seniority right, one which flows only from a tenured status, chose the wrong forum in which to proceed. As the Superior Court, Chancery Division, Ocean County iterated in Docket No. C-741-72 on June 6, 1973 when enjoining teachers Heinzman and Hickman or the Brick Township Education Association from seeking

enforcement of an arbitrator's award including a determination that a tenured status had evolved:

> "***[T]he subject matter of tenure and employment of the Defendant teachers is not a proper subject matter for arbitration under the agreement***; and,
>
> "***[T]enure of a teacher should have uniformity of interpretation which requires the expertise of the Commissioner of Education to interpret and thereby establish the educational policy with uniformity throughout the state,***"

See also in this regard Board of Education of the Township of Brick v. Ronald Heinzman, et al, 1976 S.L.D. 921 aff'd State Board of Education, 1977 S.L.D. 1278, aff'd Docket No. A-2970-76 New Jersey Superior Court, Appellate Division, January 11, 1978.

An examination of the record herein reveals no delay on petitioner's part in asserting his alleged right of tenure and seniority to reassignment as a principal, a position which he had voluntarily relinquished after serving therein for fourteen years. Such lengthy service speaks eloquently to the reasonableness of relaxation of the State Board of Education rule requiring the filing within ninety days of the complained of action.

Respondent's reliance on Richard Stolte v. Board of Education of the Township of Willingboro, Burlington County, 1980 S.L.D. ___ (decided March 17, 1980) is misplaced. Stolte, who was noticed in the spring of 1978 that he would be reassigned as a teacher upon the closing of a school, demanded that the matter proceed to arbitration. When an arbitration award was issued, January 31, 1979, denying his grievance, he waited over two months thereafter until April 2, 1979 to file a petition before the Commissioner. This contrasts sharply with the promptitude petitioner herein exhibited when he agreed that the matter be withdrawn from arbitration and filed his Petition of Appeal before the Commissioner shortly thereafter.

Further evidence is noted herein, that the Board waited, from June 27, 1979, the date arbitration was demanded, nearly two months until September 19, 1979, nine days before arbitration was scheduled when it applied to PERC for an order enjoining arbitration.

To conclude that petitioner is barred from an interpretation of his statutory rights of tenure and seniority by what appears a misdirected but good faith effort to resolve the matter under terms of the negotiated agreement, would be to place form over substance. Accordingly, **IT IS ORDERED** that the provisions of N.J.A.C. 6:1.19 shall be applied and the ninety day rule relaxed for the reason that "***strict adherance thereto *** may result in injustice." See also in this regard Hinfey v. Matawan Regional Board of Education, 77 N.J. 514 (1978) in which right of petitioners were preserved when a dispute was raised over the proper jurisdiction of State agencies before whom numerous petitions were filed.

B. PETITIONER'S TENURE AND SENIORITY RIGHTS:

N.J.S.A. 18A:28-6 provides that where a tenured teaching staff member is transferred with his consent to another tenurable position, as was petitioner herein, that:

> "***the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion."

In the event of a reduction in force, a circumstance which triggered Petitioner's transfer herein, the Legislature has provided as follows:

> 18A:28-10. Reasons for dismissals of persons under tenure on account of reduction
>
> "Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board."
>
> 18A:28-11. Seniority; board to determine; notice and advisory opinion
>
> "In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status ***."

18A:28-12. Dismissal of persons having tenure on reduction; reemployment

"If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service ***."

18A:28-13. Establishment of standards of seniority by commissioner

"The commissioner in establishing such standards shall classify insofar as practicable the fields or categories of administrative, supervisory, teaching or other educational services and the fields or categories of school nursing services which are being performed in the school districts of this state and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both."

N.J.A.C. 6:3.10, which sets forth rules which were promulgated pursuant to the Legislature's directive, ante, provides, inter alia, as follows:

"(a)***
"(b) Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories ***."

"(g) Whenever a person shall move from or revert to a category, all periods of employment shall be credited toward his seniority in any or all categories in which he previously held employment.

"(h) Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. If he shall have insufficient seniority for employment in the same category, he shall revert to the category in which he held employment prior to his employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitles him. ***"

"(j) In the event of his employment in some category to which he shall revert, he shall remain upon all the preferred eligible lists of the categories from which he shall have reverted, and shall be entitled to employment in any one or more such categories whenever a vacancy occurs to which his seniority entitles him."

The intent of the statutes enacted by the Legislature and the rules promulgated pursuant to those statutes is set forth in such clear and often repeated language as to be unmistakable. Namely, in the event of the abolishment of a position of a tenured teaching staff member resulting from a reduction in force, the tenured employee shall revert to the previous category of employment.

It is well settled that the interpretation of both statutes and the rules of an administrative agency must be consistent with the ordinary meaning of the language employed therein. As the Court stated in Essex County Welfare Board v. Klein 149 N.J. Super. 241 at 247:

> "***It is, of course, axiomatic that a rule of an administrative agency is subject to the same canons of construction and the same constitutional imperatives as is a statute. See, e.g., Hoeganaes Corp. v. Dir. of Div. of Tax., 145 N.J. Super. 352, 359 (App. Div. 1976); In re Plainfield-Union Water Co., 57 N.J. Super. 158, 177 (App. Div. 1959).***"

The Board, herein, contends that, because petitioner requested reassignment as a vice principal, he divested himself thereafter from seniority rights which he had accrued over fourteen years in the category of principal. That contention is not supported by evidence that such was his intent. Nor is it supportable given the language of applicable education law. It is the category of principal to which petitioner reverted upon the abolishment of his vice principal position, in accord with the clear language of N.J.A.C. 6:3.10(h). We are not at liberty to assume or apply an unrevealed intention of either the promulgators of statutes or administrative agencies. Had it been their intention to except from the applications of these statutes or rules an employee who voluntarily requested or accepted reassignment to a position subordinate to the one previously held, the promulgating body would or should have so stated.

> "As was said by the Commissioner in Harry A. Romeo, Jr. v. Board of Education of the Township of Madison, Middlesex County, 1973 S.L.D. 102:
>
> "***In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. Lane v. Holderman, 23 N.J. 304 (1957) Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. Duke Power Company, Inc. v. Edward J. Patten, Secretary of State et al. 20 N.J. 42, 49 (1955); Zietko v.

New Jersey Manufacturers Casualty Ins. Co., 132 N.J.L. 206, 211 (E. & A. 1944); Bass v. Allen Home Development Co., 8 N.J. 219, 226 (1951); Sperry & Hutchinson Co. v. Margetts, 15 N.J. 203, 209 (1954); 2 Sutherland, Statutes and Statutory Construction (3rd ed. 1943), section 4502*** (at p. 106)

Petitioner had no claim upon assignment as a principal by reason of his seniority after his voluntary request for reassignment to a sobordinate position until the Board's reduction in force. This triggered the provisions of the statutes and rules which then made him eligible for reassignment to his former position as principal. Since his seniority was greater than numerous of the Board's other principals, I **CONCLUDE** that the Board was at that time required to reassign petitioner as a principal effective September 1979 and to pay him consistent with its negotiated salary policy for principals. This conclusion is consistent with the oft enunciated principle that in the event of a reduction in force, a tenured teaching staff member whose seniority exceeds that of another has entitlement, by reason of that greater seniority, to a position in which he has served the longer period as a qualified employee. Lascari v. Board of Education of Borough of Lodi, 36 N.J. Super. 426 (App. Div. 1955).

The factual context of David Misek v. Board of Education of the Township of Willingboro, 1980 S.L.D. ___(decided February 14, 1980), cited by the Board differs markedly from that in the instant matter. Misek resigned his position and after two months returned to his Board's employ. In the instant matter petitioner's service as a teaching staff member was not interrupted by his voluntary reassignment. Accordingly, I **CONCLUDE** that Misek is inapplicable as is Elaine Solomon v. Board of Education of the Princeton Regional School District, 1977 S.L.D. 650, aff'd State Board of Education 1977 S.L.D. 657, another case in which it was determined that an actual resignation both terminated the running tenure and seniority rights and eliminated Solomon's accumulated seniority entitlement.

Having considered and balanced all legal arguments of counsel, the facts herein, and the conclusions hereinbefore set forth, IT IS **ORDERED** that **SUMMARY JUDGEMENT** be and is entered for petitioner. **IT IS FURTHER ORDERED** that Petitioner be appointed to a principal's position at an early date together with any differences in salary and attendant emoluments to which he would have been entitled as a principal during the period of his reassignment as a classroom teacher, in accordance with the Board's salary policies.

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

June 26, 1980
DATE

Eric G. Errickson
ERIC G. ERRICKSON, A.L.J.

RICHARD GINCEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, Summary Judgment is awarded petitioner. He shall be placed in the category of principal in compliance with his seniority, with emoluments due him as though he had not been assigned as a classroom teacher.

It is so directed.

COMMISSIONER OF EDUCATION

August 11, 1980

RICHARD GINCEL,	:	
PETITIONER-APPELLEE,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, August 11, 1980

For the Petitioner-Appellee, George W. Conk, Esq.

For the Respondent-Appellant, R. Joseph Ferenczi, Esq.

The State Board of Education affirms the Commissioner's decision for the reasons expressed therein. Request for oral argument is denied.

November 5, 1980

Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

JOANNE OTERI and THE MAGNOLIA EDUCATION ASSOCIATION,	:	INITIAL DECISION
	:	OAL DKT. NO. EDU 4348-79
PETITIONERS,	:	
	:	AGENCY DKT. NO. 337-8/79A
V.	:	
	:	
BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA, CAMDEN COUNTY,	:	
	:	
RESPONDENT.	:	

APPEARANCES:

For the Petitioner, Selikoff & Cohen (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Davis & Reberkenny (William D. Hogan, Es of Counsel)

BEFORE THE HONORABLE LILLARD E. LAW, ALJ

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Borough of Magnolia, hereinafter "Board," prays for an order of the Commissioner of Education directing the Board to remit to her the sum of $847.80, togetner with interests and costs of litigation, grounded upon her allegation that the Board withheld salary due her in violation of N.J.S.A. 18A:30-6. The Board denies the allegation and asserts that petitioner was paid her full salary entitlement for the 1978-79 school year consistent with the requirements of law.

This matter was transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on January 14, 1980 at which the following stipulations were set forth by the parties:

STIPULATION OF FACTS

1. Petitioner is a teacher with a tenured status.

2. Petitioner was employed for the 1978-79 school year at the annual salary of $14,130.

3. Petitioner's contractual year for 1978-79 was from September 1, 1978 to June 30, 1979.

4. Petitioner was disabled due to illness from May 2, 1979 for the remainder of the contractual year.

5. Petitioner's annual and accumulated sick leave expired on May 30, 1979.

6. The actual work year for classroom teachers ended June 15, 1979.

7. The Board, on June 11, 1979, passed a motion granting petitioner three (3) additional paid sick days beyond her statutory entitlement.

8. Petitioner did not return to duty for the 1978-79 school year.

9. Petitioner was paid a salary of $12,646.35 for the 1978-79 school year. (Admission, Respondent Board's Answer)

It was further agreed at the prehearing conference that the parties would file Cross-Motion for Summary Judgment. Oral Argument was conducted on the motions on May 21, 1980 at the Office of Administrative Law, Trenton, New Jersey. The parties filed Briefs and Supplemental Memoranda before the Court and the matter is now ripe for determination.

STATEMENT OF FACTS

The petitioner, Joanne Oteri, has been a duly certified teaching staff member employed by the respondent, Board of Education of the Borough of Magnolia since 1973 (Prehearing Stipulation number 2). During the school year 1978-79 petitioner's annual salary was $14,130.00 (uncontroverted pleadings, paragraph 3).

Petitioner was disabled due to illness from May 2, 1979 through the remainder of the work year (Prehearing Stipulation number 4). The active work year for classroom teachers employed

by the Board for the 1978-79 school year ended June 15, 1979 (Prehearing Stipulation number 6). Petitioner's annual and accumulated sick leave expired May 30, 1979. (Prehearing Stipulation number 5).

At its June 11, 1979 meeting the Board voted to grant three additional sick leave days to petitioner beyond the May 30 expiration date of her annual and accumulated sick leave (Prehearing Stipulation number 7). The Board subsequently paid petitioner a salary of $12,646.35 for the 1978-79 school year (uncontroverted pleadings, paragraph 6). Petitioner also received $1,858.00 as disability income payments for the period May 1 to August 22, 1979, under the Washington National Insurance Company Disability Plan provided as a benefit by the Board to petitioner. (Petitioner's Reply to Request to Admit, attached Exhibit A).

The issue, as framed in the pre-hearing Order, is as follows: Was petitioner entitled to be paid by the Board for the period from June 15 to June 30, 1979, subsequent to the expiration of her statutory sick leave entitlement which occurred on May 30, 1979? Petitioner admits that the Board was entitled to deduct from her annual salary one day's pay for each working day following May 30, 1979 during which petitioner failed to work. It is petitioner's position, however, that the Board incorrectly made deductions from her annual salary for the period June 15-30, 1979, since none of these days were days upon which teachers were required to work in respondent's school district.

In order to demonstrate the alleged error made by the Board, petitioner asserts that it is necessary to establish the method used by the Board to pay her. Petitioner's annual salary for the 1978-79 school year was $14,130.00 (Stipulation of Facts -Paragraph 2). She was to receive the salary in the form of 20 equal semi-monthly payments. The last such installment was payable as of June 30, 1979. When petitioner was absent due to illness, and her annual and accumulated sick leave had expired, the method of payment used by the Board demonstrates that the practice followed was to deduct a day's pay - calculated as 1/200th of annual salary -for each such day of absence.

Petitioner avers that the calculation of a day's pay as 1/200th of the annual salary is not merely a matter of convenience or prevailing practice, rather, it is mandated by school law. She asserts that the calculation of a day's pay has been an issue explicitly addressed by the Commissioner of Education and cites in In the Matter of the Tenure Hearing of Kathy Windsor, School District of the Township of Washington, Gloucester County, 1978 S.L.D. ___ (Aug. 16, 1978), aff'd 1979 S.L.D. ___ (State Board of Education, February 7, 1979), wherein an issue arose as

to calculation of the correct amount of pay due respondent Windsor for a school year where she had been suspended without pay in mid-March and had also been absent for five days in January (without entitlement to sick leave for those five days). She refers to the conclusion of the hearing examiner, with the affirmance of the Commissioner, that the calculation of pay was established by statute:

> "The only statutory authority for the calculation of a per diem rate for teaching staff members is found in N.J.S.A. 18A:30-6 which states in pertinent part that:
>
> > '***A day's pay is defined as 1/200th of the annual salary'." Kathy Windsor, supra

Applying this statutory formula to respondent Windsor's annual salary rate of $12,148.00, the Hearing Examiner calculated therein the amount of pay due:

> "$12,148 + 200 equals a per diem rate of $60.74 which multiplied by the five days in question equals $404.70. The annual salary of $12,148 + 20 equals a semi-monthly installment of $607.40. The hearing examiner determines that the Board should have paid respondent thirteen installments minus the disputed five days' sick leave, or $607.40 X 13 = $7,896.20 minus $303.70 or $7,592.50." Kathy Windsor, supra, at p. 10.

Applying the method demonstrated set forth in Windsor, supra, petitioner contends that the Board should have deducted from her pay 1/200th of her annual salary, or $70.65, for each working day on which she was absent and not entitled to paid sick leave, and no more should have been deducted.

In order to determine the number of days' pay to be deducted, petitioner asserts that it must be determined how many days she missed after the expiration of her annual and accumulated sick leave on May 30, 1979. She contends that the following list demonstrates that there were twelve (12) working days following May 30th on which she was absent:

1. Thursday, May 31, 1979

2. Friday, June 1, 1979

3. Monday, June 4, 1979

4. Tuesday, June 5, 1979

5. Wednesday, June 6, 1979

6. Thursday, June 7, 1979

7. Friday, June 8, 1979

8. Monday, June 11, 1979

9. Tuesday, June 12, 1979

10. Wednesday, June 13, 1979

11. Thursday, June 14, 1979

12. Friday, June 15, 1979

Petitioner avers that after June 15, 1979, there were no additional days of school, and none of the teachers in the district were required to perform any teaching duties after that date (Stipulation of Facts - Paragraph 6). The Board voted on June 11, 1979, to extend her paid sick leave by three additional days (Stipulation of Facts - Paragraph 7). The pay for these three additional days was included in petitioner's June 30th paycheck. It is petitioner's position that the Board was entitled to deduct a maximum of nine days' pay, calculated at a per diem rate of 1/200th of annual salary, from her total annual salary in 1978-79. Petitioner argues that if nine days pay, calculated as described above (9 x $70.65 = $635.85) had been deducted from her annual salary for 1978-79 of $14,130.00, the resulting amount due her would have been $13,494.15. Petitioner asserts that she only received a gross salary of $12,646.35. She contends that the difference of $847.80 demonstrates that the Board deducted from her salary an additional 12 days' per diem salary beyond the nine days' pay it was entitled by law to deduct ($847.80 + $70.65 = 12).

Petitioner contends that the Board takes the position that it was entitled to continue to deduct from her pay for the days following June 15, 1979. She argues that such a position is contrary to the recognized concept that pay may not be deducted for failure to work on a day which is not a scheduled working day. And that this concept has been applied where striking teachers were absent from duty on the Friday preceding and the Tuesday following Columbus Day, which fell on a Monday. Herbert Levitt and the Elizabeth Education Association v. Board of Education of the City of Elizabeth, 1978 S.L.D.

(July 10, 1978), aff'd on different grounds, 1979 S.L.D. ____ (State Board of Education, March 7, 1979). In finding that the local board could not deduct pay for the holiday, the State Board declared:

> "The governing principle is that there is no authority in a board of education to deduct salary for any day that is not a 'school day'." Slip Op. at 2.

She argues that there is no reason to differentiate between that absence due to a strike and absence due to illness for purposes of calculating the amount of pay to be deducted. She asserts that in her case, as in Levitt, supra, pay can only be deducted for each working day on which the teacher failed to work. The State Board summarized this basic principle in Levitt, supra:

> "(I)t is well settled that except for authorized sick leave and similar excused absences with pay, the board must deduct a day's salary (reckoned as 1/200th of annual salary) for any day on which the staff member failed to render services in accordance with his employment contract." Slip Op. at 2.

Not, she argues, is there any reason to differentiate between a public holiday and any other day on which teachers are not required to work for purposes of the matter in issue in the instant case. She contends that whenever a teacher is not required to work, a local board may not deduct a day's pay for failure to work on that day and since no teacher in the Magnolia School District was required to work on any day after June 15, 1979, the Board had no authority to deduct pay from petitioner for any day after June 15, 1979.

The Board contends that statutory law and decisional law interpreting the statutes are dispositive of this appeal. It admits that while two previous teachers employed by the Board during the last decade were reduced an amount of pay other than 1/200th of the annual pay less substitute pay when their annual and accumulated sick leave expired, it is stipulated by the Board that these two instances do not constitute past practice.

The Board contends that N.J.S.A. 18A:30-6 and 30-7 are the precise statutory provisions which squarely control decision in this case. N.J.S.A. 18A:30-6 provides:

> When absence, under circumstances described in Section 18A:30-1 of this Article (absence from post of duty because of personal disability due to illness or injury), exceeds the annual sick leave and the accumulated sick leave, the Board of Education may pay any such person each day's salary less the pay of the substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the Board in each individual case. A day's salary is defined as 1/200th of the annual salary. (Board's Emphasis)

The companion statutory provision, N.J.S.A. 18A:30-7 provides as follows:

> Nothing in this Chapter shall affect the right of the Board of Education to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave, or to grant sick leave over and above the minimum sick leave as defined in this Chapter or allowing days to accumulate over and above those provided in Section 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year.

The Board asserts that when read together, these statutory provisions indicate that individual cases are to be scrutinized when annual and accumulated sick leave benefits have expired. It argues that payment "may" be made to a teacher of salary less substitute pay if the Board decides, in an individual instance, to go beyond annual and accumulated sick leave (including possible extensions of annual and accumulated sick leave (including possible extensions of annual and accumulated sick leave benefits under N.J.S.A. 18A:30-7). It avers that N.J.S.A. 18A:30-6 sets forth the formula to be utilized: 1/200th of annual salary minus substitute pay for each day. This formula is not reached, however, if the Board chooses not to make payments in an individual case. It asserts that, pursuant to this statute, a teacher may have her entire per diem salary deducted, based on the number of working days absent over and above annual and accumulated sick leave days, if the Board, in its discretion, decides an individual case so warrants.

The Board observes that the focus on individual cases in this regard was emphasized in Hutchinson v. Board of Education of the Borough of Totowa, Passaic County, 1971 S.L.D. 511, where in denying petitioner's contention that a blanket rule required the Board to award extended sick leave benefits pursuant to N.J.S.A. 18A:30-6, the Commissioner noted that N.J.S.A. 18A:30-6 is a "permissive statute" and not mandatory.

> The Commissioner holds that the provisions of this permissive statute may be exercised by a Board of Education at its discretion whenever a Board determines that it is right and proper to do so as an expansion of the minimum sick leave entitlement made mandatory by the provisions of N.J.S.A. 18A:30-2 *** and 30-3 *** or the more liberal provisions provided in 18A:30-7. However, the Commissioner also holds that the provision of the statute may not be embodied as a statement of policy equally applicable as a blanket provision for all members of a staff, but may only be made applicable after scrutiny by the Board of "each individual case" as specifically required by the statute.
>
> In the instant matter, therefore, the Commissioner holds the Board's policy provision *** which states that after accumulated sick leave has been used up "***the full time employee shall receive the difference between the contract salary and the substitute pay for the duration of the contract period" is ultra vires in its present form by reason of the fact that it does not require an individual scrutiny of each case. Id. at 517
>
> (Emphasis in text)

Accord, Mable Marriott v. Board of Education of the Township of Hamilton, Mercer County, 1949-50 S.L.D. 69. Affirmed State Board of Education 1950-51 S.L.D. 69. See also, Taccone v. Board of Education of the City of Newark, Essex County, 1976 S.L.D. 1045 (discretionary nature of N.J.S.A. 18A:30-7.

The Board argues that the Hutchinson-Marriott-Taccone line of precedent controls this case, rather than petitioner's contention that the Magnolia Board was required to apply the

1/200th minus substitute formula of N.J.S.A. 18A:30-6 in awarding extended sick leave benefits from June 15 to June 30. The Board notes that the practical effect of such assertion would be that the petitioner would gain 1/200th of her annual salary for each school day from June 15 to June 30 without any substitute deduction, since the active work year ended June 15 and that no substitute was required, during the June 15 to June 30 period when classes were not in session.

The Board asserts that the equitable circumstances which it considered in denying petitioner's request for N.J.S.A. 18A:30-6 benefits were; (1) petitioner's receipt of $1,858.00 in disability benefits from Washington National Insurance Company for her disability, which benefit was provided by the Board; (2) the prior decision of the Board at its June 11, 1979 meeting to extend petitioner's annual and accumulated sick leave benefits by three days pursuant to N.J.S.A. 18A:30-7; and, (3) the fact that if the permissive benefits of N.J.S.A. 18A:30-6 were allowed, the petitioner would receive full per diem benefits without deduction for substitute pay.

The Board argues that as a matter of social policy, the Commissioner should also deny the petitioner's request. It asserts that if a rule mandating the automatic application of 1/200th minus substitute pay were adopted in the specific case of individuals who used up their annual and accumulated sick leave benefits, there would be an undesirable "incentive" produced. Such incentive, it further asserts, would be to use up annual and accumulated sick leave days prior to June 15 of an individual year, and insist on full salary benefits (based on the 1/200th formula) for the period June 15 to June 30. It contends that this would contravene statutory intent and social policy objectives to limit sick leave benefits to those specific number of days defined by statute or granted in an individual case by a Board reacting to individual circumstances.

Having carefully reviewed the entire record in the instant matter, I FIND that the Stipulation of Facts and the Finding of Facts as set forth hereinbefore are hereby adopted by reference and that no further recital thereto is necessary or required.

Having carefully considered the arguments of the parties I FIND that the Board's application of N.J.S.A. 18A:30-6 and N.J.S.A. 30-7 to petitioner, subsequent to June 15 and until June 30, 1979, was incorrect and misapplied. The undisputed facts show that petitioner, nor any other teaching staff

member similarly employed by the Board, was required to appear for duty at the Board's schools for the period June 15-30, 1979. It is further undisputed that those teaching staff members, other than petitioner, were paid their salaries for the period June 15-30, 1979, pursuant to their individual contractural terms. For the Board to penalize petitioner for days of absence for which she was not required to be on duty was a misapplication of N.J.S.A. 18A:30-6. The statutory definition of sick leave pursuant to N.J.S.A. 18A:30-1, provides as follows:

> "Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household." (Emphasis supplied)

I FIND that the Board was without authority to withhold the salary of a teaching staff member who had exhausted his/her sick leave entitlement, and who had performed his/her duties up to and including the last day of school, and was thereafter ill or otherwise incapacited from June 15-30, 1979.

It is observed that petitioner derived insurance benefits from a private insurance carrier for her absence due to illness and that she was not absent from duty as the result of a service connected disability, for which the Board could recoup salary payments pursuant to N.J.S.A. 18A:30-2.1. I find no statutory authority for a board of education to reduce a teaching staff member's salary due to receipt of benefits derived from a private insurance policy. I FIND, therefore, that the Board's argument that it considered petitioner's receipt of disability benefits from the Washington National Insurance Company when it decided to withhold her salary is without merit.

I FIND, therefore, that petitioner was not "absent from *** her post of duty" for the period June 15-30, 1979.

Accordingly, I DETERMINE that the Board was entitled to deduct a maximum of nine (9) days' pay, calculated at a per diem rate of 1/200th of the annual salary, from petitioner's annual salary for the 1978-79 school year. Kathy Windsor, supra.

I CONCLUDE, therefore, that petitioners' gross salary for the 1978-79 should have been $13,494.15 and that the Board of Education of the Borough of Magnolia is hereby ORDERED to reimburse petitioner the difference between the amount of $12,646.35, which it paid to her, and the amount of $13,494.15 which was due to her for the 1978-79 school year.

The Commissioner of Education is without authority to grant petitioners' claim for damages by way of attorneys' fees and cost for litigation in the herein matter, therefore, petitioners' prayer for relief with respect to such claim is hereby DENIED.

Accordingly, in all other respects, Summary Judgment is hereby entered on behalf of petitioner.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, Fred G. Burke, who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1

I HEREBY FILE my Initial Decision with the Commissioner of Education, Fred G. Burke, for consideration.

3 July 1980
DATE

Lillard E. Law
LILLARD E. LAW. ALJ

JOANNE OTERI AND THE MAGNOLIA EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 6:24-1.17(b).

The Commissioner notes that four (4) sets of exceptions were filed herein as follows:

1. Exceptions
2. Cross or reply exceptions
3. Reply to the cross exceptions
4. Reply to the reply to the cross exceptions.

The Commissioner observes that there is no provision in law beyond the first two categories, others will not be considered. The Commissioner stresses the necessity that, to be considered, exceptions most be filed in a timely fashion. N.J.A.C. 1:1-16.4.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

COMMISSIONER OF EDUCATION

August 18, 1980

JOANNE OTERI AND THE MAGNOLIA EDUCATION ASSOCIATION,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA, CAMDEN COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, August 18, 1980

For the Petitioners-Appellants, Selikoff & Cohen (Joel S. Selikoff, Esq., of Counsel)

For the Respondent-Appellee, Davis & Reberkenny (Robert F. Blomquist, Esq., of Counsel)

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

December 3, 1980

"S.W." AND "D.W.",	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

For the Petitioners, Schechner & Targan (David Schechner, Esq., of Counsel)

For the Respondent, Nichols, Thomson, Peek & Meyers (William D. Peek, Esq., of Counsel)

This matter was initially heard by a hearing examiner for the Commissioner on July 8, 1976. "S.W." and "D.W." v. Board of Education of the Town of Westfield, 1977 S.L.D. 698 Petitioner's appeal was dismissed by the Commissioner on June 10, 1977 and said dismissal subsequently affirmed by the State Board of Education on September 7, 1977 (1977 S.L.D. 703). Upon appeal to the New Jersey Superior Court, Appellate Division, the matter was remanded to the State Board for reconsideration in light of its decision in "H.D." v. Board of Education of Roxbury, 1977 S.L.D. 771.

On March 1, 1978 the State Board, in light of the Appellate Division's remand and the State Board's decision in "H.D.", supra, remanded this case back to a hearing examiner for a de novo determination of the classification of D.W., based on the evidence previously presented. A classification officer's decision was rendered February 5, 1979. Petitioners, in a letter to the Commissioner dated February 20, 1979, regarded the decision of February 5, 1979 as a hearing examiner's report making exceptions, objections and replies to that report.

The Board in a letter dated February 22, 1979 concurred with the decision of the classification officer.

On May 10, 1979, a motion was made to the State Board for an order voiding the classification officer's decision. On June 12, 1979 assistant to the Legal Committee of the State Board responded to Petitioners-Appellants' motion, stating that "when the matter was remanded on March 1, 1978 the State Board did not retain jurisdiction in the matter." Accordingly Petitioners-Appellants were advised that the proper procedure would be to file an appeal with the Commissioner of Education pursuant to N.J.S.A. 6:28-1.11.

In a letter dated July 13, 1979 Assistant Commissioner Zach denied request for oral argument and affirmed the hearing examiner's report (classification officer's decision). Petitioners thereupon filed notice of appeal to the State Board.

On September 6, 1979, the State Board remanded the matter back to the Commissioner for determination.

The Commissioner has reviewed the entire record as well as the classification officer's decision and the exceptions filed by the parties.

Petitioners object to the entire report and decision rendered by the chief classification officer on the ground that he did not follow the order of the remand "**for a de novo determination of the Classification of 'D.W.', based on the evidence previously presented."

Petitioners argue that the classification officer, by scheduling an additional hearing, conducted a de novo hearing as if it were a new trial, rather than a de novo hearing based upon evidence previously taken as ordered by remand from the State Board. Petitioners regard such action as a unilateral setting of a new standard in violation of the standard set by the State Board thus nullifying the decision. The Board, in its letter brief, takes exception to petitioners' conclusion and asserts that the classification officer's decision fully comports with the standard established by the State Board in its remand instructions. The Commissioner agrees. Nothing in the classification officer's decision can be construed as being other than a de novo review of the entire record and evidence as previously developed. The mere fact that an additional hearing was scheduled should not be permitted to detract from the integrity of the classification officer's apparently earnest attempt to review de novo the matters herein controverted.

Having addressed the exceptions filed by the parties, the Commissioner must render a determination on the merits of the arguments presented in the record and the report of the classification officer. In the interest of providing petitioners and the Board with every opportunity to affirm their position, the Commissioner has also reviewed all of the moving papers presented by both parties in the appeals before the State Board of Education and the Appellate Division.

In light of the March 1, 1978 remand from the State Board of Education, the Commissioner has reviewed the instant matter in respect to the standard enunciated by said Board in its remand to the Commissioner in "H.D." and "M.D.", on behalf of "H.D." v. Board of Education of the Township of Roxbury, 1977 S.L.D. 771 wherein the State Board said:

> "***In reaching his conclusion, the Hearing Examiner shall not accord a presumption of correctness to the prior determination of the Child Study Team.***"

Applying the aforesaid standard, the Commissioner finds the decision of the classification officer to be fully consonant with that standard and finds that the conclusions reached are fully consistent with the State Board of Education's requirements for a de novo determination of D.W.'s classification based upon the evidence previously presented. Accordingly, the Commissioner affirms the findings and determination as rendered in the classification officer's decision in this matter and adopts them as his own. Petition is dismissed.

COMMISSIONER OF EDUCATION

April 22, 1980

Pending State Board of Education

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

PETITIONER,

V.

"A.F." and "T.F.", on behalf of their daughter, "N.F.",

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

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

For the Respondents, Ralph Neibart, Esq.

Appeal of the classification officer's determination of January 5, 1979 in the above-captioned matter has been taken before the Commissioner of Education by the Board of Education of the Scotch Plains-Fanwood Regional School District, hereinafter "Board."

A subsequent Board Motion for Stay of the classification officer's decision pending final determination of its appeal before the Commissioner was partially denied and partially upheld on September 5, 1979 by the Commissioner. The Commissioner found the Board's arguments with respect to probable harm to N.F. as the result of the classification officer's original determination to be without merit. Accordingly, the original determination regarding N.F.'s classification and placement as neurologically impaired was ruled by the Commissioner as binding on both parties.

The Commissioner did grant the Board's Motion for Stay of any reimbursement to the parents of N.F. for tuition and transportation incurred by them prior to the classification officer's January 5, 1979 determination pending final disposition of the Board's appeal in this matter.

Further, the Board was directed to assume all costs for N.F.'s tuition and transportation as of the date of the decision and to reimburse her parents for any transportation and tuition costs they have paid as of the date of the decision on the Motion to Stay.

The Commissioner has carefully reviewed the Board's appeal of the January 5, 1979 decision of the classification officer. He has also examined in detail the response by the parents.

The Commissioner finds little of substance in the Petition of Appeal which convinces him to overturn any part of the classification officer's decision. In most instances the Board avers that the classification officer "did not give proper weight" to factors involved or that he did not recognize differences in the rules and regulations existing at the time of the hearing and those in effect at time of N.F.'s placement. The Board also pleads that the doctrine of laches be invoked.

In regard to the latter point, the Commissioner is constrained to comment that this controversy began in 1975 when N.F. was 14 and in junior high school. N.F. is now over 19 years of age. If this matter is not settled soon, time will run out on N.F.'s constitutional right to free public schooling within the confines of N.J.S.A. 18A:46-1 et seq. (classified handicapped children).

Competent authorities, including the classification officer, have ruled that N.F. is neurologically impaired, should have been so classified in 1975, and should be under an educational prescription to meet her needs. No evidence exists that the Board has the capability to provide for N.F.'s special needs. The day school, to which the parents have unilaterally determined to send N.F., does.

The need exists and the means for meeting it are at hand. There is no doubt that the statutes and the New Jersey Administrative Code mandate that the means be used. The Commissioner so holds.

Therefore, the Commissioner orders that the parents be reimbursed the cost of tuition and transportation ordered by the classification officer on January 5, 1979 but stayed by the Commissioner pending decision on the Board's appeal. Prospectively, the Board shall continue to pay for appropriate tuition and transportation charges incurred by educating N.F. at the day school involved so long as she is properly assigned there.

In summary, the Commissioner denies the Petition of Appeal and upholds in its entirety the decision of the classification officer. The Commissioner orders that financial restitution to the parents be made as provided therein. He further orders that the parents be saved from financial harm prospectively in providing for the educational future of N.F.

COMMISSIONER OF EDUCATION

August 8, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

LINDA MASSA	)	INITIAL DECISION
V.	)	OAL DKT. NO. EDU 0696-80
THE BOARD OF EDUCATION OF THE TOWN OF KEARNY	)	AGENCY DKT. NO. 16-1/80A

APPEARANCES:

Louis P. Bucceri, Esq., for Petitioner

Frederick R. Dunne, Jr., for Respondent

BEFORE THE HONORABLE ROBERT P. GLICKMAN, A.L.J.:

This matter comes before the Court by way of petition filed pursuant to N.J.S.A. 18A:6-9 vesting the Commissioner of Education with jurisdiction to hear or determine all controversies and disputes arising under the school laws. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

As a result of a prehearing conference on March 20, 1980, the following issues were identified:

1. Was respondent arbitrary, capricious and/or unreasonable in withholding petitioner's salary increment for the 1979/80 school year and not advancing petitioner to Step 14 of the salary guide?

2. Is the action of respondent in attempting to correct an alleged clerical error made in 1971/72 with regard to the placement of petitioner on the salary guide ultra vires, invalid and/or improper?

3. Is respondent barred by laches from taking any action to correct the alleged clerical error of 1971/72?

4. Did respondent comply with N.J.S.A. 18A:29-14 in withholding petitioner's salary increment for the 1979/80 school year?

As a result of the submission of stipulations of facts agreed to by counsel for the parties, no hearing in this matter is necessary.

The uncontroverted,stipulated facts,which this Court adopts as its Findings of Fact are as follows:

1. In September 1969 petitioner was a tenured teacher employed by the respondent Board of Education and was being paid a salary designated as Step 8 of the Board's salary guide.

2. Petitioner taught from September, 1969 to November, 1969 at which time she began a leave of absence without pay which continued through June 30, 1971.

3. At the time her leave was granted petitioner was not told whether or not she would earn any salary increments while on leave. The 1970-71 collective contract covering teachers in the district did establish that teachers on maternity leave would not be granted a salary increment for that time and respondent had followed that practice prior to 1970-71.

4. No written Board policy exists regarding the withholding of increments because state law dictates how to take such action.

5. By resolution of January 18, 1971 respondent adopted its 1971-72 salary guide. (Exhibit J-1)

6. By resolution of February 16, 1971 the respondent approved a list of teaching appointments for 1971-72 which included petitioner at a salary of $11,300, Step 9 of the 1971-72 salary guide. This placement at Step 9 instead of Step 8($10,800) was due to a clerical error by the superintendent's secretary. (Exhibits J-1, J-2 and J-3)

7. Petitioner in no way caused or was responsible for this clerical error.

8. During the 1978-79 school year a secretary in the Superintendent's office discovered the error in petitioner's placement. During that year petitioner was being paid on Step 13 of the salary guide.

9. At a regular meeting on August 20, 1979 the Board unanimously adopted a resolution reappointing a list of teachers, including petitioner. (Exhibit J-4)

10. The list of reappointments reflected that petitioner's 1979-80 salary would remain the same as in 1978-79. No new salary guide for 1979-80 had been adopted by respondent as of August, 1979 due to on-going negotiations with the K.E.A.

11. The only written notice given to petitioner regarding the action of August 20, 1979 was a salary notice dated September 4, 1979. Each reappointed teacher received such a letter. (Exhibit J-5)

12. At no time prior to January, 1980 was the Board of Education informed that an error had been made as to petitioner's salary placement for 1971-72, nor was any reason given to the Board prior to January, 1980 as to why petitioner's salary step was frozen for 1979-80.

13. On November 19, 1979 the Board adopted a resolution ratifying a new collective agreement with new salary guides for the 1979-80 school year. (Exhibit J-6)

14. By letter of November 20, 1979 petitioner was informed that her 1979-80 salary would be $19,748. (Exhibit J-7) This corresponds to Step 13 of the 1979-80 salary guide. (Exhibit J-8) No other written notice regarding the action of November 19, 1979 was given to petitioner.

15. No discussion of the petitioner's specific salary placement occurred at either the meeting of August 20, 1979 or the meeting of November 19, 1979.

The dispositive issue in this case is whether or not respondent complied with N.J.S.A. 18A:29-14 in withholding petitioner's salary increment for the 1979/80 school year.

The practical realities of the situation before this court is that petitioner's salary increment was withheld during the 1979-80 year. Admittedly, the Board's withholding of the salary increment was to accomplish the correction of a mistake caused by it in 1971. However, it is abundantly clear that the statutory procedure established in N.J.S.A. 18A:29-14 was improperly utilized by the Board in the instant matter.

N.J.S.A. 18A:29-14 states: "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

Since this court views the action of the Board as being taken pursuant to N.J.S.A. 18A:29-14, it is clear that such action is improper due to the fact that the procedure mandated by the statute was not followed and furthermore an administrative error may not be considered statutory "good cause" for withholding an increment.

As stated by the Supreme Court in Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Assn., 79 N.J. 311, 321 (1979): "However, N.J.S.A. 18A:29-14 explicitly authorizes a local board to withhold an increment only for 'inefficiency or other good cause.' The decision to withhold an increment -- although directly affecting the work and welfare of a teacher -- is thus dependent upon an evaluation of the quality of the services which the teacher has rendered. The purpose of the statute is thus to reward only those who have contributed to the educational process thereby encouraging high standards of performance..."

The aforementioned language in Bernards Township, supra, precludes a Board from withholding an increment in order to correct an administrative error for which the petitioner is not responsible. Also, the statutorily prescribed procedures, such as the requirement of the recorded roll call vote and the requirement that the petitioner be given written notice within 10 days of the vote of such action together with reasons therefore were not followed.

Thus, it is CONCLUDED that the action of the Board in the instant case in withholding petitioner's increment in reliance on statute was improper and in violation of the statutorily prescribed procedures under N.J.S.A. 18A:29-14. Furthermore, it is CONCLUDED that the Board relied on no other statutory procedure to attempt to correct its error. Thus,under all of the existing circumstances,the Board's action was arbitrary, capricious and unreasonable.

Based upon the aforegoing discussion,the other issues raised in the prehearing order are without merit.

It is, therefore, ORDERED that the action of the Board in withholding petitioner's salary increment for the 1979-80 school year by not advancing her to step 14 of the salary guide be and is HEREBY SET ASIDE. It is further ORDERED that the respondent pay to petitioner forthwith that amount of money and other benefits owed to her as a result of not placing her on step 14 of the salary guide for the 1979-80 school year.

This recommended decision may be affirmed, modified or rejected by the Commissioner of the Department of Education, Fred G. Burke, who by law is empowered to make a final decision in this matter. However, if the Commissioner of the Department of Education does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 0696-80

I HEREBY FILE my Initial Decision with the Commissioner of the Department of Education, Fred G. Burke, for consideration.

July 9, 1980
DATE

Robert P. Glickman
ROBERT P. GLICKMAN, A.L.J.

LINDA MASSA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board in its exceptions protests the application of N.J.S.A. 18A:29-14 by Judge Robert P. Glickman, ALJ, to the present case. It is the contention of the Board that it did not consider this statute in this matter because it was not allowable. The Board contends that its action was taken to correct a clerical error that has awarded petitioner since 1971 the benefit of an increment to which she was not entitled.

Petitioner's reply exceptions support the Court's initial decision restoring to her monies withheld. Petitioner's exceptions contend that she did nothing to merit an increment withholding and that she has a right to the 1971-72 increment once it was adopted by the Board. Petitioner's argument places the Board in the anomalous position of once having made a mistake in the salary placement of a teacher not being able to correct it. The Commissioner and the courts have previously held otherwise. Elizabeth Stiles et al. v. Board of Education of the Borough of Ringwood, 1974 S.L.D. 1170 and Mary Honaker v. Board of Education of the Borough of Hillsdale, 1980 S.L.D. ___ (decided August 7, 1980)

In the above-referenced cases it was held that the board was not required to continue an error and that, while not reducing teacher salaries, they were frozen at a salary rate until time and their years of experience caught up to them and entitled them to receive the next salary increment.

In the present case the Commissioner finds that the Board erred by failing to notify petitioner of its intended action to freeze her salary for reason to correct a mistake in her salary placement. The Commissioner deplores such inaction on

the part of the Board but determines that, once discovered, the error must be corrected. The Commissioner notes with disapproval that because of the clerical error petitioner was overpaid a sum of $5290.

The Commissioner notes that errors resulting in overpayment problems have been previously addressed.

The Court in Board of Education of Passaic et al. v. Board of Education of Township of Wayne et al., 120 N.J. Super. 155, 163-164 (Law Div. 1972) has stated:

> "***The general rule is that such payments made by municipal corporations or agents thereof under mistake of law are recoverable.
>
> ***
>
> "In dealing with the issue of whether the government could recover erroneous refunds, the court in United States v. Hart, 12 F. Supp. 596, 597 (E.D. Pa. 1935), aff'd 90 F. 2d 987 (3 Cir. 1937), held that 'it is well settled that in case of the government, states, and even municipalities, money paid by mistake may be recovered.'
>
> ***
>
> "The reasoning behind such a decision is that this court does not feel that a municipality or subdivision thereof, as the instrument of the people, should be bound by a misinterpretation of the law by the authorities in charge.***"

In the instant matter the Commissioner does not suggest that recovery of the money paid petitioner through clerical error be instituted by the Board. He directs the Board to correct its prior error by holding petitioner at the same step of the salary guide which she had previously attained until by reason of her continued service she attains her proper placement on that guide. The determination in the initial decision is hereby set aside and the Petition of Appeal is accordingly dismissed.

COMMISSIONER OF EDUCATION

August 25, 1980

Pending State Board of Education

JOHN T. WHITING, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY, : DECISION

RESPONDENT. :

:

For the Petitioner, Carl John Kerbowski, Esq.

For the Respondent, Blumberg, Rosenberg, Mullen & Blumberg (William B. Rosenberg, Esq., of Counsel)

Petitioner was employed by the Board of Education of the Township of Bedminster, Somerset County, hereinafter "Board," as an Administrative Principal. His employment was terminated prior to the end of his third year with the school district pursuant to the 60 day termination clause in his contract. Petitioner alleges that his termination is improper, illegal and violative of his constitutional rights and he prays for reinstatement in his former position with back salary. The Board denies that its actions resulting in petitioner's termination were illegal, tainted or violative of his constitutional guarantees.

Seventeen days of hearings were conducted between May 16, 1977 and June 22, 1978 in the office of the Somerset County Superintendent of Schools, Somerville, by a hearing examiner appointed by the Commissioner of Education. Numerous documents were admitted as evidence and testimony was adduced from twenty-seven witnesses. Memoranda were filed subsequent to the hearing and petitioner filed a Reply Brief.

The report of the hearing examiner follows:

Specifically, petitioner alleges that he was never properly evaluated by the Board pursuant to N.J.S.A. 18A:27-3.1; therefore, it was impossible for the Board to give him valid reasons why he was not reemployed. Petitioner alleges, also, that he was denied an opportunity for a hearing before the Board concerning its reasons for not reemploying him. N.J.S.A. 18A:27-3.1 et seq. Petitioner alleges also that the action terminating his employment is invalid because it was taken at a public meeting of the Board which began at 8:04 p.m. instead of 8 p.m. as demanded by the pertinent statute. He also alleges that he was not notified pursuant to statute that he would not be

reemployed. Finally, petitioner argues that the Board violated his rights to freedom of expression by being critical of his manner of casual dress and his right to freedom of speech.

Petitioner served as the district's Administrative Principal for the three consecutive years ending on June 30, 1974, 1975 and 1976. Three new Board members were elected at the annual school election on March 9, 1976 and the Board reorganized on March 18, 1976. (R-20) Hereinafter, the Board that existed prior to March 18, 1976 will be referred to as the "prior Board," and after that date will be referred to as the "new Board."

The record reflects that petitioner was evaluated by the Board on May 9, 1975. A letter sent to petitioner dated September 2, 1975 describes in some detail the outcome of a four page written evaluation which the Board discussed with him. The letter concludes in part that:

> "***You have in hand documentation of substantial inefficiencies. The implication of your suggestion of an impartial outside agent is that the Board should fix your increment based on some agent's assessment of a reasonable average. The Committee chooses to use the evaluation as the criterion and therefore rejects the proposal for an impartial outside agent.***" (Emphasis added.) (R-8, 10; C-3)

At a regular meeting of the prior Board on October 16, 1975 "Performance Objectives" were adopted by which petitioner was evaluated by the prior and new Boards. (P-38; C-2) The latter document rates petitioner's over-all performance as unsatisfactory and recommends his termination. Further evidence of an evaluation is documented in a letter to the Board from the personnel chairman dated March 22, 1976. This letter reflects a favorable evaluation; however, the Board took no official action regarding petitioner. (P-7; Tr. XII-127-131; XIII-122)

The hearing examiner finds that petitioner was evaluated by the prior and new Boards albeit he was not evaluated three times in accordance with N.J.S.A. 18A:27-3.1 which reads as follows:

> "Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of her or his duties at least three times during each school year but not less than once during each semester. Said evaluations are to take place before April 30 each year. The evaluations may cover that period between April 30 of one year and April 30 of the succeeding year excepting in the case of the first year of

> employment where the three evaluations must have been completed prior to April 30. The number of required observations and evaluations may be reduced proportionately when an individual teaching staff member's term of service is less than one academic year. Each evaluation shall be followed by a conference between that teaching staff member and his or her superior or superiors. The purpose of this procedure is to recommend as to reemployment, identify any deficiencies, extend assistance for their correction and improve professional competence."

Reasons for petitioner's termination are set forth in C-3. Thereafter, petitioner requested an informal appearance before the Board in accordance with N.J.S.A. 18A:27-3.3 and Donaldson v. Board of Education of the City of North Wildwood, 65 N.J. 236 (1974); Barbara Hicks v. Board of Education of the Township of Pemberton, 1975 S.L.D. 332. (P-14) The Board scheduled a meeting with petitioner which was adjourned at his request and rescheduled approximately one month later. (P-15-17) Petitioner protests the legality of that May 24, 1976 meeting (P-16), stating that he had insufficient time in which to prepare for it because he received the notice of the meeting on the same day as the scheduled appearance. Nevertheless, he did appear with his representative. (P-17)

The guidelines for an informal appearance before the Board are set forth in Hicks, supra, and Fred J. Hoffman v. Board of Education of the City of Asbury Park, 1975 S.L.D. 929, 932, aff'd 1976 S.L.D. 1147.

Although petitioner's contention is that he received the notice of the hearing of May 24, 1976 on that same day, the notice is dated May 14, 1976 (P-16-17), ten days prior to the hearing.

Despite this alleged short notice, the hearing examiner finds that petitioner knew the Board's reasons on or soon after April 29, 1976. (C-3) Nevertheless, he did not make a statement in his own behalf at his appearance on May 24, 1976; rather he sought another meeting at which time he could produce witnesses on his behalf. (P-17; Tr. XIII-116-119) Since petitioner refused to make any statement on his behalf there was no further determination to be made by the Board; therefore, its prior decision of March 30, 1976 was its final decision.

Petitioner contends that the aforementioned Board meeting is invalid because it began at 8:04 p.m. rather than 8 p.m. as set forth in N.J.S.A. 18A:10-6. The hearing examiner finds that there was no attempt to unnecessarily delay the

meeting. The record shows that that Board meeting was unusual in that a large crowd attended in contrast to the usual Board meetings which were poorly attended. (Tr. IV-7; XIII-113) The meeting should not be invalidated. Maurice S. Kaprow v. Board of Education of the Township of Howell, Monmouth County, 1976 S.L.D. 1032

Petitioner questioned the residency requirement of one Board member. That issue is improperly raised in this hearing. If there were any question of the Board member's residency, it should have been raised by interested members of the community at or after that member's election to the Board in March 1975. At the time of the hearing the Board member in question had served more than two years of his three year term. (Tr. IV-93) This contention must be adjudged groundless.

Petitioner's allegations of violations of his constitutional rights are grounded on his assertions that he was criticized for his "casual dress" (R-10; Tr. XIII 66-78) and because he challenged Board determinations regarding budget reductions by writing to the County Superintendent and the Commissioner. He alleges, also, that the Board interfered with his right to teach at Seton Hall University.

The record does not support these contentions. Petitioner's "casual dress" is one of many remarks, many of them positive, contained in his evaluation. (R-10) There is no assertion that he was instructed by the Board to change his attire; in fact, he testified that only one unidentified Board member was responsible for that comment. The hearing examiner stated that the evaluation would be treated only as a Board document. (Tr. XIII-78)

The Board president testified that petitioner exercised poor judgment in writing the Commissioner and the County Superintendent concerning budget determinations. (Tr. VII-85-90) Petitioner testified that the Board discussed with him its concern about his teaching at Seton Hall because they had not been informed. He replied that he would thereafter keep them informed regarding his teaching and he continued to teach there. (Tr. XIII-97)

In the hearing examiner's judgment petitioner's allegations of violations of his constitutional rights are groundless. It was said by the Court in Tidewater Oil Company v. Mayor and Council of the Borough of Carteret, 44 N.J. 338 (1965) that:

> "***It is clearly not enough if the asserted question is only remotely or speciously connected to the Constitution by the loose or contrived use of broad constitutional terminology. Shibboleth mouthing of constitutional phrases like 'due process of law'

> and 'equal protection of the laws' does not ipso facto assure absolute appealability.***"
> (at 342)

The bare assertion or generalized allegations of a constitutional right do not create a claim of constitutional dimensions. John C. Roy v. Board of Education of the Township of Middle, 1976 S.L.D. 569, quoting Winston et al. v. Board of Education of Borough of South Plainfield, 125 N.J. Super. 131 (App. Div. 1973) at page 144; see also Kathryn Fox v. Board of Education of the Watchung Hills Regional High School District, 1977 S.L.D. 1107.

Regarding petitioner's claim for denied vacation pay, the record shows that he was not paid for four days in March 1975 when he attended a Commissioner's Academy. He does not contest this reduction but asserts his claim for five days' salary when he attended a convention in California. Board minutes support petitioner's claim for salary for these five days. (R-12, p. 5; Tr. XIV-93-95)

Except for this valid claim for five days' salary, the hearing examiner finds that petitioner has not sustained his burden of proof to show that his termination was improper or violative of any of his rights.

Accordingly, it is recommended that the Petition of Appeal should be dismissed. Petitioner is entitled to five days' salary at the rate he would have been compensated while employed by the Board.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in the instant matter as well as the report of the hearing examiner. The Commissioner notes that exceptions to the hearing examiner's report were filed by petitioner.

Petitioner contends that the hearing examiner erred in failing to find the respondent's actions were violative of N.J.A.C. 6:3-1.19(e) insofar as no conference was ever held to discuss his evaluation.

While the Commissioner can adduce no evidence from the record of specific face-to-face discussion between petitioner and the Board, the record and exhibits do provide evidence that petitioner received a letter indicating to him areas of noted deficiencies in his performance. While the Commissioner believes that the statutory requirements of N.J.A.C. 6:3-1.19(e) were not strictly adhered to, petitioner cannot allege that he was unaware of the areas of concern detailed in his evaluation of May 9, 1975.

The Commissioner has consistently held that failure to strictly adhere to procedural requirements does not entitle the teaching staff member to reinstatement. See Margaret Pelose v. Board of Education of the Township of South Brunswick, 1977 S.L.D. 232; William Mueller v. Board of Education of the Borough of Glen Ridge, Essex County, 1978 S.L.D. ____ (decided April 28, 1978), aff'd State Board October 4, 1978, aff'd N.J. Superior Court, Appellate Division, April 7, 1980; John Hutzley v. Board of Education of the Manalapan-Englishtown Regional School District, 1977 S.L.D. 904; Nancy Sherwood v. Board of Education of the Township of Piscataway, 1977 S.L.D. 1226.

Petitioner also excepts to the hearing examiner's conclusion that the Board set forth its reason for nonrenewal pursuant to N.J.S.A. 18A:27-3.2 in a letter dated April 29, 1976 (C-3). Petitioner alleges that neither he nor other witnesses understood said letter nor knew from whence it came. The Commissioner cannot agree. This letter in question is signed by the Secretary to the Board and does set forth the Board's reasons for nonrenewal. In the absence of evidence to the contrary, the Commissioner must assume that the Board Secretary, as an agent of the Board, was carrying out her function and conveying to petitioner the official position of the Board pursuant to his request for the reason for nonrenewal of his employment.

Petitioner likewise takes exception to the hearing examiner's failure to conclude that he was provided inadequate notice of the date of his requested hearing before the Board pursuant to N.J.A.C. 6:3-1.20(e). Petitioner herein contends that he received notification of said meeting on the same day he was scheduled to appear. The Commissioner notes that the record

neither refutes nor establishes petitioner's contention, therefore he is constrained to accept, as did the hearing examiner, May 14, 1976 as being the date upon which such letter of notification was dispatched to petitioner.

Petitioner additionally takes exception to the hearing examiner's failure to give due consideration to his allegation of the Board's infringement of his constitutional rights of free speech. The Commissioner does not agree. Petitioner fails to carry the burden of proof to substantiate such allegations. The Commissioner and the courts have consistently ruled that the mere allegation of constitutional infringement does not create a prima facie case for such determination. When such allegations are made, the burden of proof rests clearly with the party making the allegation. In the instant matter, petitioner falls far short of sustaining said burden. See Madeline H. Hubbard v. Board of Education of the Township of Mansfield, Warren County, 1979 S.L.D. ___ (decided April 25, 1979); Betty Jane Shaw v. Board of Education of the Township of Union, Ocean County, 1978 S.L.D. ___ (decided March 20, 1978); Winston et al. v. Board of Education of Borough of South Plainfield, 125 N.J. Super. 131 (App. Div. 1973)

Accordingly, the Commissioner affirms the findings and determination as rendered in the hearing examiner's report in this matter and adopts them as his own. Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

August 26, 1980

Pending State Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF:	)	INITIAL DECISION
THE TENURE HEARING OF	)	OAL DKT. NO. EDU 3842-79
MARK BLASKO,	)	
SCHOOL DISTRICT OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY	)	

APPEARANCES:

William Davis, Esq., for the Petitioner, Board of Education of Cherry Hill

Steven Cohen, Esq., for the Respondent Mark Blasko

BEFORE THE HONORABLE JEFF S. MASIN, A.L.J.:

> "Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience and learn about the teacher."
>
> In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97

The above quotation from a decision of the Commissioner of Education well summarizes the position of the teacher as a pivotal force and focus in the learning process. In such a role a teacher's actions carry a great deal of potential to influence students, whether for good or bad. It is precisely because of this potential that allegations of improper conduct by a teacher must be closely scrutinized and where established to be true, dealt with firmly. In the present case, the Board of Education of Cherry Hill Township seeks to

establish the impropriety of certain actions of the Respondent teacher. As will be developed below, the facts are not particularly in contest, although the motivations, meanings and context of the actions are.

Procedurally, it appears that on July 9, 1979 the Board of Education of Cherry Hill Township adopted a resolution in which it determined that "there is probable cause to credit certain charges" previously made against Mark Blasko, a 7th grade teacher employed by the Board at the Brainard Jr. High School. The Board had served a Statement of Charges on the teacher and he had responded in writing. On July 10 the Board secretary advised the Commissioner of Education of the certification of the charges pursuant to N.J.S.A. 18A:6-11. The Commissioner notified Mr. Blasko of the certified charges by letter dated August 7, 1979 and Blasko responded by filing an answer with the Commissioner on August 28, 1979. The case was then transferred to the Office of Administrative Law as a contested matter pursuant to N.J.S.A. 52:14F-1, et seq. A Prehearing Conference was held on October 16, 1979. At that time the Board of Education indicated that it was taking the position that the prosecution of the case would be by the individual complainant, the father of a student in the system, and that the Board would only take an observer status. However, after reconsideration of its position, the Board subsequently notified the court that it would in fact proceed to prosecute the case. After receiving this clarification of the Board's position in mid-November, the case was scheduled for hearing on several occasions but was postponed due to procedural and scheduling difficulties. The hearing was held on April 3, 1980 at the Camden County Courthouse, Camden, New Jersey before Administrative Law Judge Jeff S. Masin. After receipt of the transcript, the parties filed briefs with the court and the record closed on June 17, 1980.

By way of a synopsis of the testimony on the merits it can be said that the chief actors in the case were the Respondent Blasko and a former student of his, W.B. The other witnesses were the father of the student, Mr. D.B. and the Respondent's principal, Mr. John A. Carusi. As will be noted below, there are perhaps others who figure in the case but they are only the subject of speculation.

The essence of this case revolves around three incidents which occurred sometime in a period in the latter part of 1977 and early 1978, although the exact outlines of the time frame are somewhat hazy. On each of these three separate occasions W.B. asserts that Blasko, then his 7th grade homeroom and Social Studies teacher, made remarks which in one way or another were offensive to W.B. in that they inappropriately referred to a person or persons of the Jewish faith. The incidents can best be referred to as they were at the hearing, as the "Christmas candy" incident, the "ruler" incident, and the "job opportunity" incident. As will be seen, the testimony of W.B. and Blasko on each of these differs only slightly.

(a) THE THREE INCIDENTS

THE CHRISTMAS CANDY INCIDENT

W.B. testified that shortly before Christmas, 1977, Mr. Blasko passed out small packages of candy to the pupils in his classroom (it was not

specified whether this was the homeroom or Social Studies class). This occurred approximately 5 or 10 minutes before the end of the period. As the class drew to a close, Blasko requested that the Jewish students in the room raise their hands. He made a comment that since the Jewish children did not observe Christmas, they should not have the candy. He instructed the Jewish children to spit out their candy in the waste basket. Blasko then picked up the waste basket and held it in the air waist-high as the students were being dismissed. W.B. testified that he did spit out his candy in the basket as he went out although he did not know if any of the other students did. He stated that there were probably six or seven Jewish students in the class of about 25 or 30 pupils.

The Respondent's description of the "Christmas candy" incident was similar. He had handed out small sandwich bag packages of candy to his students whom he described as "grateful". He allowed the children to eat the candy. About 5 or 10 minutes before the end of the class he stated that something popped into his head. He made a comment which he states was made in an attempt to be funny. He told the class that since there were some who did not observe the Christmas holiday they should "chuck" up the candy on their way out. According to the Respondent, the class thought that this was a big joke and some, including, he believed, W.B., laughed. No one objected to the comment. Blasko then went over to the waste basket and picked it up. He went to the door and held it about waist-high as the children filed out. He did not see anyone throw or spit out any candy and he did not demand it. Respondent stated that he made his comments in an attempt at humor in the style of Don Rickles.

THE RULER INCIDENT

According to W.B., the second incident was the "ruler incident". This occurred as follows: W.B. was having a problem with a class assignment which involved the use of rulers. He walked up to the Respondent who was seated at the front of the classroom. He and Mr. Blasko spoke in low voices as W.B. explained his problem. In response, Blasko asked to see the ruler. He bent it over W.B.'s nose and said that he "always wondered what the size of a Jewish nose was". W.B. recalled that everyone else was working and the conversation was whispered. No one else was standing nearby. W.B. felt this event occurred "about a month" after the "Christmas candy" incident.

Respondent's testimony as to the "ruler incident" differed in details but not in substance. As may be apparent, his own recollections are perhaps more disturbing.

Mr. Blasko stated that he thought this incident occurred before the candy affair. At any rate, he remembered that the class had been working on a project which involved the use of small plastic rulers. Frequently, he had had a problem collecting these at the end of the class as students tended to forget to turn them in. Blasko stationed himself at the door of the classroom as the class began to leave. W.B. was in the crowd. At some point Mr. Blasko took a ruler and placed it near W.B.'s nose. He then said that he "would like to measure a Jewish nose". W.B. laughed. Blasko put the ruler up to his own nose and said, "Look at mine." He then measured other noses as pupils filed

out of the room. Blasko said that this had been done in jest.

THE "JOB OPPORTUNITY" INCIDENT

W.B. described the last incident as follows: He went up to Blasko after school one day in January of 1978. He told him that he had been offered a summer job by another teacher. Blasko then said,

> "I thought you Jewish people didn't have to work for your money. It all came easy to you and it was all handed down to you and you didn't have to work for it; you don't have to do anything like that."

According to Blasko, this incident also occurred before the Christmas candy affair. When W.B. told him of the job offer, Blasko recalls replying:

> "I thought you guys didn't have to work. I thought that if you needed five or ten dollars you simply asked your parents."

Blasko denied making any reference to Jews this time. He was instead referring to the "average" Cherry Hill student, because he was always amazed at the apparent affluence of the children's families.

(b) THE INITIAL COMPLAINT AND RESPONSE

Sometime in mid to late January, 1978, after the third of the above incidents, W.B. told his mother about Mr. Blasko's remarks. She referred him to his father. When D.B. learned of the incidents, he went to the boy's school and after explaining the problem to a guidance counsellor, confronted Blasko. According to D.B., he first asked Blasko if W.B. was a wise guy, smart aleck, or bad student. Blasko said, "No." He then asked Blasko about each of the statements. Blasko admitted that he had probably said each, although not necessarily in the exact language described by D.B. Blasko then stated that the comments had been taken out of context. Blasko asked D.B. if he wanted an apology, but D.B. felt it was impossible for Blasko to apologize for what he had done to W.B.

Following the meeting with Blasko, D.B. called Mr. Caruci, the school's principal. Caruci asked D.B. to write down the story and D.B. did so in a letter dated February 3, 1978 (R-2 in evidence). After receiving this letter, Caruci called in Blasko and discussed the matter with him. On February 10, 1978, D.B. received a letter from Caruci which informed him that a Letter of Reprimand had been issued to Blasko and placed in his file (J-1 in evidence). When D.B. got the letter of February 10, he was not certain what to do. He spoke to a teacher and an assistant principal whom he knew and sought guidance from such sources as the local Jewish Community Relations Council, the Jewish Community Center, the Anti-Defamation League of B'nai Brith, and an attorney. According to D.B., after these discussions he concluded that the best thing to do was to try not to disturb his son

while he was still attending Brainard. Although D.B. stated that at the time he wanted to bring charges against Blasko immediately, he was convinced to wait until his son was out of the school. In D.B.'s phrase, he would "prolong until W. was out of Brainard." Since W.B. was then still in 7th grade, this decision meant that D.B. would not file charges with the School Board until sometime after June of 1979, when W.B. would graduate 8th grade and move up to the high school.

In response to Mr. Caruci's letter of February 10th, D.B. wrote back and said he would hold in abeyance any request for further actions "pending investigations I wish to make". (B-1 in evidence)

It is important to note that in his letter of February 10, Mr. Caruci offered to transfer W.B. to another team of teachers. The school used a team teaching principle and, therefore, in order to switch W.B. out of Mr. Blasko's homeroom and Social Studies classes, it appears it would have been necessary for W.B. to change several other teachers as well. D.B. rejected this offer and stated on cross-examination that he was not concerned at the time that Blasko would thus continue to grade his son's work. He felt that his son was a good student and would earn good grades. (See Report Card in evidence as R-1.)

D.B. was not given or shown a copy of the Letter of Reprimand issued to Blasko. He did not ask to see it. He was not told and did not inquire as to how high up the Letter of Reprimand had gone. On May 30, 1979 D.B. wrote to the Superintendent of Schools concerning his interest in pressing charges against the Respondent.

Mr. John A. Caruci, Principal of Brainard Jr. High School, testified as a witness called by the Respondent. He has known Blasko for about 17 or 18 years and has worked with him at Brainard for some 15 years. He testified that when he was first contacted by D.B. he asked him to put the charges in writing because they were serious. He then called Blasko in. Blasko said that the remarks were taken out of context and did not reflect what the words were and the tone used. The remarks had been made in a "kidding" manner, not a sarcastic one. They stemmed from Blasko's attempt to develop a rapport with his students, a desire which Mr. Caruci felt was common to most teachers.

Caruci was appalled by the remarks. While he believed Blasko when he said that they had been made in jest and in a kidding context, he found the remarks to be in bad taste and totally unacceptable. Caruci also stated that he knew W.B. Caruci advised Blasko that if the problem was not corrected and happened again he would have no choice but to submit charges to the Board of Education. However, Caruci had no intention of certifying charges based on the reported three incidents or telling the Board of them.

During Mr. Caruci's testimony the Respondent offered in evidence final evaluation reports concerning Mr. Blasko prepared for 1978 and 1979. They were marked as R-3 and R-4 in evidence, respectfully.

Caruci stated that he first learned that tenure charges had been filed at the end of the 1979 school year when someone from central administration called and asked him what he knew of the matter. Prior to this,

Caruci did not believe he had ever spoken to anyone about the matter except possibly he may have let an assistant superintendent know about it on a purely conversational basis at the time of the incident. However, the Board itself was not informed of the situation.

Caruci stated that the charges came as a shock to him. He had felt the matter closed in February of 1978. When he was contacted, he turned over his file which included the letter of reprimand and D.B.'s letters.

(c) THE "CONTEXT" DEFENSE

As has been mentioned several times before in this decision, Respondent placed much weight on the context in which the remarks were allegedly made. An examination of the testimony of W.B. and Blasko will indicate their respective comments on the relationship which existed between them.

According to W.B., he and Blasko had on several occasions engaged in arm wrestling. The first of these was on the first day of school in September of 1977. At that time W.B. was speaking with friends when Blasko asked him if he thought he was a tough guy and then added that they should see how tough he was. They arm-wrestled to a draw. On two other occasions within a few months of this first incident, they also arm-wrestled.

The only other reference in W.B.'s direct testimony to anything about his interaction with Respondent was mention that at some unspecified time after the comments were made he had been ready to go home when Blasko called him back into class to talk. As a result, W.B. missed his bus and Blasko offered to drive him home. W.B. accepted the ride.

On cross-examination, W.B. said he did not have a strong relationship with Blasko. He did not go out of his way to be in Blasko's company. He did occasionally discuss intramurals, fishing and boxing and did once invite Blasko to watch him box at the Police Athletic League. He may also have discussed his upcoming trip to Israel for his Bar Mitzvah. He also recalled having once told Blasko that he "sat like a gay". Blasko did nothing about this remark.

W.B. acknowledged that at some time, possibly in late December, Blasko had told him and his work group to settle down.

Blasko also testified about the relationship. He stated that he and W.B. had an "excellent" relationship. He knew much about W.B. During discussions they could "tease with no penalty". Anything said was done in jest. The relationship was "unusually good". It was not usual for him to have this kind of "bantering" relationship with a pupil. He described W.B. as a "good buddy", with whom he had frequent discussions about arm-wrestling, soft ball, boxing, Police Athletic League activities, fishing, boating, and basketball.

Blasko recalled that on one occasion W.B. told him that he sat "like a gay" because Blasko had his legs crossed. He had explained to W.B.

that he was comfortable that way. He believed this incident occurred sometime before Christmas during the first semester of school.

Blasko testified that he had disciplined W.B. and his group of students when they had failed to tackle a group assignment one day. He warned them on two occasions to settle down and when they did not, he told them that they would get a failing grade (E) for that day. One such E would not affect a marking period grade.

Blasko testified that when D.B. came to school he apologized profusely and said that nothing of the sort would happen again. When the Letter of Reprimand was issued he thought the matter was at an end. He reviewed the letter for accuracy to be sure that his point of view as to the "context" had been included. He saw no reason to rebut the letter because he had admitted the charges and had promised not to let such things happen again. He acknowledged on cross-examination that he had missed the part in the letter of reprimand which referred to the "job opportunity" incident and spoke of him as having made reference to "Jewish people". He believes that he only referred to "you guys".

On cross-examination, Blasko stated that it was possible that Mr. Caruci had told him in February, 1978 that it was permissable for someone other than the principal to file tenure charges. He assumed at that time that Caruci did not know if D.B. was satisfied with the issuance of the Letter of Reprimand.

Blasko stated that he knew that W.B. had a "joking and teasing" relationship with other students. He mentioned also a time when he had seen W.B. shadow boxing with another teacher, Mr. Grimaldi, at lunch and had also seen W.B. shoot fouls with Mr. Caruci and tease as to who was the best foul shooter. He also claimed to have discussed W.B. with other students.

In answer to the Court's question, Blasko agreed that his prior experience with W.B. had never included any ethnic commentary.

ANALYSIS

As can be seen by the above description of the testimony of the teacher and student, their versions of the facts do not differ all that much. I have examined the testimony and after giving due weight to it as well as to the appearance, demeanor, and age of the parties both at the time of the incidents and at the time of the hearing, I make the following FINDINGS OF FACT with respect to the incident.

1. The incidents occurred in late December, 1977 and early January, 1978. The first incident was the "Christmas candy" affair; the second, the "ruler"; and the third, the "job opportunity" incident.

2. On the day of the "Christmas candy" incident, the teacher did ask the Jewish students in his class to "chuck" up their candy. He may not have actually told them to raise their hands but he did single them out as a group from the

rest of the students. He then took the waste basket from across the room to the door and held it up waist-high as students filed out. Some students deposited items, either paper or candy, in the basket.

3. When the above remarks were made, some students laughed or giggled but I make no attempt to determine whether such reactions resulted from the students believing the remarks to be funny, or out of uncertainty as to the nature, intent, and appropriateness of the remarks. Obviously, different students may have had different reactions.

4. As to the "ruler" incident, I cannot find that either the child's recollection or the teacher's as to location, timing and direction of the remarks is convincing by a preponderance of the evidence. The event occurred over two years ago. At the time the boy was 12 or 13, and the teacher was presumably not paying careful attention to detail. I will discuss the significance of both versions below but the essential fact is clear; that is, that Mr. Blasko used a ruler for the announced purpose of measuring a "Jewish" nose.

5. With respect to the job opportunity incident, I find that Mr. Blasko did make specific reference to Jewish people when making his remarks. Given the prior history of his actions, the clarity of the student's recollection, and the failure of the teacher to object to the wording of paragraph 5 of the Letter of Reprimand, I do not doubt that an ethnic reference was made.

The parties have stipulated certain procedural facts and I, therefore, make the following FINDINGS:

6. Mr. D.B. became aware of the incidents on January 31, 1978.

7. He met with Mr. Blasko on January 31.

8. Mr. Caruci met with Mr. Blasko on February 9, 1978.

9. On February 10, Caruci issued the Letter of Reprimand and wrote to D.B. informing him of the issuance of same.

10. Within several days thereafter, D.B. wrote back to Mr. Caruci.

11. Charges were filed by D.B. with the Board of Education on May 30, 1979.

12. Mr. Blasko responded to the charges on June 14, 1979.

MOTIONS FOR DISMISSAL OF THE PETITION

LACHES

Respondent asserts two grounds for dismissal of the petition. The first of these is the equitable doctrine of laches. Respondent contends that there was an unreasonable delay by the Board of Education in bringing the present charges which caused prejudice to his client. Specifically, he argues

that as of February 10, 1978, the Board had acted, through its agent Mr. Caruci, and that at that point, with a Letter of Reprimand issued and the offer of transfer made, the matter had appeared to be over. Subsequently, W.B. left Blasko's class in June of 1978 and yet D.B. gave no notice to the Board of an intention to press charges until some nine or ten months later. As a result of this delay, and in reliance on what he reasonably thought to be an end to the matter, Blasko made no notes concerning the incidents, acquiesced in the discipline which he otherwise could have grieved, and sought out no other students from whom he might have obtained other, favorable evidence.

In support of his position, Respondent offers the decision of the Appellate Division In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, Burlington County, 1976 S.L.D. 351 as the sole reported decision on the applicability of the doctrine of laches through a delay in presentation of charges by a Board against a tenured employee. In Maratea the local superintendent of schools was faced with 27 charges upon which his dismissal was sought. He argued that the Board had waived any right to rely on any alleged misconduct occurring prior to their decision to reemploy him in the Spring of 1964 for the school year. The decision notes that a charge of misappropriation of school cafeteria funds had been made against the school superintendent and was included as charge #1 on the certification. In discussing the effect of the rehiring the court states:

> "If this were the only substantial charge, and if all the improper conduct charged occurred before Appellant acquired tenure as superintendent, it might well be argued the local Board was precluded from reviving stale charges if it was aware of the existence of them and, nevertheless, reemployed Appellant."

Since other charges existed against Maratea which apparently postdated the reemployment date, the Commissioner determined that the superintendent's unfitness had been proved.

A second case is Smith v. Carty, 120 N.J.L. 335 (E & A 1938). In this matter the Respondent teacher had borrowed money from a loan company by making misrepresentations and had failed to make repayment. The events had occurred in September and October of 1932 and charges were first presented to the Board of Education in April of 1933. Laches was raised as a defense but was rejected by the court because the delay in presenting the charges to the authorities and the school district "could not in any way be chargeable to the local Board of Education." 120 N.J.L. at 344.

> "The applicability of the equitable doctrine of laches must be determined within the context of the relevant facts in each individual matter."
>
> Gloria Ulozas v. Board of the Matawan Regional School District, Monmouth County, 1975 S.L.D., 598 (Commissioner of Education), aff'd 1975 S.L.D., 604 (State Bd. of Ed.), aff'd 1977 S.L.D., 1307 (App. Div.)

In the consideration of the instant case, there appear to be several factors necessarily important to the determination of the applicability of the laches defense. The first is the clear fact that discipline had been meted out by the school principal on February 10, 1978. Secondly, the Board was not presented with charges until May 30, 1979, a perid of 15 months from the date of the Letter of Reprimand and 16 to 17 months from the incidents themselves. Further, D.B. knew of the Letter of Reprimand in February of 1978 and apparently was aware that he could proceed further in seeking action against the Respondent. In addition, it is important to note that Respondent continued to work throughout the 15 month period without any loss of work or pay. The real questions then are whether the action of February 10 can be considered a Board action indicative of knowledge by that body of the charges and whether the proffered reasons for explaining the delay can reasonably be viewed as justifying the passage of time. Finally, one must look to see what prejudice the Respondent suffered as a result of the delay, if any.

It does not appear that the initial charges and the action taken by Mr. Caruci in issuing the Letter of Reprimand to Mr. Blasko was ever made known to the Board. Indeed, at most, Caruci may have discussed it with an assistant superintendent, although he was not at all sure that he had. As such, the first actual Board notice of the incidents was in May, 1979. The Board certified the charges on July 10, after following the procedures set forth in N.J.S.A. 18A:6-10. I cannot find that the Board, which by law is the party charged with making the decision as to whether to certify charges to the Commissioner, delayed at all from the time it actually learned of the charges. The delay between the incidents and the issuance of the Letter of Reprimand and the notice to the Board was solely the responsibility of D.B. who made a conscious decision to wait until his son left Brainard before pressing for further action against Blasko. The sagacity of this decision is open to serious debate but considering the conflicting considerations of potential disruption of W.B.'s studies, potential personality problems, the age of the student, and delay in charging the "bigoted" teacher, I cannot easily fault D.B.'s decision. (One can imagine the difficulty which D.B. faced in assessing the potentialities.)

The doctrine of laches is said to be based on

> "the policy, which requires, for the peace of society, the discouragement of stale demands. ... the adjudicated cases proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the proper forum; that by reason of his delay the average party has good reason to believe that the alleged rights are worthless or have been abandoned, and that, because of the change in condition or relations during this period of delay, it would be an injustice ot the latter to permit him to assert them."
>
> Flammia v. Maller 66 N.J. Super. 440, 453 (App. Div. 1961) citing Galliher v. Cadwell 145 U.S. 368, 372, 12 SCt. 873, 36 LEd 378 (1891)

In this case I can find no actual demonstrable detriment to the Respondent arising out of the delay in the filing of the charges. He never stopped working throughout the period (and continues to do so to this day). This is not a case, as are so many of those reported, where an employee has been disciplined (usually removed) and then delays in asserting rights of appeal. In those cases, the need for filling positions and carrying on work without undue interruptions has often been the basis for a finding of detriment. This factor does not exist here. The mentioned detriments of a failure to make notes, interview students, and grieve the reprimand hold no weight. Respondent had not made any notes, either at the time the incidents occurred, or during the period from the confrontation with D.B. until the Letter of Reprimand was issued, and had also attempted no interviews. Further, there has been no showing whatsoever that he even attempted to do so at any time since the filing of the charges. Finally, he accepted the Letter of Reprimand, presumably after some thought, because he had made comments and recognized their impropriety, even though he believed them to have been taken out of context. His own testimony indicates that this was his thinking. If he had seriously felt wronged by the issuance of the Letter of Reprimand, it can be reasonably assumed he would have grieved. His decision not to do so does not now rise to the level of a detriment.

Respondent's asserted loss of an ability to seek other employment also is an insufficient reason for invoking the doctrine of laches. This is so because there is no showing that his chances of being hired for another position are any greater or lesser today than they would have been if the charges had been presented and prosecuted at some earlier time. As such, the assumed detriment is at most hypothetical.

I CONCLUDE that a consideration of the total circumstances of this case does not support the invocation of the equitable defense of laches against the Board.

LACK OF PROBABLE CAUSE

A second asserted ground for dismissal presented by Respondent is the alleged impropriety of the Board's action in certifying the charges. The Respondent argues that the Board failed to refuse to certify where, as he sees it, no probable cause existed to warrant a dismissal or reduction in salary as required under N.J.S.A. 18A:6-11.

According to this argument, the principal did not believe the facts showed that Blasko was bigoted but only that the remarks, while improper, were made in a kidding, sarcastic manner and meant as a "put down". This conclusion was, it is asserted, based in part on Caruci's knowledge of the boy. Further, the Respondent sees the Board as having acquiesced in the disciplinary action taken when it retained Blasko for the coming school year (1978-79). Finally, the Respondent cites the Board's reluctance to prosecute the charges. (see above)

I CONCLUDE that there was nothing improper in the certification of the charges. This is so because of the fact that there was no evidence that anyone on the Board knew of the charges and the discipline when the decision was made to retain Blasko for the 1978-79 term. Further, given the

nature of the charges, relating as they did to the possibility of openly expressed bigotry on the part of a teacher, the Board's decision that probable cause existed was a reasonable one. The fact that Caruci saw no need to tell the Board of the events or bring charges himself did not mean that his decision was correct or that the Board would have agreed with him had they known of the matter when he did. They might well have seen the situation as far more serious than the principal did.

THE MERITS

Given the facts as I have found them with respect to the three incidents, it cannot reasonably be argued that Blasko's comments were in the least bit proper. What must be remembered above all else is that the person or persons to whom he expressed himself on these occasions were children, albeit 12 or 13 year olds, but still within an age where they are quite impressionable, unsophisticated and open to suggestions as to the nature of acceptable values, conduct, and feelings. In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97. As such, the type of ethnic remarks made by this teacher carried with them a great potential for creating an impression that might have been entirely undesired by the speaker. While it cannot be denied that humor has its place in the classroom and that teachers can attempt to foster friendly relationships with students, the approach taken by Mr. Blasko was extreme, inappropriate and potentially disastrous. It is not necessary to state at length in this opinion either the history of Anti-Semitism or the psychology of racial and ethnic hatred, but it is probably sufficient to say that no one is born with preconceived notions about any racial or ethnic group and must, therefore, learn them from some figure, most often quite possibly and importantly from parents and teachers and other such authority figures. Comments such as those made by Mr. Blasko concerning economic and physical myths mirror, even if unintentionally, far more vicious and dangerous myths on the same subjects. Even the reference to the fact that Jewish students do not celebrate Christmas, in a context where they are singled out as "different" from the majority, is intolerable.

Mr. Blasko has made much throughout the history of this case of the "context" in which these remarks were made, indeed the Letter of Reprimand records his defense of "bantering", "jesting", and humor. Even on the stand, he asserted his "special" relationship with W.B. as giving some legitimacy and propriety to the remarks. He even characterized the comments as in the vein of "Don Rickles" humor.

I can see absolutely nothing about the relationship between W.B. and Blasko that could possibly have permitted Mr. Blasko to conceive that he could appropriately make the type of statements which he made. As he admitted, there was no prior history of such comments between he and W.B. Even if there had been, Mr. Blasko's part in such conversations with a 12-year-old could be seriously questioned. However, what is more important is that according to Mr. Blasko's own account, on two of the occasions his remarks were openly made not only to W.B., his "friend", but to a group of Jewish and non-Jewish students, none of whom have been identified as having any such "special" relationship and who may have been far less an "appropriate" audience for the remarks than Mr. Blasko apparently believed W.B. was. On the whole, I give

no weight at all to the relationship with W.B. as being anything amounting to a defense or a mitigating factor in this case and, based on the testimony of Blasko, Caruci, and W.B., I cannot see where it could have played any mitigating role in Mr. Caruci's decision. It is significant to note that Mr. Caruci's testimony did not include anything which indicated that he had any particular special awareness of W.B. as a student who engaged in the kind of activity that Mr. Blasko said he did.

Mr. Blasko's attempt to equate his comments with the type of humor used so effectively by Don Rickles is another example of this teacher's lack of sense and sensibility. It is quite true that Mr. Rickles has made a career out of using a humor filled with racial and ethnic comments, many of which, if taken in any other context than that which his audience knows he intends them, would often amount to extreme slurs. What makes Don Rickles' presentation effective is probably the fact that his audience fully knows that he is not at all serious when he makes the comments and that he is really mocking the entire concept of racial and ethnic differences by using them in the extreme. What is more, he assaults his own ethnic background as vigorously as any other group which he attacks. Most importantly, with few exceptions, the audience to which he makes his presentation is composed of adults. While no one for a moment would think that every adult who hears Mr. Rickles understands the true nature of his intent and while history clearly shows that adults are the prime victims of the racial and ethnic myths, if this type of humor is tolerable at all it is certainly only when directed at adults. One can hardly imagine that Don Rickles' approach could ever be condoned in a classroom. Finally, it should be noted that not everyone by any means agrees that Mr. Rickles' comments even in the light in which he presents them, are humorous, appropriate or within the bounds of propriety.

THE REMEDY

While the conclusion that Mr. Blasko's actions were sufficient to amount to conduct unbecoming a teacher is not really all that difficult, the question of the proper remedy to be applied is. This is so not only because of the nature of the offense but also because the limited proofs presented show that he has not been previously the subject of any discipline over a long teaching career and further because over the lengthy period since the incidents and the issuance of the Letter of Reprimand he has not been cited for any further discipline of any type. His evaluations, offered in evidence, confirm that nothing has occurred to indicate any repetition of the previous errors. Thus, the remedy must, it seems, take into account the passage of time as well as his clean slate before December of 1977.

When charges of this type are brought, the Commissioner of Education is required to make the detemination as to what the proper penalty should be. In this case, the Board of Education has made no suggestion as to the type or amount of penalty to be applied if the charges are sustained. When one looks back on such a situation, one wonders what the penalty most appropriate just following the incident would have been. Was Mr. Caruci's issuance of the Letter of Reprimand sufficient punishment even if the action was conduct unbecoming and even if the Board was correct in determining that

Mr. Blasko's conduct was of such a nature that reasonable grounds did exist to believe that removal or reduction in pay might be an appropriate penalty? It is my belief that Mr. Caruci's action was not sufficient. While Mr. Blasko had a clean slate, the incident was a very serious one. We are not talking about a mere violation of some school regulation. We are not dealing with internal personnel problems within the professional staff. Instead, we are faced with actions directed toward students which carry a potential, albeit extremely difficult to judge, for some degree of psychological harm to either the students to whom the remarks appeared to apply or those who heard them who might have thought that they expressed an unstated agreement with bigoted attitudes. Because of this potential and because the incidents occurred on several occasions and not just in a single isolated instance, I CONCLUDE that a far more serious penalty could well have been imposed shortly after the incident. Thus, it is my belief that Mr. Caruci should have referred these charges to the Board of Education so that they could have reviewed them and have determined what action to take. As it is, when the Board finally learned of the charges, they did find probable cause and sent the matter to the Commissioner, which is the most that the law permits them to do.

I CONCLUDE that it would be too harsh a penalty to remove Mr. Blasko's tenure. While there are instances where a single event may be sufficient to warrant removal of tenure, under the particular facts and circumstances of this case I do not believe that this is that type of matter. However, I CONCLUDE that a reduction in pay is warranted as a necessary means of making this teacher, and all others, aware of the absolute need for self-restraint in this most sensitive of areas. While the amount of this reduction will not be particularly significant, I believe the message conveyed will be clear and that to do less would not be appropriate.

> "(T) teachers ... are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. ..."
>
> In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Blackhorse Pike Regional, Camden County, 1972 S.L.D. 302, 321

In setting the penalty there are, of course, no absolute guidelines. Since there were three incidents involved, and since I do not believe a substantial reduction in pay is required to serve the purpose at this time, I CONCLUDE that a fine amounting to two(2) weeks pay at the teacher's 1978 pay rate is an appropriate remedy. This finding also considers the expense

and stress which he has no doubt undergone. In Re: Fulcomer, 93 N.J. Super. 404 (App. Div. 1967); In the Matter of the Tenure Hearing of Harry I. Puch, School District of the Township of Delanco, Burlington County, 1977 S.L.D. 95, 105. This amount shall be withheld from the Respondent's paychecks beginning four (4) weeks following the date upon which this decision becomes final or the Commissioner enters his decision.

This recommended decision may be affirmed, modified or rejected by the Commissioner of the Department of Education, Fred G. Burke, who by law is empowered to make a final decision in this matter. However, if Commissioner Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with Commissioner Fred G. Burke for his consideration.

DATE

JEFF S. MASIN, A.L.J.

IN THE MATTER OF THE TENURE	:	
HEARING OF MARK BLASKO,	:	
SCHOOL DISTRICT OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF CHERRY HILL,	:	DECISION
CAMDEN COUNTY.	:	
	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner observes that this matter involves the hearing of the charges made by complainant Board against respondent of conduct unbecoming a tenured teaching staff member. The charges refer to action and statements by respondent that are offensive to W.B., a pupil of the Jewish faith. The three incidents (charges) have been catalogued for reference by Judge Jeff S. Masin, ALJ, in the initial decision as that of (1) the Christmas candy, (2) the ruler and (3) the job opportunity.

The Commissioner briefly describes the incidents as follows:

(a) The Christmas candy incident which involved the distribution of Christmas candy prior to that 1977 holiday by the teacher to the pupils under his supervision. The teacher recalled the candy from pupils of Jewish faith because they did not celebrate Christmas by asking them to spit out the candy into a waste basket.

(2) The ruler incident wherein the teacher held a ruler against W.B.'s nose because "he would like to measure a Jewish nose."

(3) The job opportunity incident wherein W.B. contends that respondent made reference to the wealth of his Jewish family (and others) and the need not to work for money.

The Commissioner finds respondent's pleading of laches as an equitable defense against the Board to be of no merit and it is accordingly dismissed.

The Commissioner notes respondent's further defense wherein he alleges that his remarks were intended as a form of

joke because of his special relationship with W.B. which is denied by the pupil. Respondent likens such humor to that of a professional entertainer who uses strongly ethnic material to invoke humor from an audience.

The Commissioner unequivocally condemns such a misplaced and misdirected sense of propriety. He notes with particularity that the charges involved a pupil of young and tender age. At twelve or fourteen years old every pupil is in a peculiarly sensitive and susceptible state of mind. The Commissioner cannot condone the use of ethnic materials, jokes, or actions that ridicule any racial group directly or by implication. Such disparagement has no place in the classroom. Tordo, supra; Sammons, supra

The Commissioner notes with approval the determination made by Judge Masin that the action taken by respondent in the instant matter was extreme, inappropriate and potentially disastrous. (at p. 12) Judge Masin has presented the facts and his determinations thereof in a thoughtful, well-reasoned manner but the Commissioner cannot agree with the conclusion the Court reached as to the remedy.

Judge Masin categorizes the matter as a very serious one (emphasis supplied). He concludes that to detenure respondent would be too harsh a penalty and determines that a fine amounting to two (2) weeks' pay at his 1978 pay rate would be appropriate. The Commissioner cannot agree.

For the very reasons stated in Sammons, supra, the Commissioner determines that a more severe penalty be invoked:

> "***This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.***"
> (at 321)

The Commissioner determines that teachers carry a heavy responsibility by their actions and comments in setting examples for the pupils with whom they have contact. The kind of behavior which stands unrefuted on the record herein cannot and will not be condoned. The Commissioner concludes that the comportment of respondent herein evidenced is totally indefensible and so foreign to the expectations of the deeds and actions of a professionally certificated classroom teacher as to raise manifest doubts as to the continued performance of that person in the profession.

The Commissioner finds and determines that respondent's lack of judgment and his overt display of insensitivity precludes his continued employment with the Board of Education of the Township of Cherry Hill which is accordingly directed to release him from its employ as of the date of the filing of charges against him, July 12, 1979.

August 28, 1980 COMMISSIONER OF EDUCATION

Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

JOHN SHIELDS, TERESA SHIELDS, LAWRENCE CHAPPA, JR. and **ROBERTA CHAPPA,**	)	INITIAL DECISION **OAL DKT. NO. EDU 5462-79** AGENCY DKT. NO. 399-10/79A

Petitioners,

v.

WEST PATERSON BOARD OF EDUCATION and **PASSAIC COUNTY REGIONAL HIGH SCHOOL DISTRICT No. 1,**

Respondents.

APPEARANCES:

James M. Shashaty for petitioners
(Fontanella, Shashaty, Harris & Lalomia, attorneys)

John G. Thevos for respondent West Paterson Board of Education

Leon A. Consales for respondent Passaic County Regional High School District No. 1

BEFORE THE HONORABLE **KEN R. SPRINGER**, A.L.J.:

This matter concerns the eligibility for bus transportation or reimbursement of travel costs of children who reside less than two miles from a private nonprofit elementary school. On October 5, 1979 petitioners, parents of elementary students living in West Paterson, New Jersey and attending St. James School in Totowa, filed a verified petition with the Commissioner of Education complaining that their children were treated differently than other children similarly situated. They alleged that their children were deprived of transportation benefits while other elementary students, attending private schools located closer to their own homes, were provided with bus service at public expense. In answers filed on October 15, 1979 and November 7, 1979 respectively, respondents West Paterson Board of Education ("local board") and Passaic County Regional High School District No. 1 ("regional board") contended that petitioners' children were ineligible for statutory transportation assistance because their homes were not remote from the school they attended and because the annual cost would exceed $250 per student. Initially, petitioners founded their claims for relief exclusively on N.J.S.A.

18A:39-1 which deals with transportation of pupils remote from schools. At a prehearing conference held on January 17, 1980, the issues were broadened to include the question of whether the boards' action violated equal protection of the law.

The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was conducted on April 24, 1980. All parties were given an opportunity to be heard and to cross-examine witnesses. Documents entered into evidence and considered in deciding this case are listed in the appendix. These exhibits include a certification from the regional board supplementing the testimony of its witness at the hearing. Trial briefs were received by May 27, 1980, and the record was closed as of that date. Although the local board did not file a separate brief, it joined in the brief filed on behalf of the regional board.

Facts supporting petitioners' case were stipulated by all parties during the course of the hearing and have been listed as factual findings No. 1 through 24. However, the parties were unable to agree on the proper method of calculating the number of students requesting transportation to St. James and of assigning these students to possible bus routes. Both these factors influence the cost per pupil of providing transportation. Therefore, the regional board, which undertook the planning of the bus routes, presented testimony on this point. My findings with respect to this factual dispute are listed as No. 25 through 27.

Andrew Hackes, who holds the dual position of board secretary/school administrator for the regional board, explained the procedure employed in obtaining bids and ascertaining transportation costs for the 1979-80 school year. In late fall of the preceding school year, the regional board sent a letter to every nonpublic school in the area, including St. James, enclosing a supply of blank transportation application forms and requesting that a completed form be returned by each applicant no later than February 1 of that year. By the end of June 1979, a transportation coordinator for the regional district began work on potential routes encompassing the three municipalities included within the regional district. Bid requests went out to various bus companies in late summer, with bids to be submitted prior to August 20, 1979. At its meeting of August 21, 1979, the regional board considered the routes based on the bids which came in before 3:00 P.M. of August 20. As of the deadline for receipt of bids, there were 71 children in the regional district seeking transportation to St. James. Of this total, only the Shields child resided in West Paterson and the rest resided in other municipalities.

According to Hackes, a school bus has a maximum capacity of 58 elementary students. It would take at least two school buses to accommodate all of the 71 children wanting to go to St. James. Consequently, the transportation coordinator mapped out two proposed routes, each of which had approximately an equal number of students along the way. Route 85, starting at the Shields' house in West Paterson and ending at St. James in Totowa (Exhibit J-2), would pick up 35 students. Route 86, which did not even go through West Paterson (Exhibit J-3), would pick up 36 students. Using the 35 children living in proximity to Route 85 who had submitted applications for transportation up to that time, Hackes calculated the annual cost per student for that proposed route to be $275.14. He concluded that the contract could not be awarded because the annual cost per student would exceed the $250 allowed by statute.

After the bidding process had been completed and the excessive bid rejected, on August 31, 1979 the Board received four additional applications for transportation between West Paterson and St. James on behalf of the two Chappa children and two others. If these four children had been added in the calculations for proposed Route 85, Hackes admitted, then the annual cost per student for transporting 39 students would be only $246.92. Thus, the cost would be below the $250 cutoff figure that the Board was using to award contracts. Since these four applications were filed late, however, the regional board did not have an opportunity to consider them at the time it reached its decision on transportation for the approaching school year. Hackes insisted that the August 20 deadline for filing applications, immediately preceding the regional board's final meeting in August, was the last practical deadline for accepting applications, considering that successful contractors had to post bonds before bussing any students. Furthermore, Hackes pointed out that one of the 35 children included in the original count was subsequently determined to be ineligible because of the residency requirement. If that child were disregarded but the four late applications were counted, then the annual cost per student for the remaining 38 students would amount to $253.42, again an amount above the $250 cutoff.

On cross-examination, Hackes acknowledged that more than 35 students could have been assigned to proposed Route 85, with a corresponding reduction in the number of students assigned to other routes. Nonetheless, he emphasized that the cost of the bid goes up with the number of stops on the route, so that the total price might increase if extra stops were added. He conceded, though, that the two Chappa children live near the Shields' house, and another stop would not have been necessary to include them on the route.

Due to the large number of potential applicants, Hackes declared that it was not feasible to contact directly all parents whose children might qualify for bussing and remind them to submit timely applications. Nor did Hackes check with the many private schools at the end of the summer to verify that all possible applications had been received. Supplemental documentation (Exhibit R-1) however, revealed that if Hackes had checked with St. James before going to bid he would have learned that 11 of the original 71 applicants were no longer eligible for one reason or another, so that the number of children requiring bussing to that school would have actually decreased rather than increased.

Having carefully reviewed the stipulated facts, testimony and the documentary evidence, **I FIND** the following facts:

1. Both sets of petitioners are residents of the Borough of West Paterson, Passaic County, New Jersey.

2. Petitioners John and Teresa Shields are the parents of Thomas Shields who is a 6th grade student at St. James Parochial School, a nonprofit school, located in Totowa, New Jersey.

3. Petitioners Lawrence and Roberta Chappa, Jr. are the parents of Lawrence Chappa, III, who is a kindergarten student at St. James School and Maria Chappa, who is a second grade student at St. James School.

4. Bus transportation is provided for students of elementary schools not for profit who live in West Paterson and whose own residences are closer than two miles from the school. These nonprofit elementary schools are located outside the Borough of West Paterson.

5. The local board pays for this transportation, but the regional board does the bidding, pays the successful contractors monthly, and, in turn, bills the local board for reimbursement of expenses.

6. Petitioners have seasonably requested bus transportation or reimbursement of expenses pursuant

to statute for their respective children for the school year 1979-80 and their requests were denied.

7. Students living in West Paterson and attending elementary nonprofit schools, some of which live closer to their schools than the Shields and Chappa children live to their schools, are provided bus transportation. The bus transportation so provided is through private contractors whose contract price does not exceed the statutory $250 per student per school year.

8. None of the bussed children attend St. James Parochial School. The schools to which these particular students are bussed include St. Bonaventure Parochial School in Paterson, New Jersey, Holy Angels Parochial School in Little Falls, New Jersey, and St. Phillip Parochial School in Clifton, New Jersey.

9. There are some nonhandicapped public school children in West Paterson living within two miles of their schools who are bussed by the local board. The reason given by the local board for providing this transportation in some cases is as a courtesy for safety reasons, in other cases because of the distance.

10. In the Ryle Park and Dowling Development sections of West Paterson, the children are not transported. The local board's reason is that such children are within walking distance. No child attending Charles Olbon School is bussed, except for children who are handicapped or who require bussing for health reasons. There are some public school children who live on all of Rifle Camp Road, Park Street, South Drive or parts of Squirrelwood Road and Upper Lackawana Avenue through New Street (all of whom live over two miles from school) who are bussed.

11. The one-way route from the entrance to the Shields' home down the steps and left onto Brook view Drive, left on Mt. Pleasant Avenue, right on Brophy Lane, right on McBride Avenue, left on Hillery Street across the bridge leading to Totowa Road, and along Totowa Road to the nearest public entrance of the St. James School measures 1.59 miles.

12. The one-way route from the entrance to the Chappa's home down the steps and right onto Mt. Pleasant Avenue, left on Rose Place, right on McBride Avenue, left on Hillery Street across the bridge leading to Totowa Road, and along Totowa Road to the nearest public entrance of the St. James School measures 1.41 miles.

13. Petitioners make no claim for bus transportation or reimbursement on the basis of their children living more than two miles from St. James School.

14. On August 10, 1979 advertisements and route descriptions were sent to eighteen different bus companies in Northern New Jersey which included Routes 85 and 86 to the St. James School in Totowa. Route 85 was to start at 50 Brookview Drive in West Paterson and was scheduled for certain pick-ups in Totowa. Route 86 embraced several pick-ups in Totowa.

15. A total of 71 applications were filed for students requesting transportation to St. James School in Totowa. Of this number, 70 applications were for students residing in Totowa and the 71st application was for Thomas Shields from West Paterson.

16. Only Kevah Konner, Inc. of Pine Brook, New Jersey submitted bids for Routes 85 and 86 on August 20, 1979 when the bids were due. A total of 35 and 36 students respectively were scheduled for Routes 85 and 86. Unfortunately, the bids received from Kevah Konner were $53.50 per day, round trip, for each route. The $53.50 price per day x 180 days amounts to $9,630.00 per year. When the cost is computed by the number of students assigned to each route as above, the cost for Route 85 amounts to $275.14 per student; the cost per student for Route 86 was $267.50. In both instances the cost per student exceeded the $250 allowed per year.

17. The local board is responsible for and administers any bussing of elementary public schools which may occur in the Borough of West Paterson.

18. The distances from houses on Maple Avenue, Taft Avenue, Mt. Pleasant Avenue and Jackson Avenue

by the most direct route are closer to Public School No. 4 in West Paterson than the Shields' house is to St. James School in Totowa by its most direct route.

19. The distances from houses on Maple Avenue, Taft Avenue, Mt. Pleasant Avenue and Jackson Avenue by the most direct route are closer to Public School No. 4 in West Paterson than the Chappa's house is to St. James School in Totowa by its most direct route.

20. Some elementary public school students living on Maple Avenue, Taft Avenue, Mt. Pleasant Avenue and Jackson Avenue in West Paterson are bussed by the local board to Public School No. 4. These students reside less than two miles from Public School No. 4 as measured by the most direct route.

21. On January 23, 1979, petitioners Shields filed with the regional board an application for transportation or reimbursement of travel expenses during the 1979-80 school year on behalf of their child Thomas.

22. On August 31, 1979, petitioners Chappa filed with the regional board an application for transportation or reimbursement of travel expenses during the 1979-80 school year on behalf of their children Lawrence, III and Maria.

23. On August 31, 1979, one Adeline Migliaccio filed with the regional board an application for transportation or reimbursement of travel expenses from West Paterson during the 1979-80 school year on behalf of her child Louis Migliaccio, a kindergarten student at St. James School.

24. On August 31, 1979 one Nicolina Russo filed with the regional board an application for transportation or reimbursement of travel expenses during the 1979-80 school year on behalf of her child Joyce Lynn Russo, a 7th grade student at St. James School.

25. The decision to divide the 71 applications for transportation to St. James School as equally as possible between the two proposed routes was a logical and reasonable exercise of the regional

board's discretionary authority to select routing patterns and designate bus stops. Even if a different allocation of students between the two routes might personally benefit petitioners, no proof has been presented that such an alternative would not disadvantage other students who have also applied for transportation.

26. In view of the necessity of reviewing all bids at the regional board's last meeting in August and obtaining the required bonds from successful contractors prior to the opening of school in September, it was necessary and appropriate to establish a cutoff date of August 20 beyond which applications for transportation will not be considered in planning routes.

27. Responsibility for obtaining forms and filing timely applications for student transportation rests with the parents of qualified students and not with the school administration. Any late applications filed after August 20, 1979 need not have been considered by the regional board in finalizing its bus routes for the upcoming 1979-80 school year.

Based on the facts adduced at the hearing and the applicable law, **I CONCLUDE** that the school bussing program, as administered by respondents, unlawfully discriminates against petitioners' children.

Although repeated reference was made by counsel to N.J.S.A. 18A:39-1, that statute applies exclusively to transportation of "remote" students and has no direct bearing on the outcome of this case. In summary, N.J.S.A. 18A:39-1 provides that whenever any school district provides bus transportation to public school students, it must also provide transportation, or reimbursement of travel expenses up to $250, to students attending nonprofit private schools in New Jersey, provided that such private school is located within New Jersey not more than 20 miles from the student's residence. By regulation, the term "remote" for purposes of this statute has been defined to be beyond two miles for healthy elementary pupils. N.J.A.C. 6:21-1.3. Given the undisputed fact that petitioners reside less than two miles from St. James School by the most direct route (Factual Findings No. 11 and 12), petitioners cannot claim any rights granted by this statute.

While transportation of public and private school students living remote from school appears to be mandatory, Bd. of Educ. of West Amwell, etc. v. State Bd. of Educ. 5 N.J. Misc. 152, 135 A. 664 (Sup. Ct. 1927), Bd. of Educ. of Woodbury Hts. v. Gateway Reg. High School, 104 N.J. Super. 76, 84 (Law Div. 1968), the determination of whether or not to transport students living closer than the established two miles lies entirely within the sound discretion of the board. West Morris Reg. Bd. of Educ. v. Sills, 58 N.J. 464, 475 (1971), cert. den. 404 U.S. 986, 92 S. Ct. 450, 30 L. Ed. 2d 370 (1971); Pepe v. Bd. of Educ. of Livingston, 69 S.L.D. 47, 49. State aid for transportation of pupils is unavailable if the board elects to bus students for lesser distances than the regulatory minimum. N.J.S.A. 18A:39-1.1.

Prior administrative decisions consistently hold that school boards have broad authority to determine which less-than-remote students should be bussed because of hazardous road conditions or other good reasons. Beggans v. Bd. of Educ. of West Orange, 74 S.L.D. 829, aff'd State Bd. of Educ. 75 S.L.D. 1071, aff'd New Jersey Superior Court, Appellate Division 75 S.L.D. 1071; Pepe v. Bd. of Educ. of Livingston, supra. It is well established that the Commissioner of Education will not substitute his own judgment for that of a local board in matters within the exercise of its discretionary authority, or intervene unless there is a clear showing of abuse of such discretion. Pepe v. Bd. of Educ. of Livingston, supra at 50. A board of education may, in good faith, evaluate conditions in various areas of the school district with regard to conditions warranting transportation. It may then make reasonable classifications for furnishing transportation, taking into account differences in the degree of traffic and other conditions existing in the various sections of the district. Shrenk v. Bd. of Educ. of Ridgewood, 1961 S.L.D. 185, 188. Similarly, the Commissioner will not disturb the good faith decision by the local board to locate bus stops at certain places rather than others, Centofanti v. Bd. of Educ. of Wall, 1975 S.L.D. 513 and Baldanza v. Bd. of Educ. of Tinton Falls, 1976 S.L.D. 362, or to select one bus route as distinguished from an alternative route, Walters v. Bd. of Educ. of Mendham, 77 S.L.D. 854, regardless of the Commissioner's personal view regarding the wisdom of the board's particular action.

Nonetheless, the Commissioner will not condone an arbitrary rule which provides transportation for some pupils and not others similarly situated. Beggans v. Bd. of Educ. v. West Orange, supra, 74 S.L.D. at 831. The Commissioner has not hesitated to invalidate board transportation policy which favors certain students over others in

entirely the same circumstances, Bd. of Educ. of Hazlet v. Garrison, 72 S.L.D. 296, or discriminates against some students without good cause. Klastorin v. Bd. of Educ. of Scotch Plains, 1956-7 S.L.D. 85.

Petitioners have established that some elementary students going to public or private schools other than St. James are provided with transportation by respondents, despite the fact that they live closer to their destinations than the Shields and Chappa children live to their destination (Factual Findings No. 4, 7, 19 and 20). Once respondents have voluntarily opted to provide bus service to some students living within two miles of school, it is incumbant upon them to justify why others in seemingly identical circumstances receive unequal treatment.

Ostensibly the reason that some of these other children are bussed is "as a courtesy for safety" (Factual Finding No. 9), yet the record is barren of any evidence that these children must traverse more dangerous highway conditions than petitioners' children encounter. Other children residing less than two miles from their schools are given transportation supposedly "because of the distance" (Factual Finding No. 9), but again the record is devoid of any showing that these children must travel farther than petitioners' children to get to school. Instead, the only possible basis for different treatment which finds support in the record is the fact that the cost of bussing petitioners' children exceeds $250 per student (Factual Finding No. 16), whereas the other students can be bussed at less expense (Factual Finding No. 7). As set forth above (Factual Findings No. 25, 26 and 27), this Court has expressly rejected petitioners' argument that the regional board erred in its method of calculating the average cost of bussing students to St. James.

It does not follow, as respondents contend, that they are automatically relieved of any obligation to extend equal treatment to petitioners merely because the cost is greater than $250 per child. Of course, it would be incongruous to place a $250 limit on long distance transportation, as the Legislature has done in N.J.S.A. 18A:39-1, but to force a school board to spend more than $250 on short distance transportation. With respect to remote travel, the Legislature has provided in N.J.S.A. 18A:39-1 that in the event the bid exceeds the $250, the parent "...shall be eligible to receive said amount toward the cost of [a student's] transportation to a qualified school..." Applying the same approach to nonremote travel would be fully in keeping with equal protection considerations and, at the same time, would be harmonious with clearly expressed legislative intent. To hold otherwise, on the other hand, would result in a policy which

"confers its benefits by fortuitous circumstances alone on one group at the dollar expense of all residents of the community." Bd. of Educ. of Hazlet v. Garrison, supra, 1972 S.L.D. at 297. Accordingly, the cost of providing bus service does not constitute a sufficiently rational basis to withstand petitioners' equal protection attack, at least insofar as petitioners ask reimbursement of travel expenses up to the $250 amount which the respondents willingly spend for others similarly situated.

For the foregoing reasons, **IT IS ORDERED THAT** the local board forthwith pay to the Shields the amount of $250 for reimbursement of travel expenses to and from St. James School incurred on behalf of their child.

IT IS FURTHER ORDERED that the local board forthwith pay to the Chappas the amount of $500 for reimbursement of travel expenses to and from St. James School incurred on behalf of their two children.

AND IT IS FURTHER ORDERED that the regional board is directed to fully cooperate in transmitting these payments to petitioners; in all other respects, the petition against the regional board is **DISMISSED.**

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

OAL DKT. NO. EDU 5462-79

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

July 10, 1980
DATE

Ken R. Springer
KEN R. SPRINGER, A.L.J.

JOHN SHIELDS, ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARDS OF EDUCATION OF THE BOROUGH OF WEST PATERSON, AND PASSAIC COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	

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

The Commissioner observes that joint exceptions were filed by respondents pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Judge Ken R. Springer, ALJ, as being founded on the equal protection doctrine of the law which the Board alleges is improper. The Commissioner cannot agree.

This issue has previously been considered by the Commissioner in Howard Schrenk et al. v. Board of Education of the Village of Ridgewood, 1960-61 S.L.D. 185 and Board of Education of the Township of Hazlet v. Earl B. Garrison, County Superintendent of Schools, 1972 S.L.D. 296 wherein the Commissioner said in part:

> "***The issue involved herein is a simple one, i.e., whether or not the proposed policy is discriminatory and a denial of those basic rights to equal protection under the law, which must be afforded to everyone. The Commissioner holds that it is***."
>
> and
>
> "***[A] policy exists which would confer its benefits by fortuitous circumstances alone on one group at the dollar expense of all residents of the community and in a discriminatory manner with respect to other children***." (at 297)

The Commissioner holds that the Board must either provide transportation for all pupils living the same distance from their school or must exclude pupils who reside less than two miles from their school and are accorded bus transportation.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Commissioner directs the Board of Education of the Borough of West Paterson to forthwith pay to the Shields the sum of $250 and to the Chappas the sum of $500.

COMMISSIONER OF EDUCATION

August 28, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

EDWIN R. OSKAMP,	)	INITIAL DECISION
PETITIONER,	)	**OAL DKT. NO. EDU 2626-79**
v.	)	**AGENCY DKT. NO. 222-5/79A**
BOARD OF EDUCATION OF HAMPTON	)	
TOWNSHIP, SUSSEX COUNTY,	)	
RESPONDENT.	)	

APPEARANCES:

Carl J. Kerbowski for petitioner, Edwin R. Oskamp

Craig V. Dana for respondent, Board of Education of Hampton Township (Morris, Downing & Sherald, attorneys)

BEFORE THE HONORABLE **BRUCE R. CAMPBELL,** A.L.J.:

DOCUMENTS IN EVIDENCE

P-1 Employment contract dated June 29, 1976 between Dr. E. Oskamp and Hampton Township Board of Education, 3 pages.

P-2 Handwritten document dated August 12, 1978, one page, letter to Hampton Township Board of Education from Dr. E. Oskamp.

P-3 One page document entitled: Hampton Township Board of Education, dated August 25, 1978, Re: Claim for reimbursement.

P-4 Letter dated August 28, 1978 from Dr. E. Oskamp to the Hampton Board of Education, one page.

P-5 Letter dated October 3, 1978 to Dr. E. Oskamp, signed by the Hampton Township Board of Education secretary, one page.

P-6 Voucher similar to P-3, Re: Claim for reimbursement.

R-1 Dr. Oskamp's record of vacation days, holidays and personal days for 1976-1977.

R-2 Dr. Oskamp's record of vacation days, holidays and personal days for 1977-1978.

R-3 Dr. Oskamp's record of vacation days, holidays and personal days for 1978-1979.

R-4 Minutes of the Executive Session, dated August 14, 1978, 4 pages.

R-5 Minutes of the Executive Session, dated August 15, 1978, 7 pages.

R-6 M.E. McKeown School
Re: Dr. E. Oskamp
Dates: 7/11-12-13-14, 1979
4 vacation days

R-7 M.E. McKeown School
Re: Dr. Oskamp
Dates: Professional days: July 14-21 (6)
Personal days: (vacation) July 11, 12, 13 (3)

R-8 M.E. McKeown School
Re: Dr. E. Oskamp
Dates: Personal days: August 7 and 8 (2)

R-9 Newspaper Article in the New Jersey Sunday Herald and New Jersey Herald, re: change of date of the Board of Education meeting.

R-10 Minutes of the Regular Meeting of the Hampton Township Board of Education, dated August 14, 1978, 8:00 p.m.

Petitioner claims entitlement to compensation for 22 vacation days allegedly earned but unused at the time of his resignation from the employ of the Hampton Township Board of Education (Board).

The Board denies petitioner has any such entitlement and requests the petition be dismissed.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Hearing was held on March 13, 1980, at the Sussex County Administration Building, Newton. Posthearing submissions were filed. The record was closed and the matter ready for disposition on June 10, 1980.

Petitioner was employed by the Board as chief school administrator from July 1970 through August 1978. He resigned from that position on August 15, 1980, (T. 64-66) although the letter of resignation was dated August 12, 1978. (P-2) The last sentence of the resignation letter reads, "This resignation is to be effective at the conclusion of my accumulated vacation and related days." (Ibid.)

The present controversy arises from differing points of view held by the parties as to the number of vacation days involved. Petitioner maintains he is entitled to 22 days. The Board calculates his entitlement to be five days.

The testimony of seven witnesses was taken and 16 documents were admitted in evidence.

I

From the testimony and documentary evidence adduced at the hearing, **I FIND:**

1. The contract of employment between petitioner and the Board in effect at the time material herein provides at Paragraph 10, "That the Superintendent shall receive thirty working days of vacation annually exclusive of legal holidays. Vacation days must be used within the contract period when they are earned." (P-2)

2. The form of the contract was supplied by petitioner.

3. During the period of his employment, petitioner routinely took the bulk of his vacation days in July and August. No objection to this arrangement was made by the Board. (T-8)

4. The Board had no policy as to when the chief school administrator must or must not take vacation days. (T. 104, 150)

5. Petitioner submitted a voucher (P-3) on August 25, 1978 for two-twelfths of his contracted travel allowance and for payment for 27 accumulated vacation days.

6. The travel allowance was paid.

7. The Board resolved to transfer three days that petitioner had taken in July 1978 as vacation days from the vacation designation to the personal leave designation. (T. 72, 96, 105)

8. The Board further resolved to compensate petitioner for five unused vacation days accrued during July and August 1978.

9. Petitioner was notified of these actions by letter dated October 3, 1978. (P-5)

10. On or about May 29, 1979, the instant petition was filed. It was subsequently amended to demand 22 days' pay.

II

This entire controversy turns on one point: is or is not petitioner entitled to all of his vacation days upon commencement of a contracted term of employment?

Certain benefits such as sick leave are available in toto to school employees from the onset of the school year. The school laws contain basic provisions pertinent to sick leave which, taken together, make it clear that sick leave benefits are available in full at any time during an employment year. See Hutchenson v. Totowa Board of Education, 1971 S.L.D. 512.

The school laws being silent on the matter of vacations, it is necessary to examine the language of the contract between the parties on the subject. As previously noted, Paragraph 10 of the contract states, in its entirety, "That the Superintendent shall receive thirty working days of vacation annually exclusive of legal holidays. Vacation days must be used within the contract period when they are earned."

Where the parties disagree as to the meaning of language in a contract, an adjudication must attempt to construe the controverted language as would a reasonably objective third party. At 17A C.J.S., Contract, § 324 at 217 it is stated

> It is a general rule of construction that where a contract is ambiguous it will be construed most strongly against the party preparing it...
>
> The reason for the rule of strict construction against the party preparing the contract is that one who speaks or writes can, by exactness of expression, more easily prevent mistakes in meaning than one with whom he is dealing and that he who has brought the

> agreement into existence and is thus responsible for its inadequacy should justly suffer for its shortcomings. Another reason given is that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage.

This reasoning has been applied in New Jersey cases. Payley v. Barton Sav. and Loan Ass'n., 82 N.J. Super. 75 (App. Div. 1964); Bank of America, Nat. Trust and Sav. Ass'n. v. Horowytz, 104 N.J. Super. 35 (Cty. Ct. 1968).

The Commissioner has addressed the question of claimed vacation time by board of education employees. In Ralph W. Herold v. Board of Education of the Borough of Mount Arlington, Morris County, 1967 S.L.D. 255, Herold was employed by the Board for several years as its administrative principal and claimed compensation for purported vacation leave from the beginning of his last contract year to the date of his resignation prior to the conclusion of that year. Herold had taken vacations with pay at the beginning of each of the contract years of his employment, but as vacation earned for the previous year's employment, a condition set forth clearly in the employment contract. The Commissioner held that absent an employment contract provision for payment for accrued vacation leave in the event of early termination or provision for salary in lieu of vacation leave, Herold had no claim for such payment. (Emphasis supplied.)

In Ronald Giberson v. Board of Education of the Borough of South Plainfield, Middlesex County, 1970 S.L.D. 433, Giberson was employed by the Board as a principal for several years and tendered his resignation on July 4, 1969, effective sixty days therefrom. Giberson continued to perform his duties during the sixty day period but failed to receive compensation for the last two week period. The Board held that because he had received vacation leave with pay during the 1969 summer and resigned, it owed him no compensation after August 15, 1969, two weeks prior to the expiration of the sixty day notice. The Board filed a counterclaim to recoup compensation it paid Giberson for vacation pay received during the 1969 summer. The Commissioner observed that neither party submitted an employment contract or Board policy regarding vacation leave and found that petitioner's claim for compensation for the last two weeks was for work performed and not for vacation pay. The Commissioner granted Giberson's claim for compensation and directed the Board to adopt appropriate policies to govern vacation leaves to avoid similar disputes in the future. (Emphasis supplied.) See also

Marilyn Arzberger v. Board of Education of the Township of Neptune, Monmouth County, 1976 S.L.D. 835.

It is clear from the foregoing that the Commissioner has placed great reliance on contract language or the absence of it in vacation time controversies.

Applying the principal of Herold to the present matter yields a result unfavorable to petitioner. As in Herold, there is no contractual provision for payment for vacation in the event of early termination or provision for salary in lieu of vacation. The Board did give some consideration to petitioner by reclassifying three vacation days as personal leave days and by tendering compensation for five unused vacation days accrued during July and August 1978. This it had the power to do, but was under no obligation to do.

Applying the construction against party using words reasoning found in 17A C.J.S. § 324 yields a result similarly unfavorable to petitioner. It is stipulated that he supplied the form of the contract. Construing the language liberally and most favorably in favor of the opposite party requires a finding that nothing in the contract establishes a right to all vacation days upon commencement of the contract. It is noticed here, however, that even without recourse to the unfavorable construction concept the subject language still fails to support petitioner's claim.

In consideration of the above findings and discussion and based upon a thorough review of the record in this matter, **I CONCLUDE** that petitioner has failed to carry the burden of persuasion in this matter. The action of the Board in denying petitioner's claim for reimbursement for 22 vacation days has not been shown to be in any manner improper.

Accordingly, the petition **IS DISMISSED**.

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

OAL DKT. NO. EDU 2626-79

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

16 JULY 1980
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, A.L.J.

EDWIN R. OSKAMP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMPTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in his exceptions alleges that because his letter of resignation reads "This resignation is to be effective at the conclusion of my accumulated vacation and related days" that it was petitioner's understanding that he would be paid for twenty-seven vacation days which he alleges are due him. The Commissioner cannot agree.

The Commissioner notes the language of the contract "***thirty working days of vacation annually exclusive of legal holidays. Vacation days must be used within the contract when they are earned***" (Emphasis Supplied). The Commissioner cannot agree with petitioner's logic wherein he testified that, although he had only worked two months of the 1978-79 fiscal year, he had earned twelve months of vacation. (Tr. 26) The Commissioner finds no merit in such a contention which is not substantiated by petitioner's submission for two-twelfths of his travel allowances for the months of July and August of that year.

In the initial decision Judge Bruce Campbell, ALJ, refers to a prior holding made by the Commissioner thusly:

> "Certain benefits such as sick leave are available in toto to school employees from the onset of the school year. The school laws contain basic provisions pertinent to sick leave which, taken together, make it clear that sick leave beneficts are available in full at any time during an employment year. See Hutchenson v. Totowa Board of Education, 1971 S.L.D. 512." (at 4)

The Commissioner realizes that Judge Campbell's decision was written on July 16, 1980 and is constrained to correct such statement because of a recent decision by the State Board, Raymond L. Schwartz, William A. Bulmer and Dover Education Association v. Board of Education of the Town of Dover, Morris County, Commissioner's Decision December 24, 1979, rev'd State Board August 7, 1980 in which was said:

> "We respectfully disagree with the Commissioner in his interpretation of that statute as requiring that every steadily employed staff member be allowed at least 10 days of sick leave in any school year regardless of when his employment began in that year. The Commissioner's view would mean that if an employee started work on June 1st, became sick on the next day and was out ill for the remainder of the school year, he would be entitled to 10 days of sick leave with pay -- the same amount of leave that would be available to a teacher who had worked the entire year. We believe that such an interpretation is not required by the language of the statute, and that it finds no support in reason or logic.
>
> As for precedents, the Commissioner has ruled that part-time employees are entitled to sick leave only on a pro-rated basis; that for example, a teacher employed for half the days of an academic year may obtain one-half the benefit of those steadily employed on a full-time basis. Woodbridge Federation of Teachers v. Woodbridge Board of Education, 1974 S.L.D. 1201, 1206. The principle of apportionment has thus been applied with respect to sick leave for persons working part-time throughout the year. We perceive no reason why the same equitable principle should not likewise govern where the part-time element pertains to the portion of the year worked rather than the portion of the day or the week. Insofar as any prior decisions of the Commissioner are inconsistent with this view, we believe that they should not be followed.
>
> Since the statute thus requires a minimum of one day's sick leave per month worked rather than a minimum of 10 days in any one year regardless of length of time worked.***"
>
> (at 1)

Judge Campbell writes that school laws are silent on vacations. The Commissioner agrees but finds it logical to extend the principle enunciated by the State Board in Schwartz, supra, to the accrual of vacation time. The Commissioner affirms the Board's determination as proper in tendering petitioner compensation for five unused vacation days accumulated.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

September 4, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

JOSEPH A. LUPPINO V. BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY	))))))	INITIAL DECISION OAL DKT. NO. EDU 4592-79 AGENCY DKT.NO. 366-9/79A

APPEARANCES:

Harold J. Ruvoldt, Jr., Esq., for Petitioner.

John V. Gill, Esqs., for Respondent.

BEFORE THE HONORABLE ROBERT P. GLICKMAN, A.L.J.:

This matter comes before the Court by way of petition filed pursuant to N.J.S.A. 18A:6-9 vesting the Commissioner of Education with jurisdiction to hear or determine all controversies and disputes arising under the school laws. This matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference on April 3, 1980, the following issues were identified:

1. Did petitioner acquire the status the tenure in the position of principal in the Bayonne Public School system?

2. Did the respondent, Board of Education, unlawfully abolish the position of principal for home instruction on August 21, 1979, in violation of N.J.S.A. 18A:28-9?

The following stipulations were made at the prehearing conference:

1. Prior to November 18, 1976 petitioner, Joseph A. Luppino, was assigned duties and responsibilities of "Acting Administrator for Home Instruction."

2. On November 18, 1976, by resolution of the Board of Education, Joseph A. Luppino was promoted and appointed as administrator for home instruction in the City of Bayonne.

3. On November 17, 1977, by resolution of the Board of Education, Joseph A. Luppino was appointed to the position of principal for home instruction.

4. On August 21, 1979, the Bayonne Board of Education abolished the position of principal for home instruction.

5. As a result of the abolition of the position of principal for home instruction, petitioner is now serving as coordinator of C.E.T.A. work study program and he receives a salary as a "teacher."

On June 12, 1980 and June 13, 1980 a hearing took place at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. At the commencement of the hearing, petitioner's attorney moved to bifurcate the two issues set forth in the prehearing order, which motion was not opposed by respondent's attorney. The Court granted petitioner's motion and the hearing only dealt with issue one, set forth in the prehearing order.

The following exhibits were marked into evidence:

1. J-1, Posting dated August 31, 1976 for position of administrator for home instruction.

2. J-2, Posting dated October 6, 1977 for position of principal of home instruction.

3. P-1, Certificate dated February 4, 19766 certifying Joseph Luppino as secondary school teacher of social studies and elementary school teacher.

4. P-2, Certificate dated September,1968 certifying Joseph A. Luppino as elementary school principal.

5. P-3, Certificate dated August, 1977 certifying Joseph A. Luppino as principal/supervisor.

6. Letter dated July 15, 1977 from Joseph F. Zach, Assistant Commissioner of Education, to Mr. Russell W. Carpenter, County Superintendent of Schools.

7. P-5, Letter dated January 5, 1978 from Joseph A. Luppino to Dr. Russell W. Carpenter, Jr.

8. P-6, Letter dated January 12, 1978 from Russel W. Carpenter, to Joseph A. Luppino.

9. P-7, Teacher evaluationdated December 7, 1976 of Saverio Maggio by Joseph A. Luppino.

10. P-8, Teacher evaluation dated May, 1979 of Anna Zsidisin by Joseph A. Luppino.

11. P-9, Approximately 38 teacher evaluations between December, 1976 and May 24, 1977 by Joseph Luppino.

12. R-2, Minutes of the Bayonne Board of Education meeting of August 24, 1976.

13. R-3, Minutes of the Bayonne Board of Education meeting of November 16, 1976.

14. R-4, Organizational chart of the Bayonne City Public School system.

15. R-5, Transcript of the Bayonne Board of Education meeting of November 17, 1977.

The following witnesses testified on behalf of petitioner:

Joseph A. Luppino, Kenneth Chmielewski, Peter Duda, and Lillian Carine.

The following witnesses testified on behalf of respondent:

Paul Hyman, Marie Farley and James Murphy

On rebuttal, petitioner called John J. Pagano and John V. Dorio, Jr.

Posthearing proposed findings of fact were requested to be submitted by July 7, 1980 on which date the hearing was deemed to be concluded. See N.J.A.C. 1:1-16.1.

The threshhold issue which must be decided by this Court is whether or not the duties performed by petitioner as administrator for home instruction were substantially the same as those performed as principal for home instruction.

Mr. Luppino testified that he was a teacher in the Bayonne Public School system from 1962 until 1976 when his assignment was changed. On or about September 30, 1976, he became the acting administrator of home instruction. As such, he performed the following responsibilities and duties: 1) met with parents who brought documentary evidence of the disability of their children; 2) communicated with school youngster's doctors; 3) communicated with child's school teacher; 4) set up meetings with home instruction teachers and child's regular teacher; 5) transferred the child from his regular school register to home instruction register; 6) required home instruction teachers to submit lesson plan books every Friday; 7) evaluated home instruction teachers; 8) administered tests to children on home instruction; 9) graded children on home instruction work.

All of the regular functions normally performed in the regular school were provided by home instruction.

In November, 1976, Mr. Luppino was appointed administrator of home instruction. There was no change in his duties from those performed as acting administrator of home instruction. On November 17, 1977, he was appointed principal for home instruction. Again, none of the duties performed as acting administrator or administrator of home instruction were changed once he became principal of home instruction.

While Mr. Luppino was acting administrator and administrator of home instruction, he was often assigned to act as principal in some of the district schools for a period of one or two days. Once he became principal of home instruction, he was assigned as a principal of Washington Street School from December, 1977 to June, 1978.

In August, 1979 the position of principal for home instruction was abolished. Subsequent to its abolition, petitioner's salary was reduced to that of a teacher.

On cross-examination, Mr. Luppino testified that the teachers who worked for home instruction were paid on an hourly basis and had no written contracts with the Board of Education. Mr. Luppino asserted that he was involved in curriculum development as administrator and principal to meet the needs of the sick children at home. As administrator of home instruction, Mr. Luppino reported to the superintendent. There were an average of 30 teachers and 75 students under him.

Kenneth Chmielewski testified that he was a member of the Board of Education in September, 1976. He was familiar with both the creation of the position of administrator of home instruction and principal of home instruction. As far as he was concerned, there is no difference between the two positions. The reason the title of administrator was first chosen, as opposed to principal, was that there was some doubt as to whether a person could be a principal without a building to report to. When the Board determined that one could be a principal without having a building, the title was changed from administrator of home instruction to principal of home instruction. The Board did not change any of the duties when it changed the titles.

Peter Duda was a Board member when the position of principal of home instruction was created sometime in November of 1977. Mr. Duda was also familiar with the job of administrator of home instruction and does not feel that the creation of the position of principal of home instruction changed the duties of the job in any respect.

Lillian Carine indicated that she was appointed to the Bayonne Board of Education upon which she served from 1976 until the beginning of 1980. The reason that Mr. Luppino was given the title of administrator rather than principal was that one could not be a principal without a physical plant. Subsequently, the position title was changed from administrator to principal of home instruction when it was ascertained that the new title was permitted. The Board did not change any of the job duties.

Paul Hyman, the President of the Board, indicated that he was on the Board in August, 1976. He recalls that the position of principal for home instruction was established because of an increase in the amount of responsibilities and duties. Mr. Luppino's added duties involved evaluations and budgetary matters which responsibilities he did not have as an administrator. However, Dr. Hyman was unable to indicate exactly what duties Mr. Luppino performed as a principal which were different from those performed as an administrator.

Marie Farly indicated that she is executive secretary to the superintendent. As such, she attends most of the Board of Education meetings. During the period of time from August to November, 1976, she has no recollection of any discussion at Board caucuses of making Mr. Luppino principal of home instruction. Additionally, at the request of Mr. Gill, she searched through the central office files and was unable to locate any evaluations done by Mr. Luppino while he was administrator of home instruction. She was, however, able to find evaluations done by him while he was principal of home instruction.

James Murphy, the present Superintendent of Schools, testified that he has been employed by the Bayonne Board of Education since 1964. From 1976 to December of 1978 he was assistant superintendent in charge of personnel. Since 1978 he has been superintendent. He drew up the posting for principal of home instruction. (J-2) When Mr. Luppino was administrator of home instruction, he reported to Mr. Murphy.

Prior to 1976, the home instruction program was run by a secretary in the superintendent's office. The teachers who gave home instruction were full-time teachers who wanted to make extra money by working after school. These teachers were paid $8.00 an hour. Now, Mr. Luppino no longer uses full-time teachers.

Mr. Murphy recalls discussions with regard to the appointment of Mr. Luppino as administrator for home instruction, but recalls none at the Board caucuses with regard to naming him principal of home instruction.

Mr. Murphy felt the duties of the administrator of home instruction were essentially the same as when the secretary in the superintendent's office ran the program. When Mr. Luppino became principal of home instruction, he took on added duties. One of the added duties involved budget, which responsibility Mr. Luppino did not have as administrator of home instruction. As principal, he was charged with drawing up his own budget. Additionally, while Mr. Luppino was administrator of home instruction, he was not required to conduct evaluations of his teachers, which he was required to do as principal of home instruction.

During the time that Mr. Luppino was administrator of home instruction, there were monthly principal meetings which were not attended by him. However, after he was named principal of home instruction, he did attend the principal meetings.

After Mr. Luppino served as administrator for a year, he was appointed principal of home instruction by the Board because the Board felt that the position should be upgraded and that his duties as principal would require a higher responsibility than those as administrator.

When Mr. Luppino was administrator, there was no established procedure by which he could evaluate home instruction teachers. Mr. Murphy indicated that the form used by Mr. Luppino in May, 1979 as an evaluation form was essentially the same as that used by him between December, 1976 and May, 1977. Mr. Luppino did perform 39 evaluations while he was an administrator of home instruction which he was not required to do. (Tr. 63)

John J. Pagano testified on behalf of petitioner. He was the School Board attorney for the Bayonne Board of Education from 1959 until 1978 when he retired. The title of administrator of home instruction was initially used because of Mr. Pagano's objection that there had to be a physical building in order to name a principal. He wrote an opinion in 1961 that in order to be a principal there had to be a school. The Board was entertaining making Mr. Luppino principal of home instruction, but delayed this title because of counsel's legal opinion. A letter from Joseph Zack, Assistant Commissioner of Education (P-4) indicating that the appropriate title for Mr. Luppino's duties would be principal of home instruction, even though there was no building, was submitted to the Board. As a result of that, Mr. Luppino's title was changed from administrator to principal. No additional duties or responsibilities were given to Mr. Luppino by the Board.

John V. Dorio, Jr., testified on behalf of petitioner. He was a member of the Board of Education in 1976. Mr. Luppino was given the position of administrator of home instruction and not principal because of the aforementioned legal opinion of Mr.Pagano. Eventually, the title was changed to principal of home instruction but no additional duties were assigned to Mr. Luppino because of this change of title.

Based upon a careful consideration of the aforegoing, including a careful review and study of the pleadings, exhibits, stipulations, and an assessment of the credibility and demeanor of the witnesses and the inherent probability of their testimony, this Court FINDS:

1. Stipulations 1 through 5 are hereby adopted as Findings of Fact and are incorporated herein by reference.

2. Mr. Luppino was a teacher for respondent from 1962 until 1976 when he was assigned to the position of acting administrator for home instruction.

3. When Mr. Luppino was appointed acting administrator of home instruction, he performed the following functions:

   A. Met with parents who brought documentary evidenc of the disability of their children;

   B. Communicated with doctors;

   C. Communicated with child's school and teacher;

   D. Set up meetings with home instruction teachers and child's regular teacher ;

   E. Transferred the child from his regular school register to home instruction register;

   F. Required home instruction teachers to submit lesson plans every Friday ·

   G. Evaluated home instruction teachers;

   H. Administered tests to children who were part of the home instruction program;

   I. Submitted marks to children.

4. All regular functions normally performed in the regular school were provided by home instruction.

5. When Mr. Luppino was appointed administrator of home instruction in November, 1976, there were no changes in his duties from those performed as acting administrator of home instruction.

6. When Mr. Luppino was appointed principal for home instruction on November 17, 1977, none of the duties performed by him as acting administrator or administrator of home instruction were changed once he became principal.

7. Mr. Luppino was involved in curriculum development while he was administrator and principal of home instruction.

8. There were an average of 30 teachers and 75 students under him while he was administrator and principal of home instruction.

9. Kenneth Chmielewski, a Board member, indicated that there was no difference between the position and duties of administrator and principal for home instruction.

10. The reason that the title of administrator for home instruction was first chosen rather than the title of principal for home instruction was that there was a question as to whether or not a person could be a principal without a building to report to.

11. While Mr.Luppino was administrator of home instruction, he was occasionally assigned to act as principal in some of the district schools for one or two days.

12. When the Board ascertained that one could have the title of principal without having a physical building to report to, Mr. Luppino's title was changed from administrator of home instruction to principal of home instruction.

13. Although one of the added duties as principal of home instruction was to draw up a budget, which was not a duty of the administrator of home instruction, this difference is insubstantial.

14. This court finds by a preponderance of the credible evidence that the duties of the administrator of home instruction and the duties of the principal of home instruction were substantially the same.

15. This court finds by a preponderance of the credible evidence that the Board of Education initially entertained making Mr. Luppino a principal of home instruction, rather than an administrator of home instruction, but did not do so because of counsel's legal opinion that one could not be a principal without a building.

16. The change of title from administrator of home instruction to principal of home instruction did not involve the meaningful additional of extra duties.

17. Mr. Luppino performed the duties of principal of home instruction from November 18, 1976 until August 21, 1979.

N.J.S.A. 18A:28-6 states in pertinent part:

"Any such teaching staff member under tenure or eligibile to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:

(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purposes; ..."

It is clear that petitioner performed the duties of principal for home instruction from November 18, 1976, when he was appointed administrator for home instruction, until August 21, 1979, when the Bayonne Board of Education abolished the position of principal for home instruction. The duties performed by petitioner as administrator of home instruction and principal of home instruction were substantially the same. Any difference in the duties was insubstantial and not of such a nature to deprive petitioner of tenure. One must not look at the title given petitioner but rather the duties performed in said position. Having performed the same duties for more than two consecutive calendar years, irrespective of the title which was applied to petitioner's position, petitioner obtained tenure pursuant to N.J.S.A. 18A:28-6(a).

As stated in Elizabeth Boeshore v. Board of Education of the Township of North Bergen, Hudson County, 1974 S.L.D. 805, 814:

"...The Commissioner must be vigilant to protect those who are entitled to tenure from the erosion of their tenure rights by subterfuge and evasion. He must be equally vigilant against the employment of devices to confer tenure upon those who are not entitled to its protection. The duties performed rather than the title of a position must be controlling in determining whether a position is protected by tenure. Nomenclatures may not be the deciding factor. ..."

See also Arthur L. Page v. Board of Education of the City of Trenton and Pasquale A. Maffei, Mercer County, 1975 S.L.D. 644 which involved the Commissioner determining whether the duties performed by petitioner as Model Cities Coordinator and Assistant to the Assistant Superintendent for Personnel entitled petitioner to tenure beyond that of a teacher. The Commissioner stated at p. 648-9:

> "While finding that his duties were most closely related to those of a school principal during the period of four years, eleven months, a question remains; namely, does the performance of such duties analagous to those of a principal confer a tenured status as principal upon petitioner? In this regard, too,the hearing examiner finds for petitioner."

Also,

> "Petitioner performed duties analagous to those of a principal. He is entitled to the tenured protection the statutes affords. ..."

In the instant case, since the duties performed by petitioner as administrator for home instruction from November 18, 1976 until November 17, 1977 were substantially the same as those performed by petitioner when he was appointed principal for home instruction from November 17, 1977 until August 21, 1979, petitioner has an entitlement to tenure under statute. The period of time that petitioner served under the title of administrator for home instruction from November 18, 1976 until November 17, 1977 is to be added to the period of time that he served as principal of home instruction from November 17, 1977 to August 21, 1979. Thus, petitioner performed the duties of principal of home instruction for respondent for approximately two years and nine months.

Therefore, it is CONCLUDED that petitioner acquired the status of tenure in the position of principal in the Bayonne Public School system since November 18, 1978.

It is, therefore, ORDERED that petitioner be paid any salary or other benefits to which he is entitled in accordance with this decision to the extent that such payments have been withheld.

This recommended decision may be affirmed, modified or rejected by the Commissioner of the Department of Education, Fred G. Burke, who by law is empowered to make a final decision in this matter. However, if the Commissioner, Fred G. Burke, does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 4592-79

I HEREBY FILE my Initial Decision with the Commissioner of the Department of Education, Fred G. Burke, for consideration.

July 18, 1980
DATE

ROBERT P. GLICKMAN, A.L.J.

JOSEPH A. LUPPINO,

PETITIONER,

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY, : DECISION

RESPONDENT.

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by the Office of Adminstrative Law.

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent's exceptions contend that petitioner's duties as an administrator of Home Instruction were significantly different from those required by the Board when he was named Principal of Home Instruction. Respondent argues that, as a consequence, time served as the Administrator of Home Instruction may not be counted towards tenure as a principal. The Commissioner notes contradictory testimony in the record concerning this allegation from former board members and former counsel. The Commissioner finds the claim of differing duties in the two positions not clearly proven and, accordingly, dismisses them.

Petitioner's exceptions address minor errors in the record and support the findings and conclusions of the Court.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

COMMISSIONER OF EDUCATION

September 5, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

BOARD OF EDUCATION OF THE TOWNSHIP OF **PARSIPPANY-TROY HILLS**, MORRIS COUNTY,	)	INITIAL DECISION
	)	**DKT. NO. EDU 51-3/79A**
V.	)	
PARSIPPANY-TROY HILLS EDUCATION ASSOCIATION	)	

APPEARANCES:

For the Petitioning Board of Education, Murray, Granello & Kenney **(Malachi J. Kenney,** Esq., of Counsel)

For the Respondent Education Association, **John W. Davis**

BEFORE THE HONORABLE **ERIC G. ERRICKSON,** A.L.J.:

The Parsippany-Troy Hills Board of Education, hereinafter "Board," is joined by the Parsippany-Troy Hills Education Association, hereinafter "Association," in requesting that the Commissioner of Education issue a declaratory judgment regarding the legality of assigning compensatory education teacher aides on a rotational basis with regular teaching staff members to supervise pupils during lunchtime.

The matter was transferred to the Office of Administrative Law on July 2, 1979 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. The case is ripe for decision in the form of the pleadings, a Stipulation of Facts with exhibits, and Briefs of Counsel.

DOCUMENTS IN EVIDENCE:

Stipulation of Facts With Appended Exhibits
Exhibit J-1 Monahan to Holub, October 16, 1978
Exhibit J-2 Holub to Monahan, November 8, 1978

Exhibit J-3 Lataille to County Superintendents, April 13, 1978
Exhibit J-4 Snow to Monahan, November 15, 1978
Exhibit J-5 Snow to Superintendents, April 28, 1978
Exhibit J-6 Application for Approval of Aides
Exhibit J-7 State Board of Education Rule 6:11-4.9
Exhibit J-8 State Board of Education Regulations 2/68

FACTUAL RECITATION:

The following are the relevants facts as stipulated by the parties:

1. The Board and the Association are parties to a negotiated agreement which provides for a rotating system of lunchtime supervision utilizing classroom teachers, specialists and compensatory education teacher aides.

2. These aides, who serve in positions which do not require teaching certificates issued by the New Jersey State Board of Examiners, are approved as aides by the County Superintendent of Schools. They receive less salary than regular teaching staff members and are considered not to serve in tenurable positions. Some but not all of them hold teaching certificates isued by the Board of Examiners.

3. Regular teaching staff members supervise pupils during lunchtime both in the cafeteria and on the playground without benefit of constant direct supervision by their administrators.

4. Prior to tne 1978-79 school year compensatory education teacher aides were assigned lunchtime supervision duties in rotation with regular teaching staff members. Both the aides and regular teaching staff members were assigned the same supervisory responsibilities.

5. Early in the 1978-79 school year the Board received communications from representatives of the State Department of Education, including the Morris County Superintendent of Schools, which led the Board to conclude that the use of compensatory education teacher aides to

provide primary supervision of the lunchroom was improper. (J-1 through J-6)

6. When the Board then discontinued the assignment of aides as lunchroom supervisors, thus increasing the rotational frequency of lunchtime supervision duty for regular teaching staff members, the Association grieved the matter and moved it to binding arbitration.

7. The arbitrator's award directed the Board to include the compensatory education teacher aides in the lunchtime supervision rotation pending a determination by the Commissioner of the legality of their assignment to such duty.

At issue is whether the Board may legally assign non-certified compensatory education aides to supervise pupils during lunchtime outside the direct supervision of a certified teaching staff member.

RELEVANT RULES AND REGULATIONS OF THE STATE BOARD OF EDUCATION:

"6:11-4.9 Paraprofessional approval

"(a) School aides and/or classroom aides, assisting in the supervision of pupil activities under the direction of a principal, teacher or other designated certified professional personnel, shall be approved in accordance with regulations and procedures adopted by the State Board of Education in February, 1968. Copies of these procedures are available from the Bureau of Teacher Education and Academic Credentials for the offices of county superintendents of schools.

"(b) Current regulations require school districts employing aides to develop job descriptions and standards for apointment. These descriptions and standards should be based on study of local needs. The nature of the job descriptions will dictate the qualifications to be met, the proficiency standards needed, and the pay to be received.

"(c) The locally developed descriptions and standards adopted by the board of education shall be submitted by the superintendent of schools or chief administrative officer to the county superintendent for approval, in accordance with the regulations outlined below:

"1. Any board of education employing school aides or classroom aides shall submit to the county superinten-

dent of schools a job description for each type of aide to be employed, setting forth the duties to be performed, the types of proficiency needed, the qualifications to be required, and the arrangement for supervision of the aides. The qualifications shall include proof of good moral character.

"2. The county superintendent of schools shall review the job descriptions and the qualifications proposed for positions for the various types of supervisory or classroom aides. If he finds that the descriptions and qualifications are in accord with the policies of the State Board of Education, and conform to sound educational practice, he shall approve them, and notify the school board of his approval in writing.

"3. At least once each year, and at such other times as the county superintendent may require, the superintendent of schools or chief administrative officer shall submit to the county superintendent the names of the persons employed as aides, and a statement certifying that the persons appointed meet the qualifications approved by the county superintendent of schools and are being supervised in accordance with the approved plan.***"

REGULATIONS AND RECOMMENDATIONS OF THE STATE BOARD OF EDUCATION FOR THE EMPLOYMENT, ASSIGNMENT, SUPERVISION, AND TRAINING OF SCHOOL AIDES [February 1968]

"***

"Definitions:

"A **clerk** is a person who performs routine and mechanical tasks in libraries, school offices, clerical pools, and other locations.

"An **aide** is a person who, under the direct supervision of a principal, teacher, or other designated certified professional personnel, assists in the supervision and instruction of pupils by performing duties such as the following:

"(a) in general, school functions, assist with playground supervision, bus loading, and monitoring lunchrooms,

and/or

"(b) in classrooms, assist the teacher with housekeeping duties, collection and preparation of instructional materials, supervision of pupil activities, and other duties assigned by the teacher.

"***

"REGULATIONS

"1. Any board of education employing school aides or classroom aides shall submit to the county superintendent of schools a job description for each type of aide to be employed, setting forth the duties to be performed, the types of proficiency needed, the qualifications to be required, and the arrangement for supervision of the aides. The qualifications shall include proof of good moral character.

"2. The county superintendent of schools shall review the job descriptions and the qualifications proposed for positions for the various types of supervisory or classroom aides. If he finds that the descriptions and qualifications are in accord with the policies of the State Board of Education, and conform to sound educational practice, he shall approve them, and notify the school board of his approval in writing.

"3. At least once each year, and at such other times as the county superintendent may require, the superintendent of schools or chief administrative officer shall submit to the county superintendent the names of the persons employed as aides, and a statement certifying that the persons appointed meet the qualifications approved by the county superintendent of schools and are being supervised in accordance with the approved plan. The local superintendent and the county superintendent shall keep appropriate records of the individuals so certified.***" (Exhibit J-8 at pp. 1-2)

DISCUSSION AND CONCLUSIONS:

A board of education is a quasi-municipal body permitted by law to do only those things which relevant education law requires or permits it to do. There is no requirement on a board to employ aides, but it is permitted to do so by N.J.A.C. 6:11-4.9(c)(13), which sets forth as a firm requirement that a district desiring to employ aides must submit among other things a job description of the duties to be performed for approval of the County Superintendent. It follows that the approval of the County Superintendent is only for those duties clearly set forth in the job description since the "***nature of the job description will dictate the qualifications to be met, the proficiency standards needed, and the pay to be received.***" (N.J.A.C. 6:11-4.9(b))

A careful reading of the job description submitted by this Board and approved on an annual basis by the County Superintendent reveals nothing either in specific or general language that makes reference to its aides performing lunchtime supervision

duties. (J-6) Rather it limits itself to the performance of classroom duties, keeping of records and maintenance of supplies and equipment.

Since the aides must be approved by the County Superintendent in order to serve as aides, the rules of the State Board of Education authorizing that approval must and does control. While in no way demeaning the communications placed in evidence from subordinates of the Commissioner, it must be concluded that such do not stand in the place of, supplement or alter promulgated education statutes or rules of the State Board. Accordingly, I find here no need to make mention of the contents thereof. Nor do I find it apropos to speculate on what the County Superintendent would have done had the job description been worded differently.

It is well settled that a board of education may not in a negotiated agreement alter or bargain away its discretionary authority to employ and assign personnel to perform duties necessary to operate a thorough and efficient program of education. Nancy Weller v. Board of Education of the Borough of Verona, 1973 S.L.D. 513 Nor can a board alter a right or responsibility set forth in statutes or rules of the State Board of Education by means of an agreement reached at the negotiating table.

I CONCLUDE that the negotiated provision in the agreement providing that aides serve in rotational lunchtime duties does not modify either the job description of the aides or the approval by the County Superintendent of that job description. Nor does it create an entitlement for such aides to serve as lunchtime supervisors in the presence of or apart from regular classroom teachers since the approved job description does not provide that they shall render such duties.

I further **CONCLUDE** and **DECLARE** that, given the job descriptions of the compensatory education teacher aides approved by the County Superintendent of Schools set forth in evidence herein, those aides may not legally serve in a lunchtime supervisory capacity either apart from or together with regular classroom teachers assigned to such duties as long as the job description which is the basis of approval by the County Superintendent does not provide for their performance of such duty.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45)

days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

July 21, 1981
DATE

Eric G. Errickson
ERIC G. ERRICKSON, A.L.J.

BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PARSIPPANY-TROY HILLS EDUCATION ASSOCIATION, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the respondent pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent excepts to the reliance by Judge Eric G. Errickson, A.L.J., on the rules and regulations of the State Board N.J.A.C. 6:11-4.9. Respondent contends that the negotiated contract between the parties is the instrument spelling out procedures for supervising pupils during lunchtime for professional staff as well as aides.

The Commissioner is constrained to reemphasize the language so cogently expressed by Judge Errickson; "Nor can a board alter a right or responsibility set forth in statutes or rules of the State Board of Education by means of an agreement reached at the negotiating table." (at page 6)

N.J.A.C. 6:11-4.9 is a clear mandate of procedure to boards of education which seek paraprofessional approval which in essence says:

(a) Aides shall be approved in accordance with rules and regulations.

(b) Regulations require school districts using aides to develop job descriptions.

(c) 1. A board shall submit to the county superintendent a job description for (aides)

2. County superintendent shall review and (where possible) shall approve in writing

3. Once a year the board shall submit a list of aides used to the county superintendent

(Emphasis supplied)

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

The Commissioner knows of no reason why existing job descriptions could not, with propriety, be modified for final approval by the county superintendent.

COMMISSIONER OF EDUCATION

September 6, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

"L.P." an infant by her guardian ad litem,	:	INITIAL DECISION
	:	
	:	OAL DKT. NO. EDU 0018-80
	:	
PETITIONERS,	:	AGENCY DKT. NO. 449-11/79A
	:	
V.	:	
	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	
	:	
RESPONDENT.	:	

APPEARANCES:

For the Petitioners, Stanzione & Stanzione
(Joseph Scalia, Esq., appearing)

For the Respondent, Russo, Courtney & Foster
(Robert W. Rosenberg, Esq., appearing)

BEFORE THE HONORABLE LILLARD E. LAW, ALJ

DOCUMENTS IN EVIDENCE

P-1 Jackson Memorial High School Failing Lists (Identification Only) 7/16/79

P-2 "L.P.'s" Absences

P-3 Letter dated 6/27/79

P-4 L.P.'s report card - '78-'79

P-5 Grade Report from Jackson Memorial High School issued to "P.P." for the 1978-79 school year

P-6 "Student Handbook Jackson Memorial High School 1978-1979" 68

P-7 Addendum to Interrogatories, List of nine Attendance Review Committee members

P-8 Two-page document entitled "Unfilled Course Requirement Letters, U.C.R.", dated June 22, 1979

P-9 Summary for '78-'79 school year

P-10 Absentee record dated 5/18/79

R-1 Copy of handwritten note from Arleen Polito dated February 22, 1980

R-2 Four-page document printed on both sides entitled "Notes on Discipline Procedures" with various underlined headings

R-3 One-page document, undated, entitled "New Policies."

R-4 Two-page document entitled "Jaguar Foot Notes"

R-5 3-page letter dated 2/15/80 to Mr. Doerr from Mrs. Kane

R-6 Memo dated 5/14/80 Subject: M.B.S.T. results - 1980

R-7 1-page document dated 6/14/79 (English)

R-8 Document dated 6/18/79 (phys. ed.)

Petitioner, "L.P.," a twelfth grade pupil enrolled in the Jackson Township Memorial High School under the direction and control of the Board of Education of the Township of Jackson, hereinafter "Board," alleges that the Board improperly denied her credit for English III and Physical Education II for the 1978-79 academic year due to alleged excessive unexcused absences, and; further alleges, that the unequal application of the Board's unexcused absence policy was arbitrary and capricious. Petitioner seeks an order from the Commissioner of Education to restore the requisite credits in English III and Physical Education II. The Board denies the allegations and requests that the herein Petition be dismissed grounded upon its assertion that petitioners failed to file the Petition of Appeal within the time limitations prescribed by N.J.A.C. 6:24-1.2.

The procedural history of the instant matter is as follows:

On or about June 21, 1979, petitioner was apprised that as a result of alleged excessive unexcused absences in English III and Physical Education II, she would be denied credit for those

respective courses. (Petition of Appeal, First Count, paragraph #4.) On November 15, 1979, the Commissioner was in receipt of the herein Petition accompanied with a Notice of Motion for Interim Relief. Oral Argument on the Motion was heard on November 21, 1979 by a representative of the Commissioner. On November 30, 1979, the Commissioner granted petitioners' Motion for Interim Relief and ordered the Board to permit petitioner to re-register in English III and Physical Education II on or before December 3, 1979, for the 1979-80 school year. The Board filed its Answer on December 6, 1979 and the matter was subsequently transferred to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F et seq.

prehearing conference was held on February 19, 1980, at which the parties reached agreement as to the issue to be resolved in the instant matter as follows:

1. Was the Board's application of its absence policy to deny petitioner credit in English III and Physical Education II, arbitrary, capricious and/or unreasonable?

2. Did the Board's application of its absence policy deny petitioner of her procedural and/or substantive due process rights?

A hearing was conducted by the above-mentioned Administrative Law Judge on May 12, 13 and 16, 1980, at the Ocean County Administration Building, Toms River. The parties were required to file simultaneous briefs before the Court on or before June 13, 1980, with rebuttal briefs due on or before June 17, 1980. Due to the illness of counsel for respondent Board, the parties agreed not to submit briefs and both represented that they would rely upon their arguments as set forth on the official transcript of the proceedings. The matter was closed on June 16, 1980.

STATEMENTS OF FACTS

1. On or about November 15, 1978, the Board commenced an amended Pupil Attendance Policy which provided as follows:

"ATTENDANCE POLICY

"Student mastery of the subject is predicated upon the student's completion of the requirements of an assigned curriculum and his/her active participation in class activities under the direction of a certified instructor. Specifically, a student who

has more than 20 days of illegal absence during a school year does not meet the minimal instructional time requirement. 20 days per year, five days per marking period.

"Students who for any reason fail to meet any requirement will be denied credit for the course. This does not mean that he/she fails the course--there is a distinction between failing and or receiving credit for the course. Credit may be made up by at- summer school, or evening school.

"Legal absences include any of the following:

1. Death in immediate family.
2. Religious holiday.
3. Legal obligations.
4. Illness, confirmed by note from parent and/or doctor.

[1]"The Board of Education has defined and clarified cases which are not absences. They are as follows:

1. When a student misses a class so as to receive "Behind the Wheel" Driver Education.

2. When a student misses a class so as to receive Band instruction.

3. When a student misses a class so as to attend a session in the Science lab.

4. When a student misses a class so as to attend the Senior class trip.

5. When a student misses a class so as to attend a meeting of Student Council.

6. When a student misses a class so as to work on the Jaguar Journal.

7. When a student misses a class so as to go on an educational trip.

8. When a student misses a class so as to attend Honor Society meetings.

9. The Board of Education will add other clarification should the need arise." (R-2)

2. The Board's high school administrative staff implemented an Attendance Review Committee for the 1978-79 school year which included five (5) classroom teachers, one guidance counselor, the director of attendance and security, the teacher in charge of discipline and the vice principal who served as Chairman of the Committee. (P-7)

3. On or about June 14, 1979, petitioner L.P. was in receipt of the following notice:

> "***The Attendance Review Committee has studied your record for the school year 1978-79 and has noted that you have an excessive number of unexcused absences in English. This has been confirmed by your teacher.
>
> You are therefore notified that your mark will read "URC" (Unfulfilled Course Requirements) and will receive no credit.***" (R-7)

4. On or about June 18, 1979, petitioner received a similar notice with regard to Physical Education. (R-8)

STIPULATIONS

The parties stipulated that P-9 in evidence represented a summary of pupils who had been reported absent in excess of twenty days and who had received a final grade and credit for the courses taken as follows:

INITIAL	COURSE	TOTAL ABSENCES	ABSENCES WITHOUT NOTES	FINAL GRADE
D.M.	Adv. Chorus	37	36	C
C.C.	Typing II	23	23	C
K.M.	Typing II	55	25	C
C.K.	Typing I	29	29	D
T.W.	English IV	35	26	D
D.B.	English IV	25	21	D
C.H.	Speech/Drama	28	24	C
S.J.	Speech/Drama	29	20	C
T.D.	Speech/Drama	27	24	B
M.G.	Phys. Ed.	43	20	C
D.A.	Spanish I	23	23	C
S.C.	Spanish I	26	23	C
E.L.	Phys. Ed.	44	24	C
D.W.*	U.S. History	29	27	D
D.D.	Sewing	25	23	B

* Needs to make up work for current period (TR. III 4-8) (P-9)

INITIAL	COURSE	TOTAL ABSENCES	ABSENCES WITHOUT NOTICE	FINAL GRADE
M.F.	Exp. Bus	32	23	D
L.B.	English II C	25	24	C
D.M.	English II B	33	29	C
C.A.	Home Ec. II	32	29	D
T.P.	Home Ec. I	47	30	D
D.R.	Home Ec. I	44	23	C
P.D.	Metal 3	33	29	C
E.M.	Art	29	26	B
L.L.	Art	40	40	D
J.K.	Art	47	34	C
K.L.	Art	27	22	C
P.H.	Art	26	26	D
L.P.	Art	35	26	A

A summary of the testimony revealed that there was confusion among pupils and teachers with regard to an understanding of the Board's amended Pupil Attendance Policy which took effect in November, 1978. Mr. Garbos, a teacher of mathematics, testified that it was his understanding of the policy that any student absent in excess of twenty days of unexcused absence was to be denied credit for the course at the end of the school year. He stated that when a pupil was absent from his classroom and the pupil subsequently brought him a note from the parent, he considered it to be an excused absence. (TR. I 34-35). He testified that the policy was not uniformly applied or understood by all of the teachers. He testified that there was an inconsistent interpretation and application of excused and unexcused pupils absences administered by the teachers. (TR. I, 36, 40-44, 55) He testified that he reviewed the report cards of two of his former pupils, whom he had denied credit because of excessive absenteeism, and discovered that these pupils had had more frequent absences in other classes, yet, they received credit in those courses. (TR. I-40)

A pupil, and president of the Jackson Memorial High School Student Council, testified that she represented the Student Council during the summer of 1978 to review and present a pupil attendance policy to the Board. She testified that the high school Disciplinary Committee had formulated the policy, however, it was incomplete when it was presented to the Board in August, 1978. She stated that because of the questions raised by the various representatives and members of the Board, the Student Council requested that the policy not be implemented for the 1978-79 school year. A further consideration for not implementing the policy for the 1978-79

school year was the fact that the new policy could not be included in the Student Handbook for the beginning of the 1978-79 school year. She testified that the Board subsequently adopted the pupil attendance policy at the end of the first marking period for the 1978-79 school year. (TR. I-105-112)

The President of Student Council testified that she understood that the Attendance Review Committee was to operate under the policy as follows:

> "***The Attendance Review Committee was to take any student who had over 20 absences in a particular class, take their records and review the reasons why they were absent, and if there were any extenuating circumstances for the excessive number of absences, then they were supposed to be, you know, excused and they were supposed to get credit. If there was no reason, no severe reason that they were absent more than 20 times, then they were supposed to be denied credit." (TR. I 112-113)

The President of Student Council testified that she had direct knowledge of four pupils who had in excess of twenty absences and received credit in those courses in which the absences occurred. (TR. I 113-115, 117-118) She testified that attendance was not consistently taken by the teachers in the classes which she attended, nor was attendance taken the same way in every classroom. (TR. I 118-121) She stated that every teacher had their own interpretation of the policy with regard to what constituted excused and unexcused absence and "***most teachers just openly admitted that they really didn't know." (TR. I 134-135) She testified that there was much confusion among pupils and teachers with regard to the implementation of the policy.

Petitioner L.P.'s mother testified that she first learned of the Board's pupil attendance policy in June, 1979, by way of a telephone call from a night operator in the Board's employ, who informed her orally that L.P. would not receive credit in English and Physical Education because of excessive absenteeism. She testified that immediately thereafter she made an appointment to meet with the then principal of Jackson High School. She stated that the principal informed her that L.P.'s English and Physical Education teachers had submitted L.P.'s name to the Attendance Review Committee for excessive absenteeism and that the Committee had determined

that L.P. was not to receive credit for the two courses. She stated that she asked the principal for a list of L.P.'s alleged absences, which he subsequently supplied. (P-2) She testified that the principal advised her that in the event L.P.'s absences could be justified, in writing, the principal would make the final decision as to whether or not the credit could be restored. L.P.'s mother stated that she was unable to justify all of the unexcused absences set forth on P-2. (TR. I 151-158) (TR. II 43-48)

L.P.'s mother testified that subsequent to her meeting with the principal, she wrote him a letter dated June 27, 1979, expressing her opinions and feelings about L.P.'s denial of credit. (P-3)

She stated that the principal informed her that he would reply to her in writing and render his decision in the matter. She asserted that she waited for the principal's reply for approximately one month and when she called his office, she was informed that he was on vacation. She stated that she subsequently went to the Board's administration building and met the principal, who had been changed in position and was no longer principal of Jackson Memorial High School, and inquired about his reply to her letter. She testified that the principal had informed her that he had mailed his reply, however, she was not in receipt of same until approximately one week after her last meeting with the principal and that the principal's reply stated that L.P.'s credit for English and Physical Education would continue to be withheld. (TR. I 163-166) (TR. II 15-17)

L.P.'s mother testified that neither she nor her daughter were invited to attend any of the meetings conducted by the Attendance Review Committee. She testified that she had the opportunity to review the school's Student Handbook for the 1978-79 school year and it did not contain any reference to the Board's policy regarding the loss of credit for more than twenty pupil absences. She testified further that she had first hand knowledge of three pupils who were absent in excess of twenty times and had received credit for the courses, one of whom was her daughter "P.P." (TR. II 4-10, 15, 18-20) (P-5) She testified that she was a former member of the Board and as a result of her understanding of the Board's policies and a review of L.P.'s final report card, L.P. would have successfully passed English III and Physical Edcation.

Petitioner, L.P., testified that she first became aware of the Board's pupil attendance policy in November or December, 1978, by word of mouth. She stated that she understood that when a pupil had more than twenty days of absence in particular courses, credit would be withheld. She testified that the interpretation of the policy differed from teacher to teacher. Although she admitted that she had cut some classes, petitioner

asserted that she did not have fifty-five absences in English nor fifty-seven absences in Physical Education. L.P. testified that she first learned that she was to be denied credit in English and Physical Education in June, 1979 and was not offered the opportunity to appear before the Attendance Review Committee. (TR. II 60-112) (R-7, R-8) L.P. testified that the final average grades for English III and Physical Education would have given her a passing grade for the two courses

The vice principal testified that he served as the chairman of the Attendance Review Committee for the 1978-79 school year. He stated that the Pupil Attendance Policy provided that a pupil would be denied credit for a course where the pupil had more than twenty (20) unexcused absences for the academic year in the course. He testified that he attended all of the Attendance Review Committee meetings where L.P.'s absences were considered. He asserted that forty-three (43) pupils, including petitioner, were denied credit in certain courses for the 1978-79 academic year because of twenty (20) or more absences. (P-8) (TR. II 163, 169-173

The vice principal testified that all of the teachers in the high school were advised, in several ways, to submit a list of the names of pupils who had a "large number of absences" in their respective classes. This advisory was subsequently changed to have the teachers submit the names of pupils who had twenty (20) or more absences. He stated that the Attendance Review Committee sent so many forms for the teachers to complete, "***that the teachers began to get angry with us (the Committee)." (TR. II 174-176) (TR. III 8-12) Subsequently, on May 18, 1979, the Attendance Review Committee issued a form to the teachers which instructed the teachers to record pupils' absences between November 15, 1978, through and including May 18, 1979, and provide the following information:

"STUDENT'S NAME	SUBJECT	TOTAL ABSENCES	ABSENCES WITHOUT NOTE	PROJECTED FINAL GRADE	EXTENUATING CIRCUMSTANCES

(P-10)

The vice principal testified that P-10 was not sent to each teacher in the high school but, rather, to any teacher who wanted to complete the form. He testified that the responses to P-10 was the initial basis for the Attendance Review Committee to determine which pupils were reported to have in excess of twenty absences and that the Committee relied upon the teachers to supply the information. He testified that he did not know, in fact, that those teachers who did not request or return P-10, may have had pupils with excessive

absences. (TR. III 10-15) He stated that the Attendance Review Committee had a follow-up procedure with those teachers who reported pupils with more than twenty (20) absences. He testified that petitioner L.P.'s name was reported to the Committee for excessive absences in English III and Physical Education. (TR. III 15-17, 20)

The vice principal asserted that the function of the Attendance Review Committee was to examine the number of individual pupil absences, the number of excuses submitted, the amount of work the pupil had made up and any other extenuating circumstances and then determine which pupils would be denied credit. He stated that as chairman of the Committee he represented the school administration and that only he had the discretion to award credit to a pupil who had in excess of twenty (20) unexcused absences (TR. III 58-60)

The vice principal testified that subsequent to the Board's adoption and implementation of the Pupil Attendance Policy the policy was distributed to parents on or about October 25, 1978 (R-2) and by way of a newsletter prior to the Christmas holidays, 1978. (R-3, R-4) (TR. III 48-50) He stated that he personally informed the student body of the Attendance Policy during the required physical education classes in the month of January, 1979. (TR. III 56-57)

On direct examination, counsel for petitioner questioned the vice principal with regard to four pupils who had an excess of twenty unexcused absences and where no mitigating circumstances had been reported yet, the pupils were not denied credit. (TR. II 178-181), 200-203)

Having carefully reviewed the entire record in the instant matter, I FIND that the Stipulations and the Statement of Facts, as set forth hereinbefore, are hereby adopted by reference as Findings of Fact. In addition thereto, I FIND the following relevant facts:

1. Subsequent to November 15, 1978, there was confusion among the pupils and teaching staff members as to the meaning of "excused" and "unexcused" absence and the respective application to the Board's amended Pupil Attendance Policy.

2. Subsequent to November 15, 1978, petitioner knew of the Board's amended Pupil Attendance Policy and its attendant penalty of loss of credit for "***more than (twenty) 20 days of illegal absence during a school year***." (R-2)

3. Petitioner cut certain classes during the 1978-79 school year. (TR. II 82-84, 87-88)

4. Petitioner was not advised that her alleged excess illegal absences was the subject of review by the Board's Attendance Review Committee.

5. Petitioner was neither invited nor did she attend meetings of the Board's Attendance Review Committee when it considered to withhold her credit in English and Physical Education for the 1978-79 school year. (TR. II 79)

6. There was unequal treatment of pupils with regard to the Board's application of its Pupil Attendance Policy.

Having considered all of the relevant facts, I DETERMINE that the Board's amended policy regarding pupil attendance was pursuant to the authority of N.J.S.A. 18A:11-1 which provides, inter alia, as follows:

> "The Board shall -
>
> ***
>
> "c. Make, amend and repeal rules, not inconsistent *** with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools *** of the district *** and
>
> "d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

The Board's policy on pupil attendance must be examined in view of other statutory provisions regarding public school attendance which includes the parents obligation and requirement to send their children to school in this State. N.J.S.A. 18A:38-25 reads in pertinent part:

> "Every parent *** having custody and control of a child between the age of six and sixteen years shall cause such child regularly to attend the public schools of the district***."

Additionally, the statutes define the days when pupils are required to regularly attend school as stated in N.J.S.A. 18A:38-26:

> "Such regular attendance shall be during all the days and hours that the public schools are in session in the district***."

In addressing the issue of compulsory education in this State, the Commissioner observed in the matter of William J. Wheatley, et als v. Board of Education of the City of Burlington, Burlington County, 1974 S.L.D. 851, that:

> "The courts of this State and the United States Supreme Court have upheld the principle that compulsory education in New Jersey is a matter of public concern and legislative regulation, and that it should be enforced so long as statutory requirements are reasonable, subject to constitutional limitations. See Everson v. Board of Education of Ewing Township 133 N.J.L., 350 (E & A. 1945), affirmed 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), rehearing denied 330 U.S. 855, 67 S. Ct. 962, 91 L. Ed. 1297. (at p. 864)

The Commissioner also noted the importance of regular pupil attendance in the schools when he said:

> "Frequent absences of pupils from regular classroom learning experiences disrupt the continuity of the instructional process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra after-school instruction. Consequently, many pupils who miss school frequently experience great difficulty in achieving the maximum benefits of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic programs. The school cannot teach pupils who are not present. The entire process of education requires a regular continuity of instruction, classroom participation, learning experiences, and study in order to reach the goal of maximum educational benefits for each individual child. The regular contact of the pupils with one another in the classroom and their participation in well-planned instructional activity under the tutelage of a competent teacher are vital to this purpose .

> This is the well-established principle of education which underlies and gives purpose to the requirement of compulsory schooling in this and every other state in the nation." Wheatley, supra at p. 864.

I CONCLUDE, therefore, that the Board's adopted amended pupil attendance policy was within its statutory authority pursuant to N.J.S.A. 18A:11-1 and in harmony with the Commissioner's prior decisions. Wheatley, supra; William C. Dooner, Jr., v. Board of Education of the Toms River School District, Ocean County, 1976 S.L.D. 619

The issue now before this Court is set forth in the Prehearing Order as follows:

> "***Did the Board's application of its absence policy deny petitioner of her procedural and/or substantive due process rights? "

The New Jersey Constitution provides and the statutes recognize that free public education is to be afforded to each school age child in this State. In this regard, the Honorable Daniel B. McKeown, Administrative Law Judge, observed in the matter of G.F., a minor, by his parents and natural guardians v. Board of Education of Washington Township, Gloucester County, 1980 S.L.D. _____ (decided January 13, 1980) that:

> "A pupil's constitutional right to attend public schools, free of charge, is not unbridled. Pupils are subject to the authority of those over them and are required to obey the rules of the school. N.J.S.A. 18A:37-1. Those pupils who refuse to recognize the authority of those over them, or who refuse to obey the established rules, are subject to disciplinary measures as set forth at N.J.S.A. 18A:37-2. This statute provides for a pupil's suspension or expulsion from further school attendance if found to be, inter alia, defiant, disobedient, or violent." (Slip Op. at p. 10)

The Commissioner and the Courts have recognized, however, that prior to a board of education exercising its statutory authority to remove a pupil from its schools that a hearing is a necessary antecedent to such action. Judge McKeown succinctly sets forth the criteria for safeguarding pupil due process rights in G.F., supra, as follows:

"In John Scher v. Board of Education of the Borough of West Orange, Essex County, 1968 S.L.D. 92, remanded by State Board of Education for completion of record, 1968 S.L.D. 97, the Commissioner, adopting the guidelines laid down in State ex rel. Sherman v. Hyman, 180 Tenn. 99, 171 S.W. 2d 822 (1942) cert. den. 319 U.S. 748 (1945) held that a pupil, prior to an expulsion action (long-term suspension) being taken against him had to be informed of the nature of the charges against him, as well as the names of the principal witnesses against him when requested and a fair opportunity to make his defense. The Commissioner also adopted the view of that Tennessee court that the pupil could not, as a matter of right, claim the privilege of cross-examination.

"The Commissioner, in the same opinion, also relied upon the guidelines for pupil expulsion laid down in Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir. 1961) which held that a notice of charges should contain a statement of the specific charges and grounds, which if proved, would justify expulsion under the regulations of the Board. Cross-examination of witnesses was affirmed as not being a matter of right.

"Judge Lane, in R.R. v. Board of Education of the Shore Regional High School District, Monmouth County, 109 N.J. Super. 337 (Chan. Div. 1970) affirmed the principles of Dixon, supra, as expressed by the Commissioner in Scher, supra, in regard to the safe-guards necessary to be employed prior to an expulsion action taken by a board against a pupil. Judge Lane also held that procedural due process as guaranteed by the Fourteenth Amendment must be afforded by public school officials to pupils who face suspension or expulsion from school. Procedural due process included a notice of charge, a list of witnesses to appear against him, not necessarily subject to cross-examination, and the pupils right to enter his defense Finally, Judge Lane opined that a pupil in such circumstance also has the right to legal counsel.

"Finally, in Tibbs v. Board of Education of the Township of Franklin, 114 N.J. Super. 287 (App. Div. 1971), aff'd 59 N.J. 506 (1971) the Court

> addressed the question of whether a pupil facing an expulsion action has the right to confront their accusers and cross-examine. The Court held that such right exists." (Slip Op. at pp. 10-11)

It is now necessary to determine a balance between the Board's statutory authority to promulgate and enforce a pupil attendance policy and the Constitutional protection of procedural due process afforded petitioner. Based upon the foregoing, I FIND that L.P. was, in fact, denied due process by the failure of school authorities to notify her, prior to the decision to withhold her academic credit, and to be heard with regard to her alleged violation of the Board's Attendance Policy.

In consideration of the established facts of the herein matter, I CONCLUDE that the withholding of academic credit from a pupil who is alleged to have had excessive absences is no less a penalty than a pupils' suspension or expulsion from school. Pursuant to G.F., supra, I CONCLUDE that due process procedural requirements apply to a pupil facing the loss of academic credit by a board and require that the school authorities advise the pupil of:

1. a notice of the charge
2. a list of witnesses and/or documents to be called in support of the change
3. the right to cross-examine witnesses
4. the right to enter an affirmative defense
5. the right to legal counsel.

I CONCLUDE further that there was sufficient credible evidence to support petitioner's claim that there was disparate treatment of pupils with regard to the Board's application of its Attendance Policy. This, coupled with the finding that petitioner's procedural due process rights were violated leads to the conclusion that the Board erred in two respects.

For the foregoing reasons and conclusions herein set forth, IT IS ORDERED that petitioner L.P. be provided the relief she requests and that academic credit in English and Physical Education be restored to her for the 1978-79 school year.

This recommended decision may be affirmed, modified or rejected by the Commissioner of Education, Fred G. Burke, who by law is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-1

I HEREBY FILE my Initial Decision with the Commissioner of Education, Fred G. Burke, for consideration.

18 July 1980
DATE

Lillard E. Law
LILLARD E. LAW. ALJ

"L.P.", an infant by her guardians ad litem, FRANCIS POLITO AND ARLENE POLITO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in all respects save that conclusion which defines due process procedural requirements in the instant matter. The Commissioner does not equate a hearing provided by an Attendance Review Committee, as herein designated, with an expulsion or long term suspension hearing provided by a board of education. While the Commissioner does agree that a student faced with the loss of credit arising from alleged excessive absence should be afforded a record review; have prior knowledge of the attendance record upon which the determination will be made; have ample opportunity to rebut or plead mitigation; and present witnesses in his or her behalf, such opportunity, however, should not rise to the level of a full adversarial proceeding including the right to counsel and the right of cross-examination. To require such elaborate due process procedure at a building review level would effectively eviscerate the policy.

Accordingly, the Board of Education of the Township of Jackson is directed to accord petitioner academic credit previously withheld in English and Physical Education for the 1978-79 school year as directed in the initial decision and to take steps to assure that its attendance policy is hereafter implemented in an equitable fashion and that students are afforded reasonable due process as herein defined.

The Commissioner is constrained to observe that such action not be construed as a sanction for absenteeism on the part of pupils and is to be judged only within the factual context of the instant matter.

September 8, 1980 COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

BARBARA ANGELUCCI, Petitioner,	)	INITIAL DECISION
v.	)	**OAL DKT. NO. EDU 5461-79** AGENCY DKT. NO. 413-10/79A
WEST ORANGE BOARD OF EDUCATION, Respondent.	)	
SHEILA NEHEMIAH, Petitioner,	)	
v.	)	
WEST ORANGE BOARD OF EDUCATION, Respondent.	)	

APPEARANCES:

Nancy Iris Oxfeld for petitioners
(Rothbard, Harris & Oxfeld, attorneys)

Samuel A. Christiano for respondent

BEFORE THE HONORABLE **KEN R. SPRINGER,** A.L.J.:

These matters concern whether a board of education acted properly in withholding certain teachers' employment and adjustment increments under N.J.S.A. 18A:29-14 for the 1979-80 school year because of alleged excessive absenteeism. Initially, seven individual teachers filed separate verified petitions with the Commissioner of

Education on October 24, 1979 against respondent West Orange Board of Education ("Board"), each claiming that denial of these increments in his or her particular case was arbitrary, capricious and unreasonable. The files were transmitted to the Office of Administrative Law for determination as contested cases pursuant to N.J.S.A. 52:14F-1, et seq. All seven cases were consolidated for hearing together in a single proceeding. Subsequently, a settlement was reached in four cases, and a stipulation of dismissal as to these cases was filed by the parties on June 11, 1980. Another petitioner was unable to proceed at the scheduled hearing date due to medical reasons, so his case was severed from the others and set down for hearing at a later time. Consequently, the remaining dispute involves complaints by petitioners Barbara Angelucci ("Angelucci") and Sheila Nehemiah ("Nehemiah") that the increments to which they were entitled for the 1979-80 school year, amounting in each instance to $1,200 over their previous salary, have been wrongfully withheld.

Facts on which everyone could agree were stipulated at a prehearing conference on January 10, 1980 and have been listed as factual findings No. 1 through 4. A full hearing was conducted on April 14, 1980. Documents entered into evidence and considered in deciding this case are listed in the appendix. Upon receipt of proposed findings of fact and conclusions of law submitted on behalf of the parties, the record in these two cases was closed as of June 2, 1980.

During the hearing, it quickly became apparent that the factual differences between the parties were very narrow. In both cases, the Board did not contest the legitimacy of the reasons which kept the teacher out of school. Nor did the Board express any dissatisfaction with the quality of either teacher's performance while she was actually in the classroom. Rather, the factual disagreements revolved around the effect of repeated or prolonged teacher absences on the continuity of instruction for the students, and also on whether the teachers had received sufficient notice that continued absences for whatever cause could result in the docking of future pay increases.

Petitioner Angelucci, currently a third grade teacher at Eagle Rock School in West Orange, testified that her frequent absences were attributable to a disease called interstial cystitis or Hunner's ulcer, a condition of unknown origin and no known cure. Whenever her periodic flareups did not respond to medication, Angelucci explained, she had to be hospitalized. Treatment at the hospital consisted of an operation under general anesthesia wherein her doctors cauterized the ulcers in her bladder to relieve the pain.

Each period of hospitalization lasted approximately seven days, and within two or three days after discharge Angelucci was able to resume normal teaching duties. Insofar as possible, Angelucci tried to schedule her treatments at or near a school vacation or during the summer recess. Letters written by Angelucci's treating doctors fully substantiated that she suffers from "a chronic and painful disease of unknown etiology" which is non-communicable and essentially non-progressive (Exhibits J-4B and P-2). One of her doctors expressed his opinion that her illness results in "no problem once back in the classroom." (Exhibit P-2).

Although the Board could have required Angelucci to undergo a special examination by its own doctor to verify the nature and extent of her sickness, N.J.S.A. 18A:16-2, or could have required her to submit a physician's certificate before granting any sick leave, N.J.S.A. 18A:30-4, instead it chose to accept her representation at face value. Regular medical examinations were conducted of all teachers every three years. When filling out the forms in connection with the routine examinations performed on Angelucci in 1975 (Exhibit P-4) and 1978 (Exhibit P-5), the examining doctor disclosed the existence of Angelucci's medical condition.

School attendance records revealed that Angelucci missed teaching classes on 24 days during the 1978-79 school year, 11 days during the 1977-78 school year, 20 days during the 1976-77 school year, 27 days during the 1975-76 school year, 40 days during the 1974-75 school year, 20 1/2 days during the 1973-74 school year and 13 1/2 days during the 1972-73 school year (Exhibits P-1a to 1f, P-12 and R-9). Over the seven year interval between 1972 and 1979, Angelucci was absent from school a total of 156 days. Previously, Angelucci had taught in the same school district from 1955 until the beginning of 1959 when she left on maternity leave. She did not return to full-time teaching in West Orange until September 1972. When Angelucci achieved tenure for the second time in September 1975, the Board was aware of her illness and her past record of absenteeism, but nonetheless voted to give her a permanent teaching position.

Prior to learning of the Board's action withholding her 1978-79 increments, Angelucci insisted, she had never been advised that her absences would be considered in evaluating her job performance. However, she did acknowledge receiving at the commencement of the 1978-79 school year a set of guidelines for the evaluation of teachers. These guidelines expressly mention teacher attendance as one of the evaluative criteria (Exhibit R-1 at page 5).

Similar testimony was presented regarding the absences of the other teacher. Nehemiah, a fifth grade teacher at Washington Street School, blamed her poor attendance record primarily on a back injury resulting from an automobile accident occurring in 1972 and aggravated by two unrelated automobile accidents occurring in 1973 and 1974. As with Angelucci, Nehemiah was never asked to provide any medical certifications to justify her absences until shortly before the Board made its decision to withhold her increments. Other absences, Nehemiah stated, were caused by her participation in teachers' conventions (for which she had obtained her principal's approval) and to illnesses of members of her immediate family or the death of close relatives. On one occasion, Nehemiah took two days in order to attend a track weekend at her son's college. From school records, it was shown that Nehemiah missed 17 1/2 days in 1978-79, 15 days in 1977-78, 24 days in 1976-77, 42 days in 1975-76, 38 days in 1974-75, 51 days in 1973-74, 31 days in 1972-73, 23 days in 1971-72, 15 1/2 days in 1970-71, 7 days in 1969-70 and 6 days in 1968-69 (Exhibits P-17a to 17c, J-38 and R-2). Throughout her 11 year teaching career in West Orange, Nehemiah missed a total of 270 days or the equivalent of 1 1/2 school years.

With regard to notice, Nehemiah acknowledged having received the guidelines setting forth the Board's policy concerning absenteeism (Exhibit R-1). Moreover, in the final evaluation report on her teaching performance for the 1976-77 school year, her principal commented that her absence during the preceding three years "mars what is an otherwise outstanding professional record." (Exhibit J-38).

Both Angelucci and Nehemiah are recognized by the Board to be unusually excellent teachers. Observations of their classroom performance have resulted in consistently favorable reports on their organizational ability, resourcefulness and knowledge of subject matter. Typically, Angelucci's 1977-78 final evaluation described her as "the kind of career teacher we need in education." (Exhibit J-8). Likewise, Nehemiah's 1976-77 final evaluation mentioned that "she continues to prove repeatedly that she ranks among the most effective teachers on the Washington School staff." (Exhibit J-38).

Most of petitioners' remaining presentation was devoted to efforts taken by Angelucci to minimize any disruptive effect which her unavoidable absences might have on her students. The principal of the school where Angelucci still teaches praised her for leaving extensive and detailed lesson plans to assist substitutes. He had personally seen her husband pick up students' papers to be marked by Angelucci at the hospital and then returned to the students at school. While in the hospital, Angelucci maintained contact

with the substitute teacher by telephone calls and exchange of notes. On cross-examination, the principal was forced to admit that ten different substitutes were assigned to replace Angelucci during 22 days of absence in 1978-79. He agreed that it was generally difficult to find suitable substitute teachers.

An assistant county superintendent of schools, whose daughter happened to be in Angelucci's class in 1975-76, testified that originally he had been concerned upon hearing about the number of times his child's teacher was absent during that year. To find out what was happening, he had arranged to confer with Angelucci and to review some of her lesson plans. He came away from these conferences satisfied that there was sufficient continuity in his daughter's educational program. This opinion was shared by another witness with ten years teaching experience. Her daughter is presently in Angelucci's class, and the mother confirmed that Angelucci kept in close contact with parents and prepared very precise lesson plans for periods of absence. Two past presidents of the local PTA commended Angelucci for her service as faculty advisor to that group. Despite her illness, Angelucci was always readily available by telephone if any work needed to be done.

At a meeting of the Board on August 14, 1980, the sponsor of the motions to deny salary increments to Angelucci and Nehemiah gave his reasons for this action. He objected to "the high cost of hiring substitutes" and also to the "dislocation that occurs when substitute help is not available." More importantly, he noted that "the quality of instruction suffers when permanent employees are replaced by temporaries." (Exhibit J-1).

Several qualified school administrators were called by the Board to express opinions on the effect of frequent teacher absences. Notwithstanding the fine lesson plans which the missing teacher may leave, the principal of Washington School felt that a substitute cannot teach as successfully as the regular teacher because of the lack of knowledge of the children in her class. Along the same lines, the principal of Redwood School thought that a substitute would not possess the depth of familiarity with the curriculum and the personal knowledge of the students to continue teaching with the same degree of effectiveness as the regular teacher. In his opinion, a substitute cannot really be aware of the rate of progress and specific needs of each individual student. These sentiments were echoed by an assistant superintendent, who observed that good teaching involves more than simply following a lesson plan, but also reflects a teacher's ability to

implement the plan based on her understanding of her own students. Lastly, the superintendent of schools pointed out that children have a less serious attitude toward learning when a substitute takes over for the regular teacher. Some children regard such days as holidays. In the area of skill and concept development, the superintendent believed that the process was cumulative, gradual and continuous. Any interruption of that process due to the absence of the regular teacher who knows the children is likely to have an adverse impact on the instructional program.

After careful review of the testimony and the documentary evidence, I FIND the following facts:

1. Petitioners Angelucci and Nehemiah are tenured teachers in the West Orange School District.

2. Each petitioner was notified by letter dated April 27, 1979 from Theodore D'Alessio, Superintendent of Schools of the West Orange School District, that the Board had approved her appointment for the 1979-80 school year.

3. In July 1979, the Board voted to approve the 1979-80 contract with the West Orange Education Association.

4. On August 14, 1979, the Board voted to withhold each petitioner's employment increment and adjustment for "excessive absenteeism." Notification of this vote was mailed to each petitioner on August 15, 1979.

5. Both Angelucci and Nehemiah received advance notice that teacher attendance was one of the evaluative criteria on which performance would be judged. Furthermore, Nehemiah's final evaluation report for 1976-77 expressly advised that her attendance record must be improved. As experienced teachers, both petitioners were well aware of the negative impact of excessive absence on the continuity of instruction.

from a lesson plan with the same effectiveness as the regular teacher who is thoroughly familiar with the curriculum and understands her own students. Children naturally realize this fact and tend to view the occasion as a holiday on which they do not have to work as hard. Since skill and concept development are cumulative and gradual processes, any repeated absences by the regular teacher will be detrimental.

12. As established by expert testimony, Angelucci's 24 absences in 1978-79 and Nehemiah's 17 1/2 absences that same year were excessive.

13. Considering the primary responsiblity of the Board to provide a thorough and efficient education for the children in the district, it cannot be said that its determination to withhold petitioners' 1979-80 employment and adjustment increments was arbitrary, capricious or unreasonable.

Based on the facts adduced at the hearing and the applicable law, I **CONCLUDE** that the Board's discretionary exercise of its statutory authority to withhold increments should not be overturned in this instance.

N.J.S.A. 18A:29-14 provides that a board of education may withhold, for inefficiency or other good cause, the employment or adjustment increment, or both, by recorded roll call majority vote of the full board. Appeals from such action may be taken to the Commissioner of Education who may either affirm or direct that the increments be paid. A decision to withhold an increment is a matter of essential managerial prerogative which has been delegated by the Legislature to the local board. Bd. of Educ. of Bernards Twp. v. Bernards Twp. Educ. Assoc., 79 N.J. 311, 321 (1971). When reviewing such determinations, the Commissioner of Education is prohibited from substituting his own judgment for that of the local board. Rather, the scope of his review is limited to assuring that there exists a reasonable basis for the decision. Exercise of the discretionary powers of the local board may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960). Moreover, it must be remembered that the burden of proving unreasonableness rests upon the party challenging the board's action. 60 N.J. Super. at

97. That difficult burden has not been satisfied by petitioners' evidence which failed to stablish that the Board's fears concerning excessive teacher absenteeism were unjustfied.

Recently, in Trautwein v. Bd. of Educ. of Bound Brook, unpublished opinion, uperior Court of New Jersey, Appellate Division, Docket No. A-2773-78 (decided April 8, 980), certif. den. ___ N.J. ___ (decided June 12, 1980), the Court had an opportunity to onsider circumstances virtually identical to our own. In that case undisputed evidence howed that Trautwein, whose teaching performance was rated excellent to good, had een absent a total of 238 1/2 days since 1964 or an average of almost 21 days per year. 'here too the absences were caused by the teacher's personal illness as well as the llnesses of her husband and daughter. Despite the legitimacy of the absences, the local oard adopted a resolution withholding Trautwein's 1976-77 salary increment. At the Commissioner's level, the local board's determination was set aside. On further appeal to :he State Board, the legal committee deadlocked on its recommendation and submitted two conflicting reports to the State Board. By an evenly split vote, the State Board was unable to reverse the Commissioner's decision and therefore voted to affirm. Reversing the State Board and reinstating the local board's denial of any salary increase, the Appellate Division commented on the appropriate standard to be applied in such situations,

> It is clear to us that we have here no more than a difference of opinion between the local board and the State Board on whether, in the circumstances, the teacher's absences, despite the State Board's acknowledgment that they were "unusually numerous" and were to be considered "material," warranted the withholding of the increment. Such divergence, in our view, is an insufficient basis for affirming the commissioner's reversal of the local board's decision. There was no determination that the board's decision was arbitrary or unreasonable or in any way constituted an abuse of the board's legislatively vested discretion in the matter. In fact, the conflicting reports submitted by the legal committee, as well as the closeness of the votes taken by the State Board, would tend to negate any conclusion that the local board acted unreasonably in withholding the increment.
>
> Slip sheet opinion at page 10.

However harsh or unwise the policy adopted by the Board may appear to petitioners, it cannot be regarded as irrational or illogical in terms of the permissible objectives which the Board sought to accomplish. Accordingly, the holding in Trautwein mandates that the decision of the Board must be affirmed.

6. Angelucci missed 24 days in 1978-79, 11 days in 1977-78, 20 days in 1976-77, 27 days in 1975-76, 40 days in 1974-75, 20 1/2 days in 1973-74 and 13 1/2 days in 1972-73. During 7 years of teaching in West Orange, she was absent a total of 156 days.

7. Nehemiah missed 17 1/2 days in 1978-79, 15 days in 1977-78, 24 days in 1976-77, 42 days in 1975-76, 38 days in 1974-75, 51 days in 1973-74, 31 days in 1972-73, 23 days in 1971-72, 15 1/2 days in 1970-71, 7 days in 1969-70, and 6 days in 1968-69. During 11 years of teaching in West Orange, she was absent a total of 270 days or the equivalent of 1 1/2 school years.

8. All of Angelucci's absences were caused by a serious medical condition which required hospitalization for treatment. These absences were due to conditions beyond her control and were clearly legitimate.

9. Many of Nehemiah's absences were related to a back injury sustained as a result of a 1972 automobile accident and aggravated by subsequent 1973 and 1974 automobile accidents. Her remaining absences were due to various proper reasons such as sickness or death in the family or participation at teachers' conventions. None of these absences was challenged by the Board and they have been accepted as legitimate.

10. Angelucci and Nehemiah are outstanding teachers who have demonstrated an exceptionally high quality of performance while in the classroom.

11. Irrespective of the legitimate reasons for these absences, frequent absences of the regular teacher inevitably have an adverse effect on the learning which takes place in the classroom. The children of West Orange are deprived of the substantial benefits derived from a full-time teacher who knows their individual needs and rate of progress. Often it is difficult for school administrators to find an available substitute. Even if available, no substitute can teach

Attention must also be given to the period of time which may properly be considered in assessing a teacher's record of absenteeism. It was the State Board's view in Trautwein that a teacher's entire record may be considered, "although as time recedes into the past the earlier record becomes less relevant to the present." Trautwein v. Bd. of Educ. of Bound Brook, 1978 S.L.D. ___, Docket No. 103-78 (decided April 28, 1978). Over petitioners' strenuous objections, the entire attendance records of Angelucci and Nehemiah were received in evidence. In the course of the hearing, petitioners' counsel argued that any absences occurring more than three years ago were too remote in time to be significant. Remoteness cannot ordinarily be determined by the passage of time alone. Cf. State v. Sands, 76 N.J. 127, 144 (1978). Nonetheless, it is unnecessary here to determine exactly how far back a board may go when deciding whether to withhold salary increments because of excessive absenteeism. Even if the search is confined to the preceding three years as petitioners advocate, the 55 days missed by Angelucci and the 56 1/2 days missed by Nehemiah during that time span are more than sufficient to support the Board's conclusion.

Finally, petitioners contend that the denial of an increment constitutes a reduction in salary necessitating the bringing of tenure charges against the affected teaching staff member pursuant to N.J.S.A. 18A:6-10. Arguments of this nature were rejected in Kopera v. West Orange Bd. of Educ., supra, 60 N.J. Super. at 297, where the Appellate Division ruled that the failure of a teacher to receive an increase of salary does not constitute a reduction. In any event, N.J.S.A. 18A:29-14 provides clear legislative authority for the action which the Board has taken.

For the foregoing reasons, the determination of the Board of Education of West Orange to withhold petitioners' 1979-80 employment and adjustment increments is **AFFIRMED.**

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

July 17, 1980
DATE

Ken R. Springer
KEN R. SPRINGER, A.A.J.

BARBARA ANGELUCCI ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by petitioners pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioners in their exceptions argue that the Board never determined whether or not pupils in their class suffered or were affected at all by their teachers' absence. Petitioners allege that pupils were not harmed in any way because of the absence of their regular classroom teacher. The Commissioner cannot agree with such a novel argument.

No offering is made as to how this lack of harm would be determined. Conjecturally, it might be made by a comparison between some agreed upon testing procedure administered to pupils on a basis of no absenteeism of the teacher involved with the results of such testing during periods when the teacher was not in attendance. Yearly scores are eliminated because the comparative basis of the teacher being present is not available. Comparison with other similar grades or classes is discouraged by teachers themselves. The Commissioner foresees monmumental problems compounded in any such determination. Assuming, arguendo, that as stated the absences of the teachers involved have no adverse effect on their pupils what limit might be expected to be drawn, if any. Could the teachers not be present at all during the year and still have their absence have no impact on the pupils. The teachers herein involved are admittedly of outstanding ability with resultant good evaluations. Such characteristics must have accrued to the teacher when present in the classroom and actively involved with pupils, not absent from that classroom no matter how legitimate the reason. The Commissioner further determines that the argument that the teachers' absences did not lessen their performance improperly places the burden of proof on the Board, rather than the teacher, where it belongs.

The Commissioner can only sympathize with teachers who suffer from debilitating illness but cannot agree that the continued absence of any teacher has no effect on the pupils. If such be true, the Commissioner is constrained to wonder the need for the presence of the teacher at all, which wonderment reduces to a legal absurdity. Wade v. Empire Dist. Electric Co., 98 Kan. 366, 158 P. 28, 30

The Commissioner observes that the professionally qualified school administrators called to testify herein expressed negative opinions on the effect on pupils of teacher absences. The Commissioner attributes great significance to such testimony. He must however call to the attention of the Board the need for the application of consistent standards by administrators in granting approved absences for teachers. If, as contended herein, frequent teacher absences adversely affect pupils and a teacher with an already established record of absences requests an approved absence, such request must be considered and weighed carefully. This admittedly places administrators in the awkward and painfully dichotomous position of making a judgment torn between sympathy for the teacher's request to be absent and the need for the teacher's presence in the classroom.

The Commissioner finds Trautwein, supra, to be directly on point.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the action of the Board of Education of West Orange to withhold petitioner's 1979-80 employment and adjustment increment is affirmed.

COMMISSIONER OF EDUCATION

September 15, 1980

Pending State Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

IN RE:	)	INITIAL DECISION
HORACE SMITH	)	**O.A.L. DKT. NO. EDU 862-80**
V.	)	AGENCY DKT. NO. 23-1/80A
JERSEY CITY BOARD OF EDUCATION, HUDSON COUNTY		

APPEARANCES:

JOSEPH CHARLES, Esq., for Petitioner.
LOUIS SERTERIDES, Esq., for Respondent.

BEFORE THE HONORABLE **ROBERT P. GLICKMAN,** A.L.J:

This matter comes before the Court by way of petition filed pursuant to N.J.S.A. 18A:6-9 vesting the Commissioner of Education with jurisdiction to hear or determine all controversies and disputes arising under the school laws. This matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference on April 3, 1980, the following issues were identified:

1. Did petitioner attain tenure in the position of supervisor as of August, 1972? Is the position of Title I coordinator of teacher aides a supervisory one within the meaning of Title 18A?
2. If so, what compensation is petitioner entitled to?
3. Was petitioner's position as coordinator in the Title I program governed by Civil Service law rather than Title 18A?

4. Would petitioner's claim for compensation and/or promotion be barred by the terms and conditions of the collective bargaining agreement between the Jersey City Education Association and the Jersey City Board of Education?
5. Is petitioner's claim barred by laches?

The following stipulations were made at the prehearing conference:

1. Petitioner is presently employed by respondent as assistant principal of P.S. No. 15 (Whitney M. Young School). He has served in that position since September, 1972.
2. Petitioner was first employed by respondent in October, 1961 as an elementary school teacher.
3. Petitioner achieved tenure in the position of teacher in September, 1966.
4. On December 16, 1968 petitioner was transferred by respondent from his assignment as a teacher assigned to school No. 3 to the assignment of coordinator assigned to Title I E.S.E.A. in charge of the teacher aide program.
5. Petitioner continued in the position of coordinator of teacher aides from December 16, 1968 until his appointment as assistant principal of P.S. No. 15 in September, 1972.
6. By resolution dated September 16, 1970 the Board of Education voted petitioner a supplementary increase in salary from $10,700 to $11,200 because he had obtained his Master's Degree.
7. By resolution dated August 26, 1970 the Board of Education affirmed petitioner's passing his competitive examination and placed petitioner in the pool for assistant principal of an elementary school.
8. Petitioner served in the position of Title I coordinator of teacher aides under supervisory certification from August 8, 1970 through August 31, 1972.
9. By letter dated May 18, 1979 respondent was given written notification of petitioner's claim for under-compensation for the aforementioned period.

10. Respondent was given further written notification of said claim by letters dated June 28, 1979, September 7, 1979 and November 1, 1979.
11. By letter from respondent's attorney dated September 21, 1979 and November 7, 1979, respondent indicated that it would not honor petitioner's claim.

On June 19, 1980 a hearing took place at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. During the course of the hearing, respondent's attorney moved to bifurcate the question of whether or not petitioner attained tenure in the position of supervisor from any issue dealing with compensation or damages. Counsel for petitioner consented to the application, which was granted by the Court. It was agreed by counsel that if the Court should grant relief to petitioner on the existing issue, counsel would attempt to work out a settlement on the question of damages.

The following exhibits were marked into evidence:

1. J-1, Jersey City Board of Education resolution dated April 9, 1969.
2. J-2, Jersey City Board of Education resolution dated September 16, 1970.
3. J-3, Jersey City Board of Education resolution dated August 26, 1979.
4. J-4, Document dated August 8, 1970 from Seton Hall University indicating Horace Smith completed the requirements for a degree of Master of Arts with a concentration in Educational Administration.
5. J-5, Rules and regulations of the Jersey City Board of Education defining duties of supervisor and assistant supervisor.
6. J-6, Definition of supervisor.
7. J-7, Job description of supervisor, teacher aide project, Title I program.
8. J-8, Letter dated October 14, 1977 from James Jencarelli to Mrs. Constance Nichols and Mr. Franklin Williams.
9. J-9, Jersey City Board of Education resolution dated August 14, 1969.

At the trial, Horace Smith testified on behalf of petitioner and James Jencarelli testified on behalf of respondent.

Post hearing proposed findings of fact were requested to be submitted by July 17, 1980 on which date the hearing was deemed to be concluded. See N.J.A.C. 1:1-16.1.

Horace Smith testified that on December 16, 1968 he was appointed to the position of coordinator of Title I E.S.E.A. teacher's aide program. Prior to that period of time, he was a teacher at public school No. 3 in Jersey City. During the period of time in question, there were three coordinators of para-professionals. Petitioner was coordinator of the instructional component of Title I, Mr. Charles Smith was the coordinator of the supportive service phase, i.e. the health program, and Mr. Everett Tillman was the coordinator of the community phase of Title I. The petitioner was responsible for the overall guidance and supervision of all teacher aide personnel. It was his duty to assign the teacher aides to classroom teachers. At that time, there were 18 schools designated as Title I schools. Petitioner assigned the original 48 teacher aides to teachers on a one to one basis. Petitioner also was responsible for handling the payroll for the teacher aides.

The Title I program is an educational program under the 1965 elementary education secondary act. The purpose of the program is to supplement the regular Board of Education program so as to upgrade the academic level of students who are deficient in reading and math. (Tr. 16)

Mr. Smith identified what schools would be selected as Title I schools. In determining this, he looked at, among other things, how many children were receiving aid for dependent children and how many children were on welfare; he also used an income averaging system. The approach for identifying Title I schools was provided by the State Department of Education. The program itself is a federal program, the money from which is filtered through the State Department of Education. The money then goes to the local districts based upon their needs and based upon the number of identifiable Title I youngsters. (Tr. 18) During the initial period of time, the budget was approximately $1.2 million; now it is approximately $4 million. Locally, the money is administered by the Jersey City Board of Education. The Board, then, directs who is to handle and supervise the program. Petitioner, in fact, was appointed to his position by the Jersey City Board of Education.

When petitioner was first appointed to his position in December, 1968, the Title I schools had already been identified. Because it was felt that certain students, as a result of testing, needed reinforcement in the skills of reading and math, teacher aides were to be placed in classrooms to assist the teachers. Anyone with a high school diploma could become a teacher aide, but at that time, one had to take an examination for the position. The in-service training was developed by petitioner, for both the Title I teacher

and the teacher aide. The program for the teacher's aide involved introducing them to materials that were utilized in the schools, instructing them how to operate audio-visual aid materials, and instructing them how to develop effective methods to assist the classroom teacher in various projects.

Mr. Smith identified the classes in which the teachers' aides would be placed, went to each school to confer with the principal, and on the basis of the recommendation of the principal, the aides were placed with various teachers. Once the teacher aides were on site, petitioner made periodic visits to the schools to discuss with the teacher, teacher aide and principal ways of improving the program. These visits took place approximately twice a month.

If the teacher aide was not performing well, the principal would contact petitioner who would arrange a conference with the teacher aide in order to solve any problems. Petitioner submitted a monthly progress report of the program. Upon being asked whether he conducted an evaluation of the teachers, Mr. Smith replied:

> "Yes, a narrative comment on not so much evaluating the teacher but really being a resource person and informing the superintendent's office whether or not a particular teaching situation with the aide was feasible, whether or not a particular teaching situation was feasible or not." (Tr. 29-30)

There were some instances in which a teacher's aide would be removed from one class and placed in another based on evaluations by petitioner and consultations with the building principal.

Petitioner developed and submitted a supplementary payroll for people who performed in the workshops during the summer and after school. With regard to the teachers' aides' payroll, petitioner had to keep a record of their time, do the payroll, verify the payroll and submit it to the Director of Title I program. Afterwards, the payroll would be submitted to the Board of Education. Mr. Smith verified the attendance of the teacher's aides.

Petitioner indicated that he was instructed to develop a cultural program for the participating Title I schools. He developed a program of roughly 100 shows of a

cultural nature. Lesson plans were developed by petitioner in conjunction with the cultural program. Some of the shows related to the ethnic backgrounds of the children. Petitioner reported to Mrs. Nichols, the Assistant Superintendent of Schools in charge of participating Title I schools, to Dr. McCarthy, the Assistant Superintendent of Schools in charge of personnel, to Mr. Vincent Jordan, the Director of State and Federally Funded Programs, to Mr. James Gaines, the Administrative Coordinator, Title I, and to Dr. Coyle, the Superintendent of Schools. Progress reports were due once a month.

Guidelines were developed for special teachers of reading who would assist Title I teachers with teacher's aides. These guidelines were developed in conjunction with Mrs. Nichols. There were approximately ten special reading teachers with ten years of experience who acted as consultants to the Title I teachers with teacher's aides.

Mr. Smith interviewed all applicants for the position of teacher aides. The applications were on regular Board of Education application forms. Once these forms were completed, petitioner would submit them to the Assistant Superintendent of Schools in charge of personnel. After his approval, they would be submitted to the Board of Education which would do the hiring.

Petitioner attended all Title I advisory Board meetings as well as Board of Education meetings where he acted as a consultant to answer any questions concerning the teacher aide program. He considered his functions as those of an educational consultant. He also consulted with the administrative staffs. Whenever a problem developed within a school, he would meet with the principal in order to resolve it. His coordinating function involved bringing the supplementary program together with the regular school program.

On cross-examination, Mr. Smith indicated that he served in the capacity of coordinator of the teacher aide program from mid-December, 1968 until August, 1972 at which time he was assigned to the position of assistant principal. Teachers' aides did not have to be college graduates nor did they have to have any certification from the State Board. In describing his evaluation of the teacher aides, Mr. Smith indicated that he filled out a question and answer form, checking off spaces indicating the teacher aide was excellent, fair or good. He would evaluate teachers in the Title I program based upon their performance in the in-service training programs. However, these evaluations were unrelated to the teachers' ability or competence to teach. (Tr. 53)

Mr. Smith, from December 16, 1968 to present, has never received a copy of a resolution enacted by the Jersey City Board of Education appointing him to the position of supervisor. (Tr. 55) The position of supervisor is one in which a person must take an examination. Mr Smith took such an exam for the position of supervisor in 1976. He also took an assistant principal exam in 1970, which is the same exam. Petitioner was appointed assistant principal in September, 1972 off a promotional list.

Since the respondent's attorney did not submit a brief to the court on the issue of laches, that issue is deemed to be waived.

After Mr. Smith's testimony was completed, petitioner rested.

James Jencarelli testified that he is employed by the Jersey City Board of Education as an assistant superintendent in charge of personnel. As such, he is familiar with the Title I program. He describes it is a federally funded program which is primarily designed to offer remediation to those people classified in need of it. (Tr. 58)

According to a memorandum from Mr. Jencarelli to Mrs. Nichols and Mr. Williams dated October 14, 1977 (J-8), he stated:

> "The recent reorganization of the Title I program included a change in the basic functions of those classified as coordinators and assistant coordinators. All duties related to evaluation and supervision of personnel were removed from their job descriptions. Such responsibilities have now been assigned to the principals of the various schools." (Tr.59) This memorandum was prompted by visits from the State Department of Education and County Superintendent who determined that coordinators who were assigned to the Title I program, in most instances, did not have the proper certification. The Board also felt that in order to have a meaningful evaluation procedure, it should be done by a properly certificated person, who, in fact, would be the principal of the building or a supervisor designated by Board resolution.

It was Mr. Jencarelli's opinion that the evaluation of teacher aides, based on Mr. Smith's testimony, was a proper function for a man who occupied the position of

coordinator of the teacher aide program. The administrative positions of the Title I program were covered by Civil Service regulations. Dr. Ganes, the present director of Title I, came off a Civil Service list. Every other position from coordinator to assistant coordinator was classified as a Civil Service position.

No teacher aide has ever been required to possess a certificate issued by the State Board of Examiners. However, Title I teachers employed by the Board now are required to have certificates issued by the State Board of Examiners. Up until July, 1979, there have been teachers in the Title I program who either have no certificate or hold improper ones.

Mr. Jencarelli neither knows of nor has seen any evaluations performed by Mr. Smith of teacher aides, which should have come into his possession in 1977.

Several teachers moved from regular Board employment, to Title I staff employment such as petitioner and Mr. Charles Epps.

On cross-examination, Mr. Jencarelli admitted that he in fact, did not know what Mr. Smith did from December, 1968 until August, 1972. The reason that his memo was written in October, 1977 was a concern that coordinators of Title I did not have the proper certification to conduct evaluations. The witness stated that it is the Board's authorization which makes a person a supervisor or an administrator, and there was no authorization by resolution from the Board assigning Mr. Smith such duties. (Tr. 78)

Mr. Jencarelli, in pointing to exhibit J-5, which was in existence between 1968 and 1972, indicated that one of the duties which Mr. Smith did not perform as a supervisor was evaluating certificated personnel, such as teachers. Also, he did not sit and have classroom visits with teachers. His visits concerned the teacher's aide and were not to evaluate the teacher. Mr. Jencarelli, in describing the functions of a supervisor, stated:

> "However, a supervisor will go in and supervise a teacher's performance and recommend to the principal that there are shortcomings or there are strong features, and together they consult and make a determination as to whether the performance is satisfactory or unsatisfactory." (Tr. 84)

Mr. Smith had the ability to give direction and guidance with regard to the work of instructional personnel, but did not have the Board authority to do so.

Upon being questioned by the Court, Mr. Jencarelli stated that the reason teachers' aides would not be included in the definition of teacher in J-5 was because they were governed by Civil Service.

J-5 in pertinent part states:

"Supervisors and Assistant Supervisors Duties:

511-01 Supervisors to Act as Educational Consultants

The supervisor shall act as educational consultants to the Superintendent of Schools, the administrative staff and teachers.

In their capacity as educational consultants they shall, through school and classroom visits and through conferences with the administrative staff, and with teachers, help to coordinate the work of their departments.

They shall supply information on textbooks.

They shall encourage the improvement of instruction."

Based upon a careful consideration of the aforegoing, including a careful review and study of the pleadings, exhibits, stipulations and an assessment of the credibility and demeanor of the witnesses and the inherent probability of their testimony, this Court **FINDS:**

1. Stipulations 1 through 11 are hereby adopted as Findings of Fact and are incorporated herein by reference.
2. The petitioner, Horace Smith, performed the following duties, among others, as coordinator of the Title I teacher's aide program from December, 1968 until August or September, 1972:
   A. Assigned teacher aides to classroom teachers;
   B. Responsible for handling the payroll for teacher aides;
   C. Developed in-service training for Title I teachers and teachers' aides;
   D. Held conferences with principals of Title I schools;

E. Made periodic visits to schools to discuss with teachers, teachers' aides and principals, ways of improving programs;

F. Submitted monthly progress reports of program;

G Developed supplementary payroll for people who performed in summer and after school workshops;

H. Developed cultural programs for participating Title I schools;

I. Developed lesson plans to be used in conjunction with cultural programs;

J. Interviewed applicants for position of teachers' aides;

K. Attended all Title I advisory board meetings;

L. Attended Board of Education meetings where he acted as a consultant to answer questions concerning the teacher aide program;

M. Conducted evaluation of teacher aides by using a form with space to check off "excellent, fair or good."

3. The Board of Education of Jersey City never passed a resolution appointing petitioner to the position of supervisor.

4. Petitioner was never authorized by the Jersey City Board of Education to act as a supervisor.

5. Petitioner never evaluated classroom teachers.

6. Most administrative positions of the Title I program were covered by Civil Service regulation.

7. Petitioner never had conferences with classroom teachers.

8. Petitioner's visits to any classrooms were for the purpose of observing teachers' aides and not teachers.

9. Petitioner had the ability to give direction and guidance with regard to the work of instructional personnel, but did not have the Board of Education's authority to do so.

10. Teachers' aides are not includable in the definition of teachers under J-5 since teachers' aides are governed by Civil Service.

The recent decision of Charles Epps, Jr., v. Board of Education of the City of Jersey City, Hudson County, Docket No. EDU 60-2/78 (aff'd by Commissioner of Education November 15, 1979 and further affirmed by the State Board of Education) is practically similar in all respects to the instant case. Mr. Epps was assigned by the Board of Education in Jersey City to the position of coordinator of teacher aides in its Title I

program. Mr. Epps asserted that he performed supervisory duties for the requisite period of time to have acquired tenure. There was no affirmative act of the Board to make petitioner a supervisor. The Administrative Law Judge in Epps, supra, stated:

> "Petitioner cannot be viewed as having acquired a tenure status as supervisor within the scope of his certificate as supervisor for two reasons:
>
> 1. The Board did not appoint him at any time to a position of supervisor... and,
> 2. Petitioner's employment responsibility of supervising and evaluating "teacher assistants" a title not recognized either in N.J.S.A. 18A, Education Law or in N.J.A.C. 6, Rules and Regulations of the State Board of Education, does not equate with supervision of teaching staff members as defined in N.J.S.A. 18A:1-1."

It is clear that tenure is a creature of statute and does not come into being until all statutory requirements are met. Ahrensfeld v. State Board of Education, 126 N.J.L. 543 (1941) and Zimmerman v. Board of Education of Newark, 38 N.J. 65 (1962).

It is axiomatic that the power of a board to appoint teaching staff members and prescribe rules for their employment is well recognized. N.J.S.A. 18A:27-1 states:

> "No teaching staff member shall be appointed, except by recorded roll call majority vote of the full membership of the Board of Education appointing him."

Additionally, N.J.S.A. 18A:27-4 states, in pertinent part:

> "Each Board of Education may make rules,not inconsistent with the provision of this title, governing the employment, terms and tenure of employment...of teaching staff members for the district..."

Mr. Smith performed some supervisory duties, and did them quite well, but in the absence of the Jersey City Board of Education taking any affirmative action to make him a supervisor. Additionally, the evaluation of teacher aides is not the equivalent of evaluating teaching staff members as defined by N.J.S.A. 18A:1-1.

This Court has looked very carefully at the duties performed by petitioner rather than the title given to him. As stated in Elizabeth Boeshore v. Board of Education of the Township of North Bergen, Hudson County, 1974 S.L.D. 805, 814:

> "...The Commissioner must be vigilant to protect those who are entitled to tenure from the erosion of their tenure rights by subterfuge and evasion. He must be equally vigilant against the employment of devices to confer tenure upon those who are not entitled to his protection. The duties performed rather than the title of a position must be controlling in determining whether a position is protected by tenure. Nomenclatures may not be the deciding factor."

See also Arthur L. Page v. Board of Education of the City of Trenton and Pasquale A. Maffei, Mercer County, 1975 S.L.D. 644.

This Court does not find that respondent engaged in any subterfuge or evasion to deprive petitioner of tenure rights. Petitioner's failure to perform the essential duty of evaluating teachers is a controlling consideration to this Court.

Based on the applicability of Epps, supra, it is **CONCLUDED** that petitioner, Horace Smith, did not attain tenure as a supervisor pursuant to either N.J.S.A. 18A:28-5 or N.J.S.A. 18A:28-6. Additionally, because of the lack of board appointment pursuant to resolution and because petitioner did not evaluate teachers but only evaluated teacher aides, it is **CONCLUDED** that the position of Title I coordinator of teacher aides is not a supervisory one within the meaning of Title 18A.

Accordingly, it is **ORDERED** that the petition be and is hereby **DISMISSED** with prejudice.

EDU 862-80

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

August 4, 1980
DATE

Robert P. Glickman
ROBERT P. GLICKMAN, A.L.J.

HORACE SMITH,

PETITIONER,

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF JERSEY CITY, HUDSON COUNTY, : DECISION

RESPONDENT.

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

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the reliance by Judge Robert E. Glickman, ALJ, on the applicability of Epps, Supra, to the instant matter. The Commissioner does not agree and finds Epps to be directly on point. Petitioner's further argument, that because he was hired as coordinator of teacher aides he acquired tenure as a supervisor, must fall. No specific certificate for his appointment to that position was required nor did the Board employ him as a supervisor of certified teaching staff members. At the most, petitioner's prime responsibility was to work with teacher aides, personnel who held little education beyond that of high school graduate and who were not required to hold any formal college education or certificate. (Tr. 49-50) The Commissioner observes that such teacher aides are not recognized in N.J.S.A. 18A, Education Law or in N.J.A.C. 6, Rules and Regulations of the State Board of Education. Any work done in the supervision of such personnel is not commensurate with the supervision of certified teaching staff members.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

September 20, 1980
Pending State Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF	)	INITIAL DECISION
GLADYS BRUN ER,	)	**OAL DKT. NO. EDU 0697-80**
PETITIONER	)	**AGENCY DKT. NO. 2-1/80A**
v.	)	
UPPER FREEHOLD REGIONAL	)	
BOARD OF EDUCATION,	)	
RESPONDENT	)	

APPEARANCES:

For Petitioner:

Kalac, Newman & Griffin **(Peter P. Kalac,** of Counsel)

For Respondent:

Greenberg & Mellk **(John B. Prior, Jr., Esq.,** of Counsel)

BEFORE THE HONORABLE **ERIC G. ERRICKSON,** A.L.J.:

STATEMENT OF CASE AND PROCEDURAL RECITATION:

Petitioner, who was employed by the Upper Freehold Board of Education (Board) as a teaching staff member from 1965 until her resignation effective October 15, 1979, alleges that the Board is legally obligated to compensate her in greater amount and provide additional attendant emoluments for the period she worked during the 1979-80 school year. The Board, conversely, asserts in a counterclaim that it overpaid her for the period from July 1, 1978 until October 15, 1978 and seeks an Order directing her to return the amount of the alleged overpayment.

The matter was filed before the Commissioner of Education who on February 6, 1980, pursuant to the provisions of N.J.S.A. 52:14F-1, et seq., transmitted it as a contested case to the Office of Administrative Law. The matter is ripe for determination in the form of the pleadings, Cross Motions for Summary Judgment, a Stipulation of Facts (J-1) and Briefs of counsel. No essential facts are in dispute.

FACTUAL CONTEXT OF THE DISPUTE:

Petitioner, a school psychologist, was employed by the Board less than full time until she was appointed effective July 1, 1978 to serve during the 1978-79 school year to a five day work week, eleven months per year, not to exceed 206 working days. Her salary for 1978-79 was fixed at $23,975.20 as per step nineteen of the masters plus thirty column of the teachers' salary guide. Petitioner's salary was paid in twenty-six equal bi-weekly payments spread over a twelve month period.

Petitioner worked during the 1978-79 and 1979-80 academic years until the last day ten-month teachers were on duty at the school. She, thereafter, worked twenty additional days each summer during the periods from the close of school in June until it reopened in September. Since negotiations had not yet been completed in July 1979, she was issued six bi-weekly checks of $991.46, totaling $5,948.76. Her resignation on September 24, 1979, which became effective October 15, 1979, was accepted.

Petitioner worked during the month of September 1979 and through the last day of scheduled classes prior to October 15, 1979, the effective date of her resignation. She received no pay check for the period October 1 through October 15, 1979. Nor did she thereafter receive a retroactive salary payment for any portion of the 1978-79 school year. The ten-month academic year salary for which she was eligible in that year as fixed by the successor agreement was $25,225. This translates, with the addition of one-tenth of the academic year salary for summer employment, to a bi-weekly payment of $1,051 when spread over a twelve-month period.

Petitioner, on October 16, 1979, was informed by the Superintendent that her salary would be retroactively recalculated on a per diem basis. She was thereafter informed that she was liable to the Board for repayment of part of the salary she had

received since July 1, 1979. Thereupon, petitioner timely filed her Petition of Appeal before the Commissioner. The Board similarly filed its counterclaim in timely fashion.

DISCUSSION, CONCLUSION, AND DETERMINATION:

It is clear that petitioner worked on an annual contract salary basis, not a per diem basis. Since few school districts require their ten-month teaching staff members to be present for each of two hundred days, it must be concluded that boards generally, and this Board in particular, compensate their ten-month employees for some days on which school is not in session.

An equitable principle as authorized in statute has been to pay employees over the ten-month period "***in equal semi-monthly or monthly installments *** while the school is in session, a month being construed, unless otherwise specified in the contract, to be twenty school days or four weeks of five school days each;***" N.J.S.A. 18A:27-6

Applying this equitable principle to the facts of this dispute, it becomes clear that petitioner worked during the 1978-79 school year the equivalent of one month during the summer, one month during September and one-half month during October for a total of two and one half months. Her salary entitlement, therefore, would be properly computed as follows:

Monthly salary entitlement	$2,522.50
Months worked	x 2.5
Total Entitlement July through October 15	$6,306.25

Since petitioner was paid during this period a total of $5,948.76, **I CONCLUDE** that she is entitled to additional compensation as here computed:

Total Entitlement	$6,306.25
Amount Received	5,948.76
Additional Entitlement	$ 357.49

Accordingly, the Board is **ORDERED** to pay petitioner the additional amount of $357.49 of her salary entitlement for services rendered during the period from the close of the 1977-78 academic year through October 15, 1979. The Board's claim for recoupment of salary is **DENIED**. Petitioner's claims to be paid for the entire months of

July and August 1979 are also **DENIED**, since she was never appointed to a twelve-month position.

The Board is also **ORDERED** to revise its salary policies applying principles as stated by the Commissioner In the Matter of the Request of the Board of Education of the Township of Brick, 1977 S.L.D. 704. Therein, it was clearly enunciated that although a board may opt to pay on a bi-weekly basis, it may not pay its employees, as this Board paid petitioner during August, for services not yet rendered. It appears likely that the application of this principle which has its origin in requirements of the New Jersey Constitution would have averted this litigation.

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

August 4, 1980
DATE

Eric G. Errickson
ERIC G. ERRICKSON, A.L.J.

GLADYS BRUNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UPPER FREEHOLD REGIONAL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner in her exceptions protests the determination by Judge Eric G. Errickson, ALJ, that she was not a 12 month employee asserting that the collective bargaining agreement shows only 10 month and 12 month employees. She contends that the Board is in violation of its own agreement when it claims an 11 month status for petitioner. Petitioner claims entitlement to interest on any monies due her.

The Board's exceptions affirm that petitioner's salary was based on an 11 month period and also makes correction of errors in the initial decision of petitioner's prior salary guide placement.

The Commissioner has examined the record carefully and cannot agree with petitioner's exceptions. The Commissioner notes that attached to petitioner's Brief in Support of Motion for Summary Judgment dated May 23, 1980 are three documents each labeled Exhibit A, each of which refers to petitioner's status as an 11 month employee. Of great significance in the Commissioner's judgment are Exhibit A(2), petitioner's salary acceptance of April 20, 1980 signed by her, and A(3) signed by petitioner and an officer of the Education Association. The Commissioner makes no judgment as to the propriety of such an 11 month status but determines that surely petitioner knew or should have known that status as did the Education Association by the signature on the aforementioned documents.

Having determined petitioner's 11 month status, the Commissioner must consider monies due her, if any. The Commissioner affirms the exception filed by the Board therein.

Petitioner's salary as determined by negotiations was $25,225.00. Her entitlement was to two and one-half months' pay as follows: $25,225.00 ÷ 11 = $2,293; $2,293 x 2.5 = $5732.50. The Board has paid petitioner $5,948.76 which constituted an overpayment as follows: $5,948.76 - $5,732.50 = $216.26.

The decision of the Court herein is accordingly set aside. The Commissioner determines that $216.26 is owed the Board by petitioner and the Commissioner therefore directs the payment of that sum.

COMMISSIONER OF EDUCATION

September 22, 1980

Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ROBERT A. KIAMIE	)	INITIAL DECISION
v.	)	**OAL DKT. NO. EDU 0230-80**
	)	AGENCY DKT. NO. 464-12/79A
	)	
BOARD OF EDUCATION OF THE BOROUGH OF NORTH HALEDON, PASSAIC COUNTY	)	

APPEARANCES:

For the Petitioner:

JAMES V. SEGRETO, Esq.

VINCENT M. LOMBARDO, former Board member

ROBERT A. KIAMIE, Petitioner

JOSEPH SASSO, Board member

JOHN KOWALSKI, Board member

ROBERT A. SCIALLA, Board member

For the Respondent:

MORTON R. COVITZ, Esq.

PAUL J. ORTENZIO, Acting Superintendent

BARBARA TERLIZZI, Board member

JOHN McLAUGHLIN, former Board secretary

ANTHONY DeFRANCO, Board member

PETER DePALMA, Board member

JOSEPH A. MEDICI, former Board member and president

EVIDENTIARY DOCUMENTS:

P-2: Kiamie to Board letter dated February 27, 1979

P-3: McLaughlin to Kiamie letter dated November 7, 1979 with envelope, resolution and certified mail receipt.

P-4: Segreto to Board letter dated November 2, 1979.

P-5A: November 2, 1979 special meeting notice.

P-5B: November 2, 1979 special meeting agenda.

P-6: Minutes of November 2, 1979 public Board meeting.

P-7: Sealed minutes of November 2, 1979 closed Board meeting.

P-8: Lombardo and Sasso letter to McLaughlin dated February 14, 1979.

P-9: Pertinent extracts of Interrogatories by petitioner, responses by Ortenzio for the Board.

P-10: October 30, 1979 memo to Board members Salloum, Terlizzi and DePalma from McLaughlin.

P-11: Certified mail envelope from Board to Kiamie (PO 13371270).

R-1: November 2, 1979 special meeting notice dated October 30, 1979 with agenda.

R-2: Certified mail receipt of P-11.

R-3 July 26, 1979 notice to Board members re Kiamie charges and responses to be heard at July 30, 1979 Board meeting.

R-4: R-1 with receipt signature of Lucille B. Debiak dated October 30, 1979 at 11:55 a.m.

BEFORE THE HONORABLE **WARD R. YOUNG**, A.L.J.:

Petitioner alleges that the action of the Board in recertifying tenure charges against him on November 2, 1979 was in violation of N.J.S.A. 10:4-6 et seq.; N.J.S.A. 18A:6-11 and/or N.J.A.C. 6:24-5-1 et seq.; N.J.S.A. 18A:6-13; and further that the de novo action was procedurally defective and did not constitute an effective corrective or remedial action of a prior certification of tenure charges which had been set aside by the Commissioner of Education.

The respondent denies the impropriety of its action and asks the Commissioner to dismiss the matter.

The Petition of Appeal was filed with the Commissioner of Education on December 17, 1979. An Answer was filed by ordinary mail on December 18, 1979. The matter was transmitted to the Office of Administrative Law on January 14, 1980 as a

contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on March 6, 1980 and hearings were held on June 10 and 11, 1980. The record was closed on July 25, 1980 with the receipt of petitioner's reply brief.

The undisputed relevant facts that follow represents a brief history of the controverted matter.

1. On February 9, 1979 charges were certified against petitioner by the Board and he was suspended from his tenured position as Superintendent of Schools without salary.

2. On July 30, 1979 the Board certified additional charges against petitioner and again acted to suspend him, but with pay.

3. The Board's action on February 9, 1979 was set aside in an Initial Decision by the Administrative Law Judge under date of November 2, 1979, which was affirmed by the Commissioner of Education due to violations of N.J.S.A. 10:4-6 et seq., the Open Public Meetings Law. In the Matter of the Tenure Hearing of Robert A. Kiamie, School District of the Borough of North Haledon, 79 S.L.D. ____ (decided December 24, 1979).

4. The Board's action on July 30, 1979 was not adjudicated due to the reasonable expectancy that the Board would act de novo to recertify the charges of February 9, 1979 and include the charges of July 30, 1979.

5. The Board recertified charges against petitioner on November 2, 1979, which by representation included the initial charges of February 9, 1979 and July 30, 1979.

A thorough and careful review of the fifteen (15) documents admitted into evidence and the testimony of eleven (11) witnesses during the two (2) days of hearing has resulted in the following **FINDING OF FACTS** deemed to be relevant:

1. Petitioner requested the Board to mail to him notices of meetings pursuant to N.J.S.A. 10:4-19. (P-2)

2. The Board recertified tenure charges against petitioner on November 2, 1979 which they "deemed a ratification of the actions by the Board of Education of February 9, 1979 and July 30, 1979 in certifying charges to the Commissioner of Education. (P-3)

3. Counsel for petitioner wrote a letter to the Board under date of November 2, 1979 acknowledging that: "I received correspondence from the Board indicating that at a special meeting on November 2, 1979, it is going to consider

certification of charges and suspension without pay against Dr. Kiamie." (P-4)

4. A notice of special meeting scheduled for November 2, 1979, under date of October 30, 1979, was receipted by the Borough Clerk as posted at 11:50 a.m. on October 30, 1979. Said notice clearly stated, inter alia, that "the purpose of this meeting is to take de novo corrective or remedial action to cure any possible violation of the New Jersey Open Public Meetings Act (N.J.S.A. 10:4-6 et seq.) regarding the consideration and action on charges filed against the Superintendent of Schools at meetings of the Board on February 9, 1979 and July 30, 1979." (P-5A).

5. The agenda notice for the November 2, 1979 special meeting, also dated October 30 and receipted by the Borough Clerk, included in purposes: "Resolution regarding private session" and "Resolution regarding charges against Superintendent, Dr. Robert A. Kiamie (private session)." (P-5B)

6. At the public meeting on November 2, 1979, the Board President read a statement detailing the posting of notices for the meeting and the hand deliverance of same to the Paterson Evening News, the Herald News and the Bergen Record, all of which occurred on October 30, 1979. (P-6).

7. At the public meeting on November 2, 1979 the Board passed resolution 170-80 by a roll call vote of 8-1 which authorized a private session of the Board and stated in pertinent part that the purpose was "De Novo consideration of all charges and statements (of) evidence filed against Robert A. Kiamie in January, 1979 and all responses filed by Robert A. Kiamie to said charges and statements of evidence" and also "To take possible action on said charges in order to cure any technical violations of the Open Public Meetings Law which may have occurred in connection with the meetings of the Board of Education on February 9, 1979 and July 30, 1979." (P-6)

8. The petitioner testified that he received both the February, 1979 and July, 1979 charges and prepared sworn responses to each set and submitted same to the Board. (Tr. I, 38 and 42)

9. The November 2, 1979 Board resolution (171-80) in private session to recertify the February, 1979 and July, 1979 charges passed with six (6) affirmative votes, one (1) negative, and two (2) abstentions. (P-7)

10. Board secretary McLaughlin testified that he delivered the February and July charges with petitioner's responses to members new to the Board since either February or July. (Tr. II-36)

11. Four of the six Board members who voted affirmatively on resolution 171-80 testified and stated that they had reviewed

both sets of charges and responses. (Tr.I-164, 165; Tr.II-110, 111; Tr.II-151; Tr.II-159, 160, 161)

12. The one Board member who voted negatively on resolution 171-80 testified that he never received petitioner's responses to charges. (Tr.I-76). This testimony is contradicted by R-3.

13. The two Board members who abstained from voting on resolution 171-80 testified. One reviewed both sets of charges and responses. (Tr.II 198, 199). The other had no interest in the exercise of review because he was involved in the charges and did not request copies of the charges and responses, but did receive the February charges but not the responses. (Tr.II-194, 195). This testimony was contradicted by R-3.

ARGUMENTS OF LAW

The extensive arguments of law put forth by petitioner are incorporated herein by reference, but the alleged violations and related statutes are summarized:

1) Petitioner was not given 48 hours notice pursuant to N.J.S.A. 10:4-8(d) and 10:4-19, and said notice was not adequate as per 10:4-8.

2) The opening statement at the November 2 meeting did not comply with N.J.S.A. 10:4-10.

3) Reasonably comprehensible minutes were not kept pursuant to N.J.S.A. 10:4-14.

4) The pre-private session resolution did not comply with N.J.S.A. 10:4-13.

5) The de novo action of the Board pursuant to N.J.S.A. 10:4-15 violated the 45 day rule of N.J.S.A. 18A:6-13 and there is no law which provides an extension of the latter.

6) The Board was in violation of N.J.S.A. 18A:6-11 because there was no reading or consideration of the charges, responses or evidence; Board counsel's analysis and comments constituted unsworn evidence; petitioner was not given an opportunity to respond; and the charges were not supported by sworn evidence.

7) The petitioner was not served with a copy of the charges after recertification pursuant to N.J.S.A. 18A:6-15 nor did the Board announce all actions taken at the private session.

DISCUSSION

The undersigned held for the petitioner in an Initial Decision of November 2, 1979 (and affirmed with modification by the Commissioner on December 24, 1979) when the Board's initial certification of charges on February 9, 1979 were set aside because of violations of the Open Public Meetings Law. The letter and spirit of the law as construed to be intended by the Legislature were followed. Said spirit will again be followed.

I do not feel compelled to reproduce N.J.S.A. 10:4-6 et seq. or the sections of 18A referred to by petitioner. They are incorporated herein by reference. Nor do I feel compelled to restate the findings of fact, but do **FIND** the following in relation to petitioner's arguments of law:

1) Petitioner was fully aware of the purpose and intent of the November 2, 1979 Board Meeting.

2) The opening statement at the November 2 meeting did not violate N.J.S.A. 10:4-10.

3) The minutes of the private November 2 meeting were sufficiently comprehensive to fulfill the requirements of N.J.S.A. 10:4-14.

4) The resolution passed by the Board at public session substantially complied with N.J.S.A. 10:4-13.

5) The alleged violation of the 45 day rule of N.J.S.A. 18A:6-13 is without merit as inapplicable to the de novo action, which occurred prior to the final decision of the Commissioner which set aside the initial certification.

6) The alleged violation of N.J.S.A. 18A:6-11 relative to the reading or consideration of charges, etc. is without merit.

7) The alleged violation of N.J.S.A. 18A:6-15 is frivolous.

As pointed out in respondent's Brief, the Governor expressed concerns when he signed the Open Public Meetings Bill (A-1030) into law. As the idea of open government became a reality, concerns were expressed as to whether administrative bodies could "continue to carry out all their administrative tasks without undue delay;" and whether this law would "engender costly litigation based on frivolous grounds." See Statement of Governor Brendan Byrne on Signing A-1030, October 21, 1975.

The Court in Pollilo v. Deane, 74 N.J. 562 (1977) said:

> These remedial statutory sections (of N.J.S.A. 10:4-6 et seq.) contemplate maximum flexibility in rectifying governmental action which falls short of the standards of openness prescribed for the conduct of official business. Consistent with the breadth and elasticity of relief provided in the legislative scheme, it is entirely proper to consider the nature, quality and effect of the noncompliance of the particular offending governmental body in fashioning the corrective measures which must be taken to conform with the statute. Thus, in this context, the "substantial compliance" argument of defendants carries some weight on the question of remedy and relief. (at 579).

In Houman v. Mayor and Council of the Borough of Pompton Lakes, 155 N.J. Super. 129 (Law Div. 1977), the Court said:

> "Substantial compliance" with a statutory requirement is normally sufficient and occurs whenever, as a practical matter, it is reasonable to conclude that partial compliance has fully attained the objective of the statute as though there had been complete and literal compliance — in other words, that there has been such compliance with the essential requirements of the statutory provision as may be sufficient for the accomplishment of its purpose. (At 169, 170).

CONCLUSIONS OF LAW

After careful and thorough review of the testimony, evidentiary documents, findings of fact, arguments of counsel, statutory and case law **I FIND** that the petitioner has not met his burden of proof that the Board's action was illegal. **I ALSO FIND** no evidence that the Board appeared or indeed acted to circumvent the spirit of the Open Public Meeting Law.

I CONCLUDE, therefore, that this Petition shall be and is hereby **DISMISSED.** It is further **ORDERED** that the substantive issues In the Matter of the Tenure Hearing of Robert A. Kiamie be heard and expeditiously scheduled to enable the children in the school district of North Haledon to benefit from the stability of administration as soon as possible.

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

4 August 1980
DATE

Ward R. Young
WARD R. YOUNG, A.L.J.

ROBERT A. KIAMIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH HALEDON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the finding by Judge Ward R. Young, ALJ, that the resolution passed by the Board at a public session substantially complied with N.J.S.A. 10:4-13. Respondent Board's reply exceptions refute those of petitioner and argue that the court's decision should be sustained. The Commissioner cannot agree.

The Commissioner finds the argument of petitioner persuasive as it addresses the applicability of N.J.S.A. 10:4-6 et seq. (Open Public Meetings Act) Certainly that law applies to the Board; the question raised and to be decided herein is whether or not substantial compliance with the spirit of the law is sufficient. The Supreme Court of New Jersey has said otherwise in Polillo v. Deane, 74 N.J. 562 (1977) wherein was stated:

> "***Defendants would allow a charter commission or any other governmental agency to disregard the dictates of the law whenever there would be 'substantial compliance.' Rather than providing a new exception to the rule, we believe that defendants' suggestion would swallow the rule. Accordingly we reject this argument completely and hold that strict adherence to the letter of the law is required in considering whether a violation of the Act has occurred.***" (Emphasis supplied.) (at 578)

Judge Young's finding in relation to this states:

> "4) The resolution passed by the Board at public session substantially complied with N.J.S.A. 10:4-13." (at p. 6)

The Commissioner herewith sets down N.J.S.A. 10:4-13 in full:

> "No public body shall exclude the public from any meeting to discuss any matter described in subsection 7.b.***until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:
>
> a. Stating the general nature of the subject to be discussed; and b. Stating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public."

Nothing in the record indicates strict adherence to this statute; the Commissioner cannot accept Judge Young's determination of substantial compliance by the Board as being sufficient.

Having determined that the Board's action of November 2, 1979 was in violation of the Open Public Meetings Act, the Commissioner does not deem it necessary to address any further legal arguments advanced. Accordingly, the action of the Board at its meeting of November 2, 1979 is set aside. Nothing in this decision precludes the Board from making a proper certification of charges in the future as part of its discretionary authority. The Commissioner is constrained to express his concern that this matter be resolved in an expeditious manner.

COMMISSIONER OF EDUCATION

September 22, 1980

ROBERT A. KIAMIE,	:	
PETITIONER-APPELLEE,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF NORTH HALEDON, PASSAIC COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, September 22, 1980

For the Petitioner-Appellee, Segreto & Segreto (James V. Segreto, Esq., of Counsel)

For the Respondent-Appellant, Greenberg & Covitz (Morton R. Covitz, Esq., of Counsel)

The State Board of Education reverses the Commissioner's decision on the basis of the reasons stated by the Administrative Law Judge.

December 3, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN RE:	)	INITIAL DECISION
JOYCE CARNEY	)	**O.A.L. DKT. NO. EDU 4247-79**
V.	)	AGENCY DKT. NO. 352-9/79A
BOARD OF EDUCATION, CITY OF SUMMIT, UNION COUNTY		

APPEARANCES:

LOUIS P. BUCCERI, Esq., for Petitioner.
STEVEN B. HOSKINS, Esq., for Respondent.

BEFORE THE HONORABLE **ROBERT P. GLICKMAN,** A.L.J.:

This matter comes before the Court by way of petition filed pursuant to N.J.S.A. 18A:6-9 vesting the Commissioner of Education with jurisdiction to hear or determine all controversies and disputes arising under the school laws. This matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

At a prehearing conference on March 11, 1980, the following issues were identified:

1. Did petitioner obtain a tenure status with respondent pursuant to N.J.S.A. 18A:28-5(c)? And, if so, what relief is she entitled to?
2. Is petitioner's claim barred by the doctrine of laches?
3. Did petitioner fail to obtain tenure status with respondent pursuant to N.J.S.A. 18A:28-5(c) due to a lack of continuity of her employment services between June 30, 1978 and January 5, 1979?
4. Is petitioner's claim barred by the doctrine of waiver and/or estoppel?

As a result of cross motions filed for partial summary judgment with regard to issue 3 of the prehearing order, this Court on April 30, 1980, in a letter decision, granted

petitioner's motion and denied respondent's motion for the reasons set forth therein, which letter decision is incorporated herein by reference. An order reflecting the Court's decision was signed by it on May 13, 1980.

The only remaining issues to be determined at the trial, which took place on June 10, 1980 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey, were prehearing issues 1, 2, and 4.

The following stipulations were made at the prehearing conference:

1. Petitioner was initially employed by respondent as a permanent substitute and/or long-term substitute for respondent from April, 1975 to June, 1975.
2. Petitioner was re-employed by respondent as a regular contract teacher for the following school years:
   A. 1975/76
   B. 1976/77
   C. 1977/78
3. Petitioner's position was eliminated through a reduction in force for the 1978/79 school year.
4. Petitioner was recalled by respondent and re-employed from January 5, 1979 to June 30, 1979.

At the trial, the following exhibits were marked into evidence:

1. J-1, Employment contract between Joyce Carney and the Summit Board of Education from September, 1975 to June 30, 1976.
2. J-2, employment contract between Joyce Carney and the Summit Board of Education from September, 1976 to June 30, 1977.
3. J-3, employment contract between Joyce Carney and the Summit Board of Education from September 1, 1977 to June 30, 1978.
4. J-4, Superintendent's report to the Board of Education dated December 21, 1978.
5. P-1, Employment contract between Joyce Carney and the Summit Board of Education from January 5, 1979 to June 30, 1979.
6. R-1, Letter dated April 6, 1978 to Joyce Carney.
7. R-2, Letter dated April 10, 1979 from Rudolph Schober to Joyce Carney.

8. R-3, Letter dated April 16, 1979 from Richard Fiander, Superintendent of Schools, to Joyce Carney.
9. R-4, Letter dated May 2, 1979 from Joyce Carney to David C. Davidson.
10. R-5, Letter dated October 23, 1978 from Erna Pitts to Dr. Richard Fiander.

At the trial, Joyce Carney testified for petitioner. Richard L. Fiander, Gerard Murphy and David C. Davidson testified on behalf of respondent.

Post hearing briefs were requested to be submitted by July 23, 1980 on which date the hearing was deemed to be concluded. See N.J.A.C. 1:1-16.1.

At the outset of the trial issue #2 of the prehearing order was withdrawn by the parties. Only issues #1 and #4 remain for the Court's determination.

Joyce Carney testified that she began her employment as a substitute with the Summit Board of Education in April, 1975 until the end of that school year. She worked during the 1975/76 school year as a fifth grade teacher at Lincoln School. During the 1976/77 and 1977/78 school years, she was again employed as a fifth grade teacher at Lincoln School. Mrs. Carney performed all of the duties expected of an elementary school teacher while employed by the Board.

Mrs. Carney was not re-employed beginning September, 1978 because of declining enrollment. However, she was employed beginning January 5, 1979 until the end of the school year. Her form of contract of employment for the aforementioned period of time (P-1) was exactly the same as that used for her employment during the 1975/76, 1976/77, and 1977/78 school years. (See J-1, J-2 and J-3). Her employment contract (P-1) states the following:

> "It is agreed between the Board of Education of the City of Summit in the County of Union, party of the first part, and Joyce M. Carney, party of the second part, that said Board of Education has employed and does hereby engage and employ the said party of the second part to teach in the public schools under the control of said Board of Education from the fifth day of

January, 1979, to the thirtieth day of June,1979, at the rate of $12,540 to be paid in equal semi-monthly installments on the 15th and last days of each month during said period; that the said party of the second part holds an appropriate certificate issued in New Jersey now in full force and effect (if certification is required by law to hold this position), or will procure such certificate before the date said person shall begin service, and that said person, before entering upon the duties of such position, will exhibit the certificate to the Union County Superintendent of Schools and to the Superintendent of Schools of Summit for recording.

The said party of the second part hereby accepts the employment aforesaid and agrees faithfully to do and perform all duties under the employment aforesaid, and to observe and enforce all rules and regulations prescribed for the government of the school by the Board of Education.

It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party's giving to the other 60 days' notice in writing of intention to terminate the same, but that in the absence of any such written notice, the contract shall run for the full term named above.

This contract will be considered null and void if not returned to the office of the Superintendent of Schools or the Secretary of the Board of Education on or before January 5, 1979.

Dated this twenty-second day of December, 1978, Board of Education of the City of Summit, in the County of Union.

s/President of the Board of Education
(Signature illegible)

s/Joyce M. Carney

Attest:s/Secretary of Board of Education
(Signature illegible)"

Mrs. Carney testified that the duties which she performed between January 5, 1979 and the end of that school year were exactly the same as those performed by her as an elementary school teacher in Lincoln School during the prior three years. The reason she was hired in January was to replace Mrs. Erna Pitts, a school teacher who was moving to Phoenix, Arizona.(R-5) Mrs. Pitts had taught from September to January.

On cross-examination, Mrs. Carney indicated that she had a conversation with Dr. Murphy, the Assistant Superintendent of Schools, and was told by him of the vacancy caused by Mrs. Pitts' retirement. There was a brief discussion about the topic of tenure. Mrs. Carney asked if her re-employment would have anything to do with the situation of tenure. Dr. Murphy responded that if there was a question, they would get someone else. (Tr. 25) Dr. Murphy also told Mrs. Carney that she would begin at the next rung on the salary scale. The thought did enter Mrs. Carney's mind that she might acquire tenure upon returning to the school district, but she did not discuss it in detail with Dr. Murphy since he indicated that they might get somebody else and she wanted to teach. Mrs. Carney denied that she agreed with Dr. Murphy that she would not assert a claim for tenure for her employment. (Tr. 32)

It was Mrs. Carney's understanding that in order for her to obtain tenure, the Board of Education had to take some affirmative action in granting it to her. She did not think that she would acquire tenure merely by going back to work in January, 1979. For the period of time from January, 1979 to June, 1979, Mrs. Carney received the dollar amount that one would receive for a fourth year of teaching.

Dr. Richard Fiander testified that he is the Superintendent of Schools for the Summit Board of Education. He learned sometime in December, 1978 that Dr. Murphy was considering having Mrs. Carney replace Mrs. Pitts as the fifth grade teacher. He was concerned about the legalities of having her replace Mrs. Pitts, because of to the question of tenure. Dr. Fiander eventually recommended to the Board of Education that Mrs.

Carney be hired temporarily to fill the position for the remainder of the year. He did not feel uncomfortable about that since he felt Mrs. Carney would not pursue any legal rights with regard to tenure. Sometime in April, 1979 Dr. Fiander wrote to Mrs. Carney to thank her for replacing Mrs. Pitts. (R-3)

On cross-examination, Dr. Fiander admitted that Mrs. Carney never told him that she would not claim tenure, but reached his understanding of her position from his conversations with Dr. Murphy.

Dr. Gerard Murphy testified that he is employed by the Summit Board of Education as Assistant Superintendent of Schools. Upon learning that Mrs. Pitts was resigning effective December 31, 1978, Dr. Murphy talked to Dr. Fiander about replacing her with Mrs. Carney. Dr. Fiander raised the question about tenure and suggested to Dr. Murphy that he check the legal aspects of it. Mr. Davidson, the Principal of Lincoln School, communicated with Mrs. Carney to find out if she was available and interested in replacing Mrs. Pitts. Eventually, Dr. Murphy called Mrs. Carney directly sometime in December, 1978 and communicated to her:

> "I said if there was at least an unresolved question surrounding tenure and if she was interested in pursuing that question at any time I'd like to know that right at the beginning." (Tr. 67)

Mrs. Carney replied that she was interested in teaching and wasn't overly concerned about tenure. During a second conversation in December, Mrs. Carney indicated to Dr. Murphy that she would accept the position according to the terms discussed in the previous conversation. Dr. Murphy understood this to mean that Mrs. Carney agreed not to pursue the question of tenure.

On cross-examination, Dr. Murphy indicated that Mrs. Carney was offered salary at the fourth step. It was customary for teachers upon being rehired to be placed on the next step of the salary scale for the subsequent year. Also, non-tenured teachers would sign employment contracts, such as the ones marked into evidence. A teacher, having taught three full years, upon being hired for the fourth year would sign an employment contract. Tenured teachers in Summit do not sign contracts. Upon being asked: "Did Mrs. Carney ever expressly say to you that she was abandoning any tenure

claim that she might acquire, in those words or similar words?" Dr. Murphy replied: "Mrs. Carney indicated to me that she was not interested in pursuing the question of tenure and would not, in fact." (Tr. 73) According to Dr. Murphy, her words were that she would not pursue the question of tenure.

Upon being asked by the Court whether Mrs. Carney said anything else, Dr. Murphy indicated Mrs. Carney said: "I will not pursue the question of tenure." (Tr. 74-75)

Based upon a careful consideration of the aforegoing, including a careful review and study of the pleadings, exhibits, stipulations and an assessment of the credibility and demeanor of the witnesses and the inherent probability of their testimony, this Court **FINDS:**

1. Stipulations 1 through 4 are hereby adopted as Findings of Fact and are incorporated herein by reference.
2. During the school years 1975/76, 1976/77 and 1977/78 petitioner was employed as a fifth grade teacher at Lincoln School and performed all of the duties expected of an elementary school teacher.
3. The form of contract signed by petitioner for employment from January 5, 1979 until the end of the school year was exactly the same form of contract signed by her for employment during the 1975/76, 1976/77 and 1977/78 school years.
4. The contract signed by petitioner for employment from January 5, 1979 to the end of the school year contains no language indicating that she was a "temporary employee."
5. The contract signed by petitioner for employment from January 5, 1979 until the end of the school year contains no language indicating that she waived her rights to obtain tenure.
6. The duties performed by petitioner from January 5, 1979 until the end of the school year were

exactly the same as those performed by her during the school years 1975/76, 1976/77 and 1977/78.

7. Petitioner was re-employed from January 5, 1979 until the end of the school year to replace Mrs. Erna Pitts who moved to Arizona.

8. When petitioner and Dr. Murphy had a conversation in December, 1978 prior to petitioner being re-employed, and when the discussion of tenure came up, Dr. Murphy indicated to petitioner that if there was a question, they would get someone else.

9. Petitioner was paid according to the fourth step on the salary scale for the period of time from January, 1979 until the end of the school year.

10. Mrs. Carney did not agree with Dr. Murphy that she would not assert a claim for tenure for her employment.

11. Mrs. Carney believed that in order for her to acquire tenure, the Board of Education would have to take some action to grant it to her.

12. Petitioner did not think that she would acquire tenure merely by going back to work in January, 1979.

13. Even if this Court should find, which it does not, that petitioner said: "I will not pursue the question of tenure" that statement does not amount to a waiver under law.

14. All of the statements and actions attributable to petitioner by respondent, under all of the existing circumstances, do not constitute a waiver of her right to obtain tenure.

15. Petitioner, by her words and conduct, did not waive her rights to tenure.

The law is clear that waiver involves an intentional and voluntary relinquishment of a known right. Merchants Indemnity Corp. of N.Y. v. Eggleston, 37 N.J. 114, 130-131 (1962); East Orange v. Bd. of Water Com'rs., etc., 41 N.J. 6, 17 (1963); A waiver generally presupposes a full knowledge of the right and cannot be predicated on consent given under a mistake of fact. West Jersey Title and Guaranty Co. v. Industrial Trust Co., 27 N.J. 144 (1958). This Court is unable to conclude that petitioner's actions amount to an intentional and voluntary relinquishment of her right to obtain tenure. The most that could be said is that there was an informal discussion of the topic of tenure which discussion never rose to the status of waiver.

Since this Court concludes that petitioner did not waive her right to obtain tenure under the statute, it is unnecessary to discuss whether or not one may waive a statutory right. It should be pointed out, however, even if respondent included a contractual waiver of statutory rights in the employment contract with petitioner, in order for this Court to give such language effect, any such waiver would have to be clearly and unmistakably established and the contractual language alleged to constitute the waiver could not be read expansively. See Red Bk. Reg. Ed. Assn. v. Red Bk. Reg. High Sch. Bd. of Ed., 78 N.J. 122, 140 (1978).

Since the contract of employment from January, 1979 until the end of the school year was silent with regard to waiver, this Court has reviewed and considered oral testimony dealing with this issue and has not excluded any of it based on the parol evidence rule, which is a rule of substantitive law that excludes testimony offered for the purpose of varying or contradicting the terms of an integrated contract. See Atlantic Northern Airlines, Inc., v. Schwimmer, 12 N.J. 293, 302 (1953); Ross v. Orr, 3 N.J. 277, 282 (1949). Respondent argues that petitioner's employment was temporary and under the holding in Point Pleasant Beach Teachers Ass'n. v. Callam, 173 N.J. Super 11, (App. Div. 1980) petitioner could not acquire tenure. This Court **CONCLUDES** that Point Pleasant, supra, is inapplicable. The Court in Point Pleasant, supra, was concerned with the sole issue of whether teachers employed under Title I were "teaching staff members" within the meaning of the teacher tenure statute, N.J.S.A. 18A:28-5. Some of the factors which the Court in Point Pleasant, supra, considered in determining whether one was a teaching staff member were:

1. Source of funds to pay teacher;
2. Teachers hired annually without written contract;
3. Teachers were paid on an hourly basis;

4. Teachers were restricted to Title I program;
5. Teachers acted primarily as tutors giving individual remedial aid to the children.

There is nothing about the nature of petitioner's employment herein which is similar to the nature of the employment of the Title I teachers in Point Pleasant. The mere fact that Mrs. Carney worked from January 5, 1979 until the end of the school year does not, under the totality of the circumstances, make her a temporary employee which would deny her the status of a teaching staff member or deny her an entitlement to acquire tenure.

It has been held that, "the law is a silent factor in every contract and the parties are presumed to have contracted with reference to it." Gibraltar Factors Corp. v. Slapo, 41 N.J. Super. 381, 384 (App. Div. 1956), aff'd 23 N.J. 459 (1957). Assuming the aforementioned, N.J.S.A. 18A:28-5(c) was a factor in the reemployment contract. The Board, aware of the possibility that petitioner would acquire tenure under statute upon her being re-employed, took no meaningful steps to legally prevent her from becoming tenured.

It is, therefore, **CONCLUDED** that petitioner obtained tenure with respondent pursuant to N.J.S.A. 18A:28-5(c) and did not waive her right to the acquisition of tenure.

Accordingly, it is **ORDERED** that petitioner be reinstated forthwith with all pay and any other benefits which she is entitled to for the 1979/80 school year mitigated by any other earnings.

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

July 31, 1980
DATE

Robert P. Glickman
ROBERT P. GLICKMAN, A.L.J.

JOYCE CARNEY, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY, : DECISION

RESPONDENT. :

:

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

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent excepts to the determination by Judge Robert P. Glickman, ALJ, that petitioner did not waive her tenure rights and that the holding in Point Pleasant Beach Teachers Association, supra, is not applicable to the present case. Respondent contends that N.J.S.A. 18A:28-5(c) requires continuous service on the part of the teacher.

Petitioner's reply exceptions affirm the findings of the Court and reflect respondent's exceptions. The Commissioner supports petitioner's exceptions.

The Commissioner has examined the record carefully and finds only conflicting and inconclusive testimony regarding petitioner's alleged waiver of tenure rights. Assuming arguendo that petitioner had agreed to waive her tenure rights in order to secure employment, the Commissioner determines that such a condition shall not be imposed on a teacher as a requisite to employment with a board of education thereby negating a status conferred by the Legislature.

The Commissioner does not agree with the Board that petitioner's employment was temporary and that therefore she could not acquire tenure under Point Pleasant Beach Teachers Association, supra. The record is clear; petitioner was not a substitute for a teacher out sick or on leave of absence, rather petitioner was hired on a full contractual basis as a regular classroom teacher as a replacement for a teacher who had moved out-of-state. (R-5) Petitioner's resultant employment from January 5, 1979 to the end of the school year bears no resemblance to the characteristics set down in Point Pleasant Beach.

The Commissioner finds no merit in the Board's argument that, in order for N.J.S.A. 18A:28-5(c) to apply, all service of the teacher must be continuous. That statute says in pertinent part:

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

The Commissioner notes that no mention is made therein of "continuous" service and herewith sets down petitioner's service record with the Board as a regular contractual teacher for the following years : 1975-76; 1976-77; 1977-78; 1978-79, from January 5, 1979 to June 30, 1979.

It has long been held that to acquire the status of a permanent teacher under the tenure law, the teacher must comply with the precise conditions articulated in statute. Zimmerman v. Board of Education of City of Newark, 38 N.J. 65 (1962), cert. denied 83 S.Ct. 508 (1963) The Commissioner finds that petitioner obtained tenure with respondent pursuant to N.J.S.A. 18A:28-5(c).

Accordingly, the Commissioner directs the Board of Education of the City of Summit to reinstate petitioner forthwith with all emoluments mitigated by substitute employment if any.

COMMISSIONER OF EDUCATION

September 22, 1980

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK AND LONG BEACH ISLAND BOARD OF EDUCATION, OCEAN COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

LONG BEACH ISLAND BOARD OF EDUCATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,

RESPONDENT.

For the Lakewood Board, Rothstein, Mandell & Strohm (Mark Williams, Esq., of Counsel)

For the Brick Township Board, Martin B. Anton, Esq.

For the Long Beach Island Board, Norton & Kalac (Peter P. Kalac, Esq., of Counsel)

For the Wall Township Board, Mirne, Nowels, Tumen, Wooley, Magee, Kirschner & Graham (William C. Nowels, Esq., of Counsel)

Petitioner, the Lakewood Board of Education, hereinafter "Lakewood Board," contends that the Long Beach Island Board of Education, hereinafter "Long Beach Board," and/or the Brick Township Board of Education, hereinafter "Brick Board," should be held responsible for the tuition and transportation of "M.J.," a classified pupil attending Eden Institute in Princeton, a private facility for autistic children, for the school years 1975-76, 1976-77 and 1977-78. The Long Beach Board in cross-contention alleges that the Wall Township Board of Education, hereinafter "Wall Board," is responsible for the tuition and transportation of M.J. to Eden Institute. A hearing in the combined matters was

conducted on June 5, 1978 in the office of the Ocean County Superintendent of Schools, Toms River, before a hearing examiner appointed by the Commissioner of Education. A stipulation of facts and joint exhibits were accepted into the record. The report of the hearing examiner follows:

There is no disagreement about the following factual presentment. M.J. is a nine year old male pupil. Prior to July 20, 1976 he resided with his mother in Lakewood and was enrolled in that school system. During the 1975-76 school year M.J. was classified by the Lakewood Board's Child Study Team as emotionally disturbed and was enrolled in the Eden Institute. The Lakewood Board assumed the tuition and transportation costs for M.J.

On or about March 1, 1975 M.J.'s parents separated; the mother continued to reside in Lakewood and the father moved to and lived for two years in Brick Town. (Tr. 21) The mother was hospitalized in a mental institution due to an emotional breakdown and the father entered into a foster-care agreement with the New Jersey Division of Youth and Family Services, hereinafter "DYFS," by virtue of N.J.S.A. 30:4C-26 in which he did not surrender his parental rights. (J-2) As a result of this agreement DYFS placed M.J. in a foster home in Ship Bottom, Ocean County, a constituent district in the Long Beach Island School district, where he continues to reside. The father moved to Wall Township June 1, 1977 where he presently resides and was subsequently divorced on October 11, 1977. (J-1; Tr. 19)

At the start of the 1977-78 school year M.J. was again registered at the Eden Institute and the Lakewood Board withdrew financial support for his continued education and transportation. The Long Beach Board, without prejudice, assumed the financial responsibility for the tuition and transportation of M.J. at the Eden Institute in Princeton.

This concludes the recitation of facts in the instant matter.

The father of M.J. testified that during the period of separation he paid his wife alimony and child support until the time of the divorce. (Tr. 47) He said he contributed about $200 for clothing and $400 for megavitamin therapy for M.J. (Tr. 27-28) The father testified that he continues to contribute to his son's upkeep for megavitamins and clothing but does not plan to be reunited with his son. (Tr. 32, 38) He said he felt his son's present placement in the foster home in Ship Bottom was beneficial to M.J. and that he should remain there. (Tr. 44)

A social worker for DYFS testified that she knew M.J. quite well. (Tr. 68) She characterized the relationship between him and his foster parents as excellent and said that there were no plans presently to change his foster home placement. (Tr. 73-74)

residence and domicile when it states:

> "***'Residence' means domicile unless a temporary residence is indicated***."

The Lakewood Board contends that N.J.S.A. 30:4C-26 determines that M.J. was placed by DYFS in residence in Ship Bottom which should pay his educational costs. (Tr. 91)

The Brick Board concurs in the contention that Long Beach Board is responsible for the education of M.J., arguing further that his placement is a permanent one. (Tr. 95)

The Wall Board argues that M.J. is domiciled in Ship Bottom which makes that district responsible for M.J.'s tuition and transportation costs to Eden Institute. (Tr. 105)

The Long Beach Board contends that the Wall Board is responsible for M.J.'s education and argues that the domicile of M.J. should follow the domicile of his natural father presently residing in Wall Township, citing Mansfield Township Board of Education v. State Board of Education, 101 N.J.L. 474 (Sup. Ct. 1955) and Board of Education of the Township of Little Egg Harbor v. Boards of Education of Galloway et al., 1973 S.L.D. 324, aff'd State Board 1974 S.L.D. 1410, aff'd 145 N.J. Super. 1 (App. Div. 1975) (1975 S.L.D. 1089), rev. 71 N.J. 537 (1976) (1976 S.L.D. 1148).

The hearing examiner observes that the Lakewood Board's argument in which the Brick Board and Wall Board concur stems from the interpretation of N.J.S.A. 18A:1-1, ante, equating residence with domicile and N.J.S.A. 30:4C-26 which, in pertinent part, provides:

> "***Whenever the Division of Youth and Family Services shall place any child, as provided by this section, in any municipality and county of this State, the child shall be deemed a resident of such municipality and county for all purposes, and he shall be entitled to the use and benefit of all health, educational, recreational, vocational and other facilities of such municipality and county in the same manner and extent as any other child living in such municipality and county.***"

The hearing examiner has examined the record and the arguments of the boards of education involved and cannot agree that the physical residence of M.J. determines his domicile. He finds nothing in the record to set aside the traditional concept identifying the child's domicile with that of his father. Surely, if family circumstances had been happier and the family unit had moved to Brick Town and subsequently to Wall, the question of M.J.'s domicile could never have been raised. That domicile would have been that of his father and the board of education of the district wherein the family unit (including M.J.) lived would have been responsible to provide nine year old M.J. a free public education designed to best meet his individual needs. N.J.S.A. 18A:38-1 and 18A:46-6 In the matter herein controverted, through unfortunate and unhappy circumstances the parents separated and the mother was institutionalized. The father moved to Brick Town and finally to Wall, but the hearing examiner does not find this to be the case of an abandoned child. The father continued to support the mother and children contributing monthly to this purpose, although he admitted not knowing how much of this amount benefited M.J. directly. (Tr. 51) He continues to contribute to M.J.'s needs for megavitamins and clothing in addition to the conditions set forth in the divorce decree. (Tr. 32; J-1) Notwithstanding where the father has lived, he has continued to contribute to the support of M.J., has evidenced interest in his son and has not surrendered his parental rights.

It is necessary at this juncture to comment on the definition of "domicile," as it applies to the education statutes.

Black's Law Dictionary 572 (rev. 4th ed. 1968) is quoted, in part, as follows:

> "DOMICILE. That place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. Kurilla v. Roth, 132 N.J.L. 213, 38 A.2d 862, 864 *** Not for a mere special or temporary purpose, but with the present intention of making a permanent home, for an unlimited or indefinite period. *** 18 N.J. Misc. 540.***"
>
> "The established, fixed, permanent, or ordinary dwelling-place or place of residence of a person, as distinguished from his temporary and transient, though actual, place of residence. It is his legal residence, as distinguished from his temporary place of abode; or his home, as distinguished from a place to which business or pleasure may temporarily call him.***"
>
> (Emphasis supplied.)

Also, "residence" is defined, in part, as follows:

> "RESIDENCE. A factual place of abode. Living in a particular locality. ***It requires only bodily presence as an inhabitant of a place.***
>
> "As 'domicile' and 'residence' are usually in the same place, they are frequently used as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.***"
>
> (Ibid., at 1473)

The courts have traditionally held that the domicile of a child is that of the father. However, this general conclusion is not without exception or modification. In Kenneth B. Walton v. Board of Education of the City of Brigantine, 1950-51 S.L.D. 39, the Commissioner determined that petitioner's children were domiciled with their mother because of an arrangement made at the parents' divorce settlement. In the present matter the divorce decree does not refer to the custody of M.J., assigning only the custody of two other minor children to the mother. The hearing examiner finds the following principle of law controlling:

> "***[A] minor child's domicile, in the case of divorce of its parents, is that of the parent to whose custody it has been legally given; and if there has been no legal fixing of custody, its domicile is that of the parent with whom it lives; but if it lives with neither, it retains father's domicile.***" Ross v. Pick, 86 A. 2d 463, 467 (Court of Appeals Md. 1952)

The record in the instant matter shows that the father, faced with his wife's illnesses and the dissolution of his marriage and family unit chose to move to Brick Town and lived there for two years from June 1, 1975 to May 31, 1977. For reasons unstated he subsequently moved to Wall Township June 1, 1977 and continues to reside therein.

The hearing examiner sets down, in part, the comments of Judge Morgan in her dissenting opinion in Little Egg Harbor, supra, which the New Jersey Supreme Court viewed with favor in its reversal of the Appellate Division's majority opinion (see 71 N.J. 537 (1976):

> "***The circumstances present in this case provide no reason, compelling or otherwise, to depart from the traditional rule identifying the domicile of the child with that of her father, Galloway Township, and that municipality is required by Section 14 of Chapter 46 to bear the financial burden of A.S.'s special educational placement. Clearly, the nexus between the natural father and A.S., born of blood and continuing family ties together with economic support, is more compelling than the severed relationship between A.S. and her former foster parents who make no contribution, financial or otherwise, even by way of providing her with a place to live.***"
>
> (145 N.J. Super. at 8)

For the above stated reasons the hearing examiner recommends that the Commissioner find the domicile of M.J. to be that of his father and, accordingly, that the Brick Board be and is responsible for the school years 1975-76 and 1976-77 for the costs of tuition and transportation of M.J. at Eden Institute and, similarly, the Wall Board for the school year 1977-78.

He recommends further that the Commissioner direct that proper restitution of moneys be made to the Lakewood Board of Education and the Long Beach Island Board of Education.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record in the instant matter, including the report of the hearing examiner and the exceptions filed thereto by respondents, Wall Township and Brick Township Boards of Education.

Respondents take exception to the hearing examiner's finding that the domicile of the father and child are one. Respondents contend that the term "domicile" should not be treated in a mandatory fashion and that a foster child's relationship with his foster parents should determine his/her domicile.

The Commissioner has carefully considered respondents' foregoing exceptions in relation to the issue in this matter, i.e., the financial responsibility during the academic years 1975-76, 1976-77 and 1977-78 for the tuition and transportation of a classified pupil, M.J., who is a day student at Eden Institute, Princeton, a private facility for autistic children.

A review of the record indicates in June 1975 M.J.'s father moved from the family home in Lakewood to establish his separate domicile in Brick Township. M.J., however, continued during the academic year 1975-76 to live with his mother in Lakewood where the school system had classified M.J. and arranged for his enrollment and tuition at Eden Institute. There was no formal separation or divorce agreement between M.J.'s parents that year nor was there any provision for his sole custody.

The Commissioner observes that N.J.S.A. 18A:38-1 is applicable to M.J.'s situation for the 1975-76 academic year. It provides in pertinent part that:

> "Public schools shall be free to the following persons***:
>
> "(a) Any person who is domiciled within the school district;
>
> ***
>
> "(c) Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-around dwelling place within the district for 1 year or longer shall be deemed to be domiciled within the district for the purposes of this section***."

N.J.S.A. 18A:1-1 defines "Residence" as "domicile, unless a temporary residence is indicated."

Furthermore, the Commissioner is guided by the principle articulated in C.K.F. v. Board of Education of Upper Township, 1975 S.L.D. 723 which provides:

> "***'***[A] minor child's domicile, in the case of divorce of its parents, is that of the parent to whose custody it has been legally given; and if there has been no legal fixing of custody, its domicile is that of the parent with whom it lives***' Ross v. Peck, 86 A.2d 463 (Court of Appeals Md. (1952)) at p. 467***" (Emphasis added.) (at 723-724)

Since there was no legal determination of M.J.'s custody, the Commissioner finds that his domicile was that of his mother with whom he lived in Lakewood during 1975-76. Therefore, the Commissioner rejects that portion of the hearing examiner's determination that the traditional principle identifying a child's domicile as that of his father governs the instant matter during 1975-76 and therefore determines that the Lakewood Board of Education is responsible for M.J.'s tuition for and transportation to Eden Institute for the academic year 1975-76.

After that time a different set of facts arose with respect to M.J.'s residence. During the summer of 1976 M.J.'s mother committed herself to a psychiatric care facility. M.J.'s father, although not surrendering his parental rights, agreed in July to foster care placement with the Division of Youth and Family Services (DYFS) which placed M.J. in a foster home in Ship Bottom, Long Beach Island. M.J. has continued to reside on Long Beach Island, except for a month's stay in Somerset County, and has not returned to live with his mother. His father continued to live in Brick Township for the 1976-77 year and subsequently moved in June 1977 to Wall Township. M.J.'s parents were divorced in October 1977 with no indication in the decree as to his custody.

The Commissioner takes notice of the Legislature's recent provision effective July 1, 1980 (but not applicable herein) stating that the responsibility for educational benefits for foster children are those of the district of the foster child's residence, as distinguished from the district in which he is placed in a foster home. N.J.S.A. 30:4C-26 (as amended to be effective July 1, 1980) provides in part:

> "*** b. Whenever the Division of Youth and Family Services shall place any child, as provided by this section, in any municipality and county of this State, the child shall be

> deemed a resident of such municipality and county for all purposes except school funding, and he shall be entitled to the use and benefit of all health, recreational, vocational and other facilities of such municipality and county in the same manner and extent as any other child living in such municipality and county.
>
> "c. Whenever the Division of Youth and Family Services shall place any child, as provided by this section, in any school district, the child shall be entitled to the educational benefits of such district; provided, however, that the district of residence, as determined by the Commissioner of Education pursuant to law, shall be responsible for paying tuition for such child to the district in which he is placed.***"
>
> "***Whenever the Bureau of Childrens Services shall place any child, as provided by this section, in any municipality and county of this State, the child shall be deemed a resident of such municipality and county for all purposes, and he shall be entitled to the use and benefit of all health, educational, recreational, vocational and other facilities of such municipality and county in the same manner and extent as any other child living in such municipality and county.***"
>
> (N.J.S.A. 30:4C-26)

The Court, in 1975, interpreted N.J.S.A. 30:4C-26 (prior to its most recent 1979 amendment) as not applicable to a situation where a foster child was attending a private school outside the school district in which his foster home was located, not only because in that particular decision the student was no longer living in the foster home, but also because such a private facility was not "available to other children residing in the community". A pertinent portion of Judge Morgan's dissenting opinion in Board of Education of Township of Little Egg Harbor v. Boards of Education of Galloway et al., 145 N.J. Super. 1, 11 (App. Div. 1975), rev'd 71 N.J. 537 which furnished the basis for the N.J. Supreme Court's reversal states:

> vocational and other facilities of such municipality and county in the same manner and extent as any other child living in such municipality and county.

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>
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> "***N.J.S.A. 30:4C-26 insures to foster children the same municipal services available to all other children in the same district; Collier School, however, is not a public, but a private facility, is not located in Little Egg Harbor and is not therefore available to other children residing in that municipality.***"

The Commissioner is further guided by Ross, supra, which states with reference to a minor child's domicile that, if there has been no legal fixing of custody and the child lives with neither parent, it retains the father's domicile. C.F.K., supra at 723 Therefore, the Commissioner determines that during

the years 1976-77 and 1977-78 when M.J. lived with neither his father nor mother and there had been no legal fixing of his custody, his domicile was that of his father, i.e. Brick Township in 1976-77 and Wall Township in 1977-78.

The Commissioner does not agree with respondents' exception to the hearing examiner's report and respondents' contention that the facts in the instant matter are sufficiently distinguishable from those in Little Egg Harbor, supra, to lead to the conclusion that M.J.'s domicile should be that of his foster parents in this particular set of circumstances. The Commissioner, therefore, agrees with that position of the hearing examiner's report which concludes that M.J.'s domicile in 1976-77 and 1977-78 was that of his father.

In summary, the Commissioner determines as follows:

1. 1975-76

The Commissioner agrees with respondents that the domicile of a child is not necessarily that of his father. The Commissioner reverses that part of the hearing examiner's decision as to 1975-76 and finds Lakewood was M.J.'s domicile and therefore the Lakewood Board of Education was responsible for his tuition and transportation for the 1975-76 academic year.

2. 1976-77

The Commissioner is not persuaded by respondents' contention that the child's relationship with his foster parents should control in all foster care placements prior to the 1979 amendment to N.J.S.A. 30:4C-26. The Commissioner therefore affirms and adopts that part of the hearing examiner's determination that Brick Township, the domicile of M.J.'s father, was responsible for his education and transportation costs in 1976-77. Accordingly, Brick Township Board of Education is ordered to reimburse Lakewood Board of Education for its payments of M.J.'s tuition for and transportation to Eden Institute for academic year 1976-77.

3. 1977-78

The Commissioner determines that Wall Township was the domicile of M.J. and his father in 1977-78. The Wall Township Board of Education was therefore responsible for and shall reimburse Long Beach Island Board of Education for the 1977-78 costs for M.J.'s tuition for and transportation to Eden Institute.

COMMISSIONER OF EDUCATION

September 26, 1980
Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

MADELINE CHILDS,	)	INITIAL DECISION
	)	
Petitioner,	)	**OAL DKT. NO. EDU 4937-79**
v.	)	AGENCY DKT. No. 253-6/79A
	)	
UNION TOWNSHIP BOARD OF EDUCATION,	)	
	)	
Respondent.		

APPEARANCES:

Gerald M. Goldberg for petitioner
(Goldberg & Simon, attorneys)

Howard Schwartz for respondent
(Simone & Schwartz, attorneys)

BEFORE THE HONORABLE **KEN R. SPRINGER**, A.L.J.:

This matter concerns whether tenure status may be acquired in the position of guidance counselor. On June 28, 1979 Madeline Childs ("Childs") filed a verified petition with the Commissioner of Education alleging that her transfer by respondent Board of Education of Union Township ("Board") from guidance counselor to classroom teacher for the 1979-80 school year violated her rights under the tenure law. She sought reinstatement to her job as guidance counselor and compensation for monetary losses allegedly incurred as a result of the transfer. In its answer filed on July 10, 1979, the Board denied that Childs was entitled to tenure as a guidance counselor. Instead, the Board contended that Childs was simply transferred to another teaching assignment properly within the scope of her certifications. Resolution of the controversy depends on whether the reassignment constitutes a "demotion" as Childs maintains, or a lateral transfer to a position of "equivalent rank" as the Board claims.

The file was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. Facts on which everyone could agree were stipulated at a prehearing conference on January 7, 1980 and have been set forth below as factual findings No. 1 through 3. A hearing was conducted on May 22, 1980. All parties were given an opportunity to be heard and to cross-examine witnesses. Documents entered into evidence and considered in deciding this case are listed in the appendix. Upon receipt of proposed findings of fact and conclusions of law, the record in this case was closed as of June 26, 1980.

Testimony focused on the job differences between guidance counselors as distinguished from classroom teachers. Childs, hired by the Board in 1971 as a science and English teacher, testified that in 1974 she became a guidance counselor in the hope that the experience might further her chances of promotion to elementary school principal. Despite her background as a former principal of a parochial school, Childs discovered during job interviews that she lacked sufficient exposure to the public school system to be considered seriously for a top management post. Instead, she observed that guidance counseling was one route for advancement to greater administrative responsibilities. She cited as examples a guidance counselor at her school who was appointed to a principalship, and another guidance counselor who was promoted to assistant administrator of personnel. At the time Childs came to the district, she was certified as an elementary school teacher. To qualify for guidance work, it was necessary for her to take additional education courses and obtain a certification in student personnel services which she acquired in November 1974. Significantly, for two years after she became a guidance counselor Childs was described in evaluation reports by her superiors as being non-tenured, even though she had already been a classroom teacher in the district for almost three consecutive years. In an evaluation report prepared during Child's fifth year with the district, it was strongly recommended that Childs "be approved for tenure as a guidance counselor." (Emphasis added). Subsequent to Child's transfer to a classroom teaching position in May 1979, a notice was posted at the school advising staff members of a vacancy in the guidance counselor position.

Several ways in which the scope of guidance counseling is broader than teaching were outlined by Childs and other witnesses who testified on her behalf. In contrast to a teacher who is limited to teaching a certain subject to a particular group of students within the confines of a classroom, a guidance counselor deals directly with many students, their parents and the whole faculty on a broad range of subjects

including scheduling problems, college admissions and career choices. Consequently, guidance counselors must be familiar not just with a single subject area, but with the contents of the entire curriculum. Guidance counselors administer and interpret general achievement and aptitude tests, as compared to teachers who give tests primarily on specific material which they have taught. Ann Whitford, a New Jersey Education Association representative personally acquainted with opportunities for teacher advancement, agreed that guidance counseling is a more extensive function which better prepares its practitioners for increased administrative responsibility than ordinary teaching would. One of the duties of a guidance counselor is to help with master scheduling, thus necessitating that the guidance counselor gain an understanding of every course offering in the school. Often guidance counselors must become actively involved in dispute-resolution or interpersonal problems between teachers and students, so that they serve in the role of "ombundsman" in handling disagreements among people. Moreover, a guidance counselor develops time-management skills by budgeting her own time, unlike some classroom teachers whose time-frame is structured by someone else. Herbert Levitt, an experienced guidance counselor employed by the Board of Education of Elizabeth, New Jersey, shared the view that the skills required for a guidance counselor are qualitatively different from those required for a teacher. Besides the factors already mentioned by other witnesses, he suggested that a guidance counselor must be able to deal with discipline on a larger scale than in the classroom. Both Childs and Levitt insisted that a guidance counselor is a member of the child study team, comprised of specialists who evaluate the nature of a student's learning difficulties and arrange for appropriate special services. Childs further explained that any teacher may request intervention by the child study team, but the guidance counselor acts as a clearing house in channeling these referrals to the team.

With respect to the duties performed by a guidance counselor, the Board called its superintendent of schools James M. Caulfield. Previously Caulfield had worked as a teacher-counselor (the term by which guidance counselors were once known) and as director of student personnel services, so he is knowledgeable about what the job involves. Emphasizing the similarities between counseling and teaching, Caulfield declared that a guidance counselor is nothing more than a teacher on a particular assignment. He mentioned that guidance counselors have identical working hours and must sign in and out exactly like any other teacher. More importantly, he pointed out that guidance counselors lack supervisory authority over teachers, and must themselves report to the building principal or other supervisor just like any other teacher. Also, guidance counselors belong to the same bargaining unit as teachers do, distinct from the separate bargaining unit which represents supervisors.

Traditionally the teacher-counselor taught some classroom hours each week, and Caulfield is reinstituting the practice of having guidance counselors meet with students in groups, rather than individually, to discuss mutual concerns. He does not want guidance counselors under his supervision to lose their "feel" for the classroom. Many support people, however, work with students on an individual or small group basis, such as Title I staff, remedial personnel and learning disability specialists; yet all of them, according to Caulfield, are still ranked as "teachers." As Caulfield saw it, the major difference between a guidance counselor and a classroom teacher is that it is easier to tutor 3 or 4 children than to teach a full classroom of 25. He also sought to correct the misimpression that a guidance counselor was automatically a member of the child study team. Referring to N.J.A.C. 6:28-1.3, Caulfield stated that the child study team consists of the school psychologist, social worker and learning disabilities-teacher consultant.

In terms of salary and other benefits, Childs claimed that a guidance counselor earns more than a teacher. Although guidance counselors in the district are paid on the same salary guide as teachers, Childs noted that under the Board's contract guidance counselors were required to work five extra days per year, for which they received payment in the amount of 1/200 of their annual salary for each additional day worked. Generally in Union County, Whitford added, the majority of school contracts provide that guidance counselors get more money or work different hours than teachers with corresponding years of service. Such is the case in Elizabeth, Levitt confirmed, where guidance counselors receive higher pay than teachers. Other perquisites which differentiate guidance counselors from teachers include access to a private office and telephone, a secretary and, in some other districts, a personal parking space.

On the other hand, Caulfield maintained that there was nothing unique about paying somebody for working extra days, and he gave instances of other teachers who got greater compensation for extra work such as the summer writing program. Insofar as private offices are concerned, Caulfield described the quarters for guidance counselors as small cubicles, each containing a desk, chair and filing cabinet, located in a renovated auditorium. Secretarial or clerical help is available as needed to guidance counselors, in the same manner that such help is available to all other departments in the school.

In conclusion, petitioner's witnesses all expressed the opinion that the position of guidance counselor is of a higher level in the educational hierarchy than a classroom teacher, and that it is a stepping stone for possible promotion into an administrative position. This view was disputed by the Board which regarded the position of guidance counselor as equivalent to any other teaching position.

After careful review of the testimony and the documentary evidence, **I FIND** the following facts:

1. Childs has been employed continuously by the Board since November 1971.

2. Initially, Childs was employed by the Board as an English and science teacher for three years. For the last five years preceding commencement of this action, Childs has been employed as a guidance counselor.

3. On or about May 9, 1979, the Board notified Childs that she would be employed for the 1979-80 school year as an English teacher and not as a guidance counselor. (It was uncontroverted that at Child's own request she was actually assigned to a Title I elementary classroom rather than to a high school English class as originally planned. However, that fact has no bearing on the issues presented in this case and may be the subject of further litigation.)

4. An instructional teaching certificate alone does not qualify its holder to become a guidance counselor. To become a guidance counselor, an individual must take the necessary courses to be certified in student personnel services. Childs obtained the proper certification for guidance work in November 1974.

5. By treating the evaluation of Child's performance as guidance counselor as if she were untenured for a two year probationary period, the Board tacitly admitted that guidance counselor is a tenure-eligible position.

6. Guidance counseling is much broader in scope than teaching. It involves dealing on a daily basis directly with many students, parents and teachers on a wide range of problems which cut across subject matter or department lines.

7. Knowledge required of a guidance counselor is more diffuse than that required of a teacher. Guidance counselors must be familiar not just with a single subject area or field, but with the contents of the entire curriculum. Their training and talents must equip them to give advice to students and parents on a variety of topics including scheduling problems, college admissions and career choices. They administer and interpret general achievement and aptitude tests, as compared to teachers who give tests primarily on specific material.

8. Skills employed in guidance counseling prepare the professional for increased administrative responsibility. Guidance counselors have a greater role than teachers in setting up the master schedule. They are often called upon to act as an intermediaries in resolving disputes among students and teachers. Because they budget their own time and are not bound by a rigid class schedule, guidance counselors have an opportunity to develop time-management skills. Therefore, the guidance counselor position is a natural training ground for advancement to a higher administrative level, especially for persons who already have extensive experience as classroom teachers.

9. Although technically a guidance counselor is not a member of the child study team, in some districts including Union Township the guidance department functions as a clearing house to channel referrals for evaluation of students made by teachers to the team.

10. Guidance counselors lack supervisory authority over teachers.

11. Throughout Union County generally, guidance counselors are frequently paid a higher salary than teachers. In Union Township, guidance counselors are paid on the same salary scale as teachers. However, under their contracts guidance counselors in Union Township are required to work an extra five days each year, for which they are paid 1/200 of their salary for each day worked.

12. Benefits available to guidance counselors and not teachers in Union Township include a private office and telephone. Both guidance counselors and teachers have access to secretarial assistance, although it appears that guidance counselors make use of this service more regularly.

13. When Childs was transferred to a classroom position in May 1979, a vacancy was created in the guidance counselor position for the 1979-80 school year, which the Board sought to fill with someone else.

Based on the facts adduced at the hearing and the applicable law, I CONCLUDE that the transfer of a guidance counselor to a classroom teaching position constitutes a "demotion" to a job of lesser rank, which cannot be accomplished without either the affected individual's consent, a reduction in force or a tenure hearing.

A teaching staff member's rights in the event of transfer are governed by several interrelated statutory sections. N.J.S.A. 18A:25-1 confers upon boards of education the broad authority to transfer or reassign staff members within the scope of their certification. Power to transfer teachers is an inherent management responsibility which cannot be bargained away by the board. Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144 (1978). Nevertheless, a board's authority is qualified by other statutes granting tenure rights to staff members. N.J.S.A. 18A:28-5 provides that teaching staff members, including "such...employees as are in positions which require them to hold appropriate certificates issued by the board of examiners," acquire tenure after service in the district for the appropriate three-year probationary period. Thereafter, they "shall not be dismissed or reduced in compensation except for inefficiency, incapacity or conduct unbecoming such a teaching staff member or other just cause." N.J.S.A. 18A:28-6 goes on to provide that any staff member under tenure "who is transferred or promoted with his consent to another position" obtains tenure "in the new position" after the prescribed two-year period of employment. Here the Board does not deny that Childs, who has been continuously employed since 1971, acquired tenure as a teacher. But the Board argues that she has no vested right to any particular assignment, class or school, and therefore is not entitled to continue as a guidance counselor.

Recently, in Williams v. Bd. of Educ. of Plainfield, 1980 S.L.D. ___ (decided January 9, 1980), appeal pending before the Superior Court, Appellate Division, Docket No. A-2102-79A (filed February 14, 1980), the State Board of Education reviewed the voluminous litigation endeavoring to achieve an acceptable balance between the need of a board to transfer staff members as may be best for the educational program and the policy of protecting the job and financial security of tenured staff members. After thorough consideration of the law, the State Board concluded,

> Out of this litigation has emerged the concept of tenure as protecting the professional standing or status of the teaching staff member, the courts having used such terms as "rank", "demotion" and "comparable positions". In Viemeister v. Prospect Park Board

of Education, 5 N.J. Super. 215, 218 (App. Div. 1949), the Court said:

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

Likewise, in Bigart v. Paramus Board of Education, decided February 23, 1979, the Commissioner stated with regard to a transfer that "the work assigned must be of a rank equivalent to that by which the tenure status was acquired."

(Slip Sheet opinion at page 4)

The State Board ruled that where the transfer is to a position of equivalent rank, the local board may act without the staff member's consent; but where the transfer is a promotion or demotion to a different rank, the staff member's consent is required. Under the facts before it, the State Board in Williams held that a transfer of an individual from principal of a high school to principal of an elementary school was not a reduction in rank. In reaching that determination, the State Board took into account that the same certification is required for the two positions, that the duties and responsiblities are comparable and that compensation was not reduced.

Applying the Williams guidelines to the present facts leads to the conclusion that Childs suffered a reduction in rank. Looking at the certification requirement, it is evident that the kind of certification needed for guidance work is very different from the certification needed for teaching. Basically, there are three categories of certification in New Jersey: administrative, educational services and instructional. In order to teach, a teaching certificate falling within the instructional category is required. N.J.A.C. 6:11-3.1. To perform guidance and counseling work, a student personnel services certificate falling within the educational services category is required. N.J.A.C. 6:11-12.13. Before receiving such certification, one must already possess a standard teacher's certificate or its equivalent. Additionally, one year of successful teaching experience and credits in relevant courses such as counseling and interviewing techniques are prerequisites to issuance of this specialized certificate. Clearly, the student personnel services certificate is a more advanced credential than a regular teaching certificate.

As detailed in the factual findings above, the duties and responsibilities of a guidance counselor are substantially different from and greater in scope than those of a classroom teacher. Seizing on the admitted fact that a guidance counselor lacks supervisory authority over teachers, the Board insists that rank necessarily implies difference in chain of command. Nothing in the cases, however, dictates such a military analogy for the meaning of rank in the academic setting. Webster's 3d New International Dictionary (1976) defines "rank" more generally as "a position or order in relation to others in a group." In the Williams case, the State Board spoke of "status," "equal positions" and "comparable positions" as if these concepts were interchangeable with "rank." Hence, change of rank in this context refers to a transfer to another level of the educational hierarchy where the fundamental nature of the job is sufficiently dissimilar. Even if the Board's approach were adopted, it is noteworthy that the skills practiced by the guidance counselor are more closely related to the administrative function than would be any instructional activity. In that sense, the transfer at issue is from a "higher" to a "lower" position of managerial responsibility. Another case touching upon the problem has reached similar results, Stegemann v. Bd. of Educ. of Twp. of Union, Dkt. No. EDU 2505-79, 1980 S.L.D. __ (decided March 27, 1980), aff'd State Bd. 1980 S.L.D. __ (decided July 2, 1980) (transfer from position as cooperative industrial education coordinator held to violate petitioner's tenure rights).

While guidance counselors' pay in Union Township is measured on the same salary as teachers' pay, the school year for guidance counselors is five days longer than the school year for teachers. Of course, guidance counselors required to work beyond the normal academic year are entitled to extra compensation for their extra services. Bowers v. Bd. of Educ. of Burlington, 1976 S.L.D. 865. Regardless of the identical rate at which pay is calculated, because of the shorter year Childs received less money in 1979-80 as a classroom teacher than she would have received as a guidance counselor. Thus, the practical effect of the transfer on Child's pocketbook was a reduction in compensation. Merely a possibility that some teachers may be assigned extra work during vacation or after school hours is not equivalent to the contractual certainty of more money which guidance counselors enjoy.

Finally, the Board repeats the truism that the Legislature did not intend for all positions to be tenured, and makes the equally obvious point that wishing for a position to be tenured does not create tenure. Cases relied on for the unassailable proposition that not every staff member gets tenure involve factual situations easily distinguishable

from our own, such as substitute teachers, Biancardi v. Waldwick Bd. of Educ., 139 N.J. Super. 175 (App. Div. 1976), part-time teachers, Capella v. Bd. of Educ. of Camden Cty. Voc. Tech. School, 145 N.J. Super. 209 (App. Div. 1976), or teachers discharged before expiration of the probationary period, Canfield v. Bd. of Educ. of Pine Hill, 51 N.J. 400 (1968). It may be readily agreed that a teacher's perceptions regarding her own tenure status does not automatically bestow tenure where it does not otherwise exist. However, it does not logically follow, as the Board suggests, that a teacher's testimony about the nature of her present assignment in comparison to her prior assignment is totally irrelevant to the decision-making process. The Williams case, supra, directs that a delicate determination be made concerning whether the transfer was to a position of equal or lesser rank. Who is better qualified to provide information helpful to making that decision than persons with actual on-the-job experience in either or both positions? Certainly the decision should not be made in the abstract, or solely on the testimony of supervisory personnel who are just as interested as the teacher in the outcome. A sound judgment can only be based upon a full record containing all of the facts bearing on the issue.

For the foregoing reasons, it is **ORDERED THAT** that Board forthwith reinstate Childs to a guidance counselor position.

FURTHER ORDERED THAT the Board pay to Childs an amount equal to 5/200 of her 1979-80 annual salary to compensate her for income lost as a result of the wrongful transfer.

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

OAL DKT. NO. EDU 4937-79

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

August 11, 1980
DATE

Ken R. Springer
KEN R. SPRINGER, A.L.J.

MADELINE CHILDS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board in its exceptions contends that Judge Ken R. Springer, ALJ, erred in numerous findings of fact and that others were unsupported by evidence. Petitioner in her reply exceptions refutes the Board's arguments and affirms the initial decision. The Commissioner agrees. He finds that Judge Springer based his findings on "sufficient, competent, credible evidence". N.J.S.A. 52:14B-10(c).

The Commissioner, however, modifies that portion of the Court's conclusion wherein is stated:

> "***the transfer of a guidance counselor to a classroom teaching position constitutes a 'demotion' to a job of lesser rank***."
> (at p. 7, ante)

The Commissioner determines that the position of guidance counselor represents a service category in which petitioner can acquire tenure and from which a transfer cannot be made without the affected individual's consent, a reduction in force or a tenure hearing. The contention that it is, perforce, a position of higher level in the educational hierarchy than that of classroom teacher is a distinction without a difference and cannot be sustained.

The Commissioner in rendering this decision relies upon his determination in Richard Stegemann v. Board of Education of the Township of Union, 1980 S.L.D. _____ (decided March 27, 1980), aff'd State Board July 2, 1980 wherein he held that transfer of a cooperative industrial education coordinator to the position of teacher of industrial arts represented a violation of petitioner's tenure rights.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter except as herein modified and adopts them as his own.

Accordingly, the Union Township Board of Education is directed to reinstate petitioner in a guidance counselor position with proper remuneration of emoluments resulting from her wrongful transfer.

COMMISSIONER OF EDUCATION

September 29, 1980

Pending State Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

THOMAS KUC and **JOHN NILIO**,	)	INITIAL DECISION
Petitioners,	)	**OAL DKT. NO. EDU 2627-79**
v.	)	**AGENCY DKT. NO. 249-6/79A**
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	)	
Respondent.	)	

APPEARANCES:

Joseph F. Defino, Esq., for the Petitioners

Robert H. Otten, Esq., for the Respondent

DOCUMENTS IN EVIDENCE:

P-1 Affirmative Action Policy

R-1 List of First Year Teachers Appointed to Coach Positions

BEFORE THE HONORABLE **DANIEL B. McKEOWN**, A.L.J.:

Petitioners (Nilio and Kuc), both of whom are employed as teaching staff members by the Board of Education of the Township of Hazlet (Board), allege the Board subjected them to gender-based discrimination contrary to N.J.S.A. 18A:6-6 and that it violated its own affirmative action policy in its determination to appoint female applicants instead of them to extracurricular assistant coach positions for the 1979 spring season.

The Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. A hearing

was conducted April 8 and May 29, 1980 after which the parties filed Briefs in support of their respective positions. The record was closed and readied for disposition July 11, 1980 the day ater the final Brief was filed.

The facts of the matter are based on the following testimony and documentary evidence.

Nilio has been employed by the Board as a teacher of physical education for ten years. He is also assigned as coach of the girls' softball team and coach of the boys' soccer team. These latter assignments are extracurricular to the Board's regular academic program.

During April 1978, Nilio applied for the then newly created position of assistant coach for the girls' soccer team. The Board, instead of appointing any applicant to that position, determined to further study the question of whether that position was essential.

The Board thereafter determined the extracurricular position was indeed necessary for the position was announced as available during February 1979. The qualifications necessary for consideration to be appointed were those as required by law.

Nilio testified he again applied for the position, was interviewed by the athletic director, Frank Farrell, and the head coach of the girls' soccer team, Bart Boyle. Nilio explained Farrell told him he, Nilio, would be appointed to the position of assistant coach of the girls' soccer team.

Nilio testified that on or about February 27, 1979 while he began to prepare for the soccer season, Farrell told him he was not to be appointed as assistant coach. Nilio explained he was told by Farrell that the assistant superintendent, Michael Cleffi, who is also the Board's affirmative action officer, stated a female must be appointed to that position. Farrell did not testify before me.

It is noticed here that Patricia Jordan, a first year teacher of physical education in the Board's employ who had also applied for the position, was in fact appointed by it as assistant coach of girls' soccer for the 1979 spring season.

Petitioner Kuc has been employed by the Board for sixteen years as a teacher of English. Kuc has also been assigned by the Board to the extracurricular positions of coach of the boys' freshman basketball team and assistant coach of the girls' track team, both of which positions he continues to hold today. Kuc complains, though, that the Board appointed a female colleague to the position of assistant coach of the girls' track team for the 1979 spring season.

Kuc testified that because he had been the assistant coach of the girls' track team for the 1978 spring season he assumed he would be automatically reappointed to that position for the 1979 season. Kuc, inexplicably in light of his stated assumption, testified he was interviewed for the position for the 1979 season by Farrell, the athletic director and by the head coach of the girls' track team, Michael Urich.

Kuc testified that at a time after the interview Urich told him he was not to be appointed assistant coach for girls' track for 1979; a female teaching staff member who had also applied for the position was to be appointed. Kuc testified it was his understanding that both Farrell and Urich recommended him for appointment to Cleffi, the assistant superintendent/affirmative action officer who was to have rejected the recommendation and determined a female had to be appointed.

Josephine Cavalloro, a first year teacher in the Board's employ, was appointed by the Board to the position of assistant coach of girls' track for the 1979 season. It is noticed Kuc was appointed to that position for the 1980 season along with Urich as head coach and another male assistant coach.

Cleffi testified that persons who apply for appointment to extracurricular positions such as herein file applications with the athletic director - Farrell. Farrell interviews the applicants, submits names to the high school principal who in turn submits names to the Superintendent. The Superintendent then makes recommendations for appointment to the Board. Cleffi testified he does not receive recommendation.

Cleffi testified that as the Board's affirmative action officer he has the responsibility to implement the Board's affirmative action policy for employment practices as required at N.J.S.A. 6:4-1.3 and as approved by the Department of Education. (P-1) That policy provides in its preamble:

It has always been the policy of the Hazlet Township Board of Education to hire the most qualified applicant regardless of race, religion, sex, national origin or socio-economic status. Therefore, the areas of underutilization have not occurred purposefully but have occurred inadvertently.

Through the following plan of action, the district will meet its Affirmative Action objective of correcting past discrimination patterns and practices which were inadvertent.

There follows a series of twelve affirmative steps to be taken to insure that past, inadvertent patterns of discrimination would be corrected in the "areas of under-utilization" which areas are identified in the policy as minorities and females.

The following of the twelve affirmative steps are deemed relevant herein:

1. A continual examination will be made of all employment policies to be sure they do not, if implemented, operate to the detriment of any persons on grounds of race, religion, sex, national origin or socio-economic status.

2. In-service programs for central administration, school administration and staff will be conducted to sensitize them to employment opportunity.

3. Steps will be taken to recruit, employ and promote qualified members of groups who formerly were inadvertently excluded.

4. All contracts with employee groups will include a non-discrimination clause and an elimination of all sexist language.***

7. ***

   c. The Affirmative Action Officer will monitor applicants for each job category posted by race, sex and national origin to insure that recruitment procedures are soliciting responses from all groups.***

8. Standards and criteria for employment will be explicit and available to all employees, i.e.

   1. Educational background
   2. Experience in the field
   3. Past accomplishments
   4. References
   5. Past job performance records
   6. Tests of actual samples of jobs to be done

7. Health examinations based on actual job performance criteria

9. Established criteria and standards for all promotions will be administered on a fair and equitable basis.

***

Cleffi testified with respect to Nilio's complaint that in February 1979 Farrell told him he received two applications for the position of assistant coach for the girls' soccer team, one of which was from a female. He explained that Farrell was to have stated he believed the appointment should go to the female because it was a female sport. Cleffi testified he informed Farrell that given an application from a male and from a female, and upon the assumption both are as equally qualified, the female should receive the appointment. This was so, Cleffi explained, because females were underutilized as coaches during the 1978-79 year. There were approximately five female coaches of a total of sixty-five to seventy coaches.

The Superintendent testified that while he is uncertain of the number of female coaches to male coaches during 1978-79, he knows females were assigned in a disproportionate number of coaches compared to male coaches.

The Superintendent testified he received Patricia Jordan's name from Farrell as the person to be appointed assistant coach for girls' soccer for the 1979 spring season. He testified she was properly qualified to fill the position and that in his view it is essential to have a female coach, when available, assigned to female sports for locker room supervision and as a role model for the female athletes.

Cleffi and the Superintendent also testified in regard to Kuc's complaint that Josephine Cavalloro was appointed assistant coach of the girls' track team for the 1979 spring season instead of him.

Cleffi testified Farrell sought him out on that position for advice on female vis-a-vis male applications he had received. Again, Cleffi testified he informed Farrell he felt females should be considered for the position. Cleffi testified that he did not tell Farrell whom to select in either Nilio's case or in the case of Kuc.

The Superintendent explained that in the case of Kuc the head coach of the girls' track team, Urich, requested and was granted a meeting to press his demand that Kuc, in addition to another male teacher, be appointed his assistant coaches. Urich testified Farrell had told him one of the two assistant coaches had to be female.

The Superintendent obviously was not convinced of the validity of Urich's demands because he, the Superintendent, recommended a male, not Kuc, and a female to be Urich's assistant coaches for the 1979 spring season. The Superintendent's recommendations were adopted by the Board.

It should be noted here that Cleffi testified a Board policy exists which is to prohibit the assignment to coaching positions of teachers in their first year of employment with the Board. If such a policy existed, the Board has not consistently followed it since 1970. This is so for since the 1970-71 academic year, the Board has appointed at least twenty-one persons who were in their first year of employment with it. (R-2)

This concludes the recitation of testimony and documentary evidence upon which the following findings of fact are based:

1. Petitioners Nilio and Kuc were not appointed as assistant coaches for the girls' track and soccer teams, respectively, for the 1979 spring season.

2. The assistant superintendent/affirmative action officer encouraged Farrell to consider female applicants for the controverted positions in light of the Board's affirmative action policy and because females were underutilized in coaching positions.

3. Farrell recommended two female applicants for the controverted positions.

4. The Superintendent accepted, approved and forwarded to the Board Farrell's recommendation of the two females.

5. The Board did appoint two female teachers, both of whom were in their first year of employment and both of whom filed applications.

6. Females, as coaches of extracurricular activities, were underutilized in the Board's employ.

7. The Board's affirmative action policy is intended to eliminate past practices of unintended discrimination.

DISCUSSION OF LAW

Petitioners ground their complaint of discrimination upon N.J.S.A. 18A:6-6 which provides:

> No discrimination based on sex shall be made in the formulation of the scale of wages, compensation, appointment, assignment, promotion, transfer, resignation, dismissal, or other matters pertaining to the employment of teachers in any school, state college, college, university, or other educational institution, in this state, supported in whole or in part by public funds unless it is open to members of one sex only, in which case teachers of that sex may be employed exclusively.

Petitioners contend that the Board violated this statute and subjected them to gender-based reverse discrimination in its appointment of the two females to the coaching positions. Petitioners further contend the Board violated its own affirmative action policy, affirmative step eight, by not applying that specific criteria to the selection of coaches. Petitioners assert that had the Board followed its policy the conclusion would have to be reached that they, petitioners, were more qualified by virtue of their prior coaching experience.

It is recognized that the State Board of Education set forth its position in regard to discrimination at N.J.A.C. 6:4-1.6 which provides:

> "(a) All persons regardless of race, color, creed, religion, sex, or national origin shall have equal access to all categories of employment in the public educational system of New Jersey.
>
> "(b) All New Jersey public school districts shall comply with all State and Federal laws related to equal employment, including but not limited to the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1, et seq.).***"

N.J.A.C. 6:4-1.7(c) requires boards of education to submit to the Department of Education for approval its affirmative action plan to overcome the effects of any previous patterns of discrimination. (See N.J.A.C. 6:4-1.3(b).)

Discrimination involves the making of choices. The intent to actively discriminate contrary to law must be proved. Jones v. College of Med. and Dent. of New Jersey, Rutgers, 155 N.J. Super. 232 (App. Div. 1977) Intent to discriminate must generally be found by examining what was done and what was said in the circumstances of the entire transaction. Parker v. Dornbierer, 140 N.J. Super. 184 (App. Div. 1976)

Here, the initial decision-maker, Farrell, in regard to the recommendation of the two females was not called as a witness. Thus, I infer his testimony would be of no probative value to the issue herein.

I FIND no basis upon which to conclude that either Cleffi, the assistant superintendent/affirmative action officer or the Superintendent improperly discriminated against either petitioner. Cleffi, as the affirmative action officer, has the duty to sensitize his colleagues not to illegally discriminate against anyone. That he performed this duty with Farrell does not in my view establish he subjected petitioners to gender-based discrimination. The Superintendent, as the chief executive officer of the Board, has the duty to supervise the entire school operation. That Farrell's recommendation of two females over petitioners for appointment to the coaching positions coincides with the Superintendent's view that a female is needed for locker room supervision and as a role-model does not constitute illegal discrimination.

Petitioners claim that they were more qualified for the positions than were the females is without merit. The qualifications for such positions are set forth at N.J.A.C. 6:29-6.3 which requires certification and employment. Petitioners' prior experience as coaches has no relevance to the issues herein. The females who were appointed were as equally as qualified as were petitioners.

Petitioners complain that the Board has a policy which prohibits assignments of teachers in their first year of employment. Even if such a policy exists, the Board is not bound by such a policy. It is established that a board of education may amend and alter its own rules as it deems necessary, appropriate, and for legitimate reasons.

Greenway v. Camden Board of Education, 129 N.J.L. (Sup. Ct. 1942), aff'd 129 N.J.L. 461 (E. & A. 1943)

I FIND nothing improper or illegal in the appointment of Patricia Jordan as assistant coach for the girls' soccer team for the 1979 spring season because (1) she applied for the position, (2) she was qualified for the position, (3) the Superintendent determined a female assistant coach was necessary for legitimate reasons, (4) her selection was consonant with the Board's affirmative action policy, and (5) her selection is within the authority of a board of education to subjectively select from among equally qualified applicants those it chooses to appoint to such extracurricular positions. (See Joseph J. Dignan v. Board of Education of the Rumson-Fair Haven Regional High School, 1971 S.L.D. 1876, aff'd N.J. Super. (App. Div. 1975).)

Petitioner Nilio's complaint herein, **I CONCLUDE**, is without merit. Petitioner Nilio's complaint is **DISMISSED**.

Petitioner Kuc's complaint is equally found to be without merit within the context of the facts and of the law. Initially it is noted Kuc presumed that because he was the assistant coach for girls' track during 1978 he would automatically be reappointed for 1979. Such presumption is not valid. Extracurricular assignments are within the sole discretion of the Board. Dignan, supra

The female applicant who was appointed by the Board was as equally qualified for the position as was Kuc; the Superintendent determined it was necessary to have a female assistant coach for the girls' track team already assigned a male head coach and assistant coach; the female's appointment was consonant with the Board's affirmative action policy; and the female's appointment was within the discretion of the Board.

I CONCLUDE Petitioner Kuc's complaint is without merit. Petitioner Kuc's complaint is **DISMISSED**.

Having determined neither Petitioner Nilio's complaint nor Petitioner Kuc's complaint is with merit, the Petition of Appeal is **DISMISSED**.

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

DATE

DANIEL B. McKEOWN, A.L.J.

THOMAS KUC AND JOHN NILIO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

September 29, 1980

Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE BOARD	)	INITIAL DECISION
OF EDUCATION OF THE **CITY OF**	)	**DKT. NO. EDU 4-1/78**
LINDEN, UNION COUNTY	)	

APPEARANCES:

For the Commissioner of Education, John J. Degnan, Attorney General of New Jersey (**Alfred E. Ramey**, Jr., Deputy Attorney General)

For the Respondent Linden Board of Education, Greenwood, Weiss & Shain (**Robert H. Greenwood**, Esq., of Counsel)

BEFORE THE HONORABLE **ERIC G. ERRICKSON**, A.L.J.:

DOCUMENTS IN EVIDENCE:

C-1	July 28, 1975	Taranto to Burke
C-2	June 28, 1976	Thomas to Board President
C-3	December 29, 1976	Sobel to Lataille
C-4	January 27, 1977	Sobel to Lataille
C-5	February 16, 1977	Lataille to Superintendent
C-6	May 13, 1977	Sobel to Lataille
C-7	July 22, 1977	Greenwood to Burke
C-8	June 19, 1975	Superintendent to OEEO
C-9	September 9, 1975	Burke to Superintendent
C-10	December 18, 1975	Superintendent to Burke
C-11	February 9, 1976	Burke to Superintendent
C-12	April 28, 1976	Superintendent to Burke
C-13	May 11, 1976	Lataille to Superintendent
C-14	May 20, 1976	Board President to Lataille
C-15	June 28, 1976	Thomas to Board President
C-16	January 2, 1977	Lataille to Sobel
C-17	June 22, 1977	Burke to Superintendent
C-18	September 8, 1977	Burke to Greenwood
C-19A-H	1970-75	Enrollments with Minority Breakdown
C-20	1970-77	Composite Enrollments with Minority Breakdown
C-20A	September 1979	Composite Enrollments with Minority Breakdown
C-21	January 4, 1978	Burke to Greenwood
C-22	November 5, 1969	Guidelines for Developing Equal Education Opportunity

R-1	September 27, 1977	Comparison of Racial Balance by Schools
R-2	1978-79	Textbook Expenditures by Schools
R-3	1978-79	Teacher Supply Expenditures by Schools
R-4	May 2, 1978	Teacher Pupil Ratio by Schools and Grades
R-5	February 1976	Walling Demographic Study of Linden Schools
R-6	September 1977	Enrollments by Schools and Grades
R-7	Map of Linden with Schools and Districting Boundaries	
R-8	Map of Linden with Schools and Districting Boundaries	
R-9	August 1978	White Flight Publication by Armor
R-10	1968-1982	Projected and Actual White Enrollments
R-11	Projected 1979-80 Enrollments	
R-12	July 10, 1979	Waters to Superintendent
R-13	April 1979	On Roll Figures

ISSUE AND PROCEDURAL RECITATION:

This matter was opened by the Commissioner of Education on January 4, 1978 by issuance of an Order directing the Linden Board of Education, hereinafter "Board" to show cause "***why the Commissioner should not take appropriate action to correct racial imbalance within the district's elementary schools***." (C-21) The Board, claiming that it has made substantial progress toward integration of its schools, contends that a mandated order by the Commissioner would be contrary to the best interests of pupils and the school district. The Board further asserts that its pupils are provided equal educational opportunity and requests dismissal of the complaint and the Order to Show Cause.

Four days of the plenary hearing were conducted by the undersigned, then a hearing examiner in the Division of Controversies and Disputes of the Department of Education. When the undersigned was appointed an Administrative Law Judge in the Office of Administrative Law, the matter was transferred to the Office of Administrative Law on July 2, 1979 as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. Thereafter, the remaining three days of the plenary hearing were conducted at Westfield. A Motion to Dismiss by the Board on the third day of hearing was denied on grounds that a prima facie case had been established. (Tr. III-4-27) Briefing was concluded rendering the record complete with the final submission of enrollment data on July 8, 1980.

UNCONTROVERTED FACTS:

The following relevant uncontroverted facts reveal the contextual setting of the disputed matter:

1. In a related case of Ralph Dill v. Board of Education of the City of Linden, 1970 S.L.D. 269, the entire record of which need not be related herein, the Commissioner temporarily and tentatively accepted a plan which the Board had advanced to improve racial balance. He retained jurisdiction, however, and directed the Board to improve that plan and make frequent reports on its revision and implementation "***pending the accomplishment of a racially integrated school system in the City of Linden which *** meets the standards required under the laws of New Jersey." (1970 S.L.D. at 273)

2. After numerous reports to and communications with the Commissioner and his subordinates, the Board on June 19, 1975, submitted an interim plan to improve racial balance in its schools. (C-8) On July 28, 1975 the Commissioner notified the Superintendent that this voluntary open enrollment desegregation plan was unacceptable on grounds that it was too nebulous and that its proposed comprehensive demographic study was a proposal, not a commitment. An alternate plan was required by the Commissioner no later than August 15, 1975. (C-1)

3. After further communications the Commissioner on September 9, 1975 directed the Board to forward to him a detailed desegregation plan by January 1, 1976 to be implemented by September 1976. (C-9)

4. On December 18, 1975, the Board notified the Commissioner that it had contracted for preparation of a comprehensive demographic study and that the effect on racial balance of voluntary transfers had been minimal, since only sixty-nine pupils had voluntarily transferred. (C-10)

5. The Commissioner on February 9, 1976 advised the Superintendent that the Board was required to submit a desegregation plan with detailed goals, guidelines and procedures by April 30, 1976. (C-11)

6. After further communications (C-2-3, 12-13) the Board on May 20, 1976 requested an extension of time until December 31, 1976 to complete a final proposal based on the demographic study for which it had contracted. That request was granted when the Board was allowed an extension until January 31, 1977 to submit an acceptable plan. (C-14-16)

7. On January 25, 1977 the Board advised the Deputy Commissioner of a resolution adopted on January 19, 1977 of a three-phase voluntary modified open enrollment plan to be instituted over a three year period. Phase I of that plan predicted dramatic improvement of racial balance in schools 1, 5, 6 and 8 by September 1, 1977. Phase II was to accomplish the same for schools 4, 9 and 10 by September 1978. Phase III was to improve racial balance in all remaining schools by September 1979. (C-4) That proposal, however, was rejected as inadequate. (C-5)

8. On May 13, 1977 the Board Secretary advised the Deputy Commissioner as follows:

> "As Secretary of the Linden Board of Education, I am advising you that at a special meeting of the board held May 11, 1977, the following motion was adopted:
>
> > 'To challenge the powers of the Commissioner to direct the Linden Board of Education as to how to racially balance the elementary schools.' " (C-6)

9. On June 22, 1977, after no acceptable plan had been submitted, the Commissioner wrote to the Superintendent as follows:

> "This is in response to the May 13 letter from Board Secretary Ruth Sobel informing me of Linden's decision to disregard the law mandating school desegregation.
>
> "I regret the Board has chosen this option and I urge you to reconsider your position in the interest of saving time and money which could best be used to provide equal educational opportunity to the children of Linden.
>
> "In the hope that the Board will reconsider its decision, I am giving Linden another opportunity to submit a Board-approved desegregation plan 30 days from the date on this

letter. Implementation of the plan is to be initiated at the opening of the 1977-78 school term.

"If a plan is not received by July 8, 1977, you will give me no choice but to order Linden to show cause why the Commissioner should not order the implementation of his own plan. This letter serves as official notice to that effect.

"As stated above, I hope legal action will not be necessary, but only the Board can prevent it. As you know, the resources of this Department are available to assist you."

10. When the Board on July 6, 1977 resolved to institute a revised plan, the Commissioner advised that such a plan must include the following information to be submitted by October 3, 1977:

"An assessment of Linden's current status in regard to desegregation.

The number of minority pupils transferring in the current school year plus an indication of the number of minority students potentially involved in open enrollment transfer.

The impact of open enrollment upon the majority group students to be involved in open enrollment transfer.

An indication of the schools that open enrollment minority students will be attending and the possible balance accruing at these schools plus a projection of future enrollment in this regard.

The criteria for the selection of Schools No. 2, 4, 4A and 5 instead of others.

Why the imbalance at other schools is not being addressed this year and when they will be addressed.

The possible effect of feeder patterns upon the two junior high schools.

A contingency plan to insure successful desegregation in the event that open enrollment does not achieve the desired results.

Curricular change, modification or development responsive to a desegregating school district in an inter-ethnic society.

A program of inservice training for staff and administrators toward better performance in a school district implementing a desegregation plan." (C-18)

11. On January 4, 1978 the Commissioner advised the Board through its attorney that, despite eight years of attempts to improve racial balance, only two of its ten elementary schools approximated within ten percent the district's overall minority population. The Commissioner on that date issued the aforementioned Order to Show Cause. (C-21)

SUMMARY OF RELEVANT TESTIMONY:

The Director of the State Department of Education's Office of Equal Education Opportunity, hereinafter "OEEO," testified that, despite progress in achieving racial balance at the district's two junior high schools, there "***has not been any significant changes in the elementary schools***." She testified concerning rejection of the Board's various open enrollment programs as follows:

> "***In and of itself we have not known anyplace where open enrollment has presented a viable system or plan. In the first place, the decision is for the students attending the various schools on a voluntary basis and it means then that the Board really has no control per se over the assignments. They're really leaving it up to the parents and the students to make that decision. So on these observations we just felt that it was possible for Linden to develop a more comprehensive plan other than a voluntary one.***"

The Director of OEEO also testified that the district had regularly submitted detailed reports, had made progress in the areas of curriculum, had in Elementary School No. 10 achieved significant improvement in racial balance, but had failed to submit and/or implement an acceptable plan to desegregate its elementary schools.

A compliance specialist in the Office of Equal Educational Opportunity, of the State Department of Education (OEEO) testified of the lengthy history of efforts of OEEO to assist the Board in effecting racially balanced schools. She testified that although the Board had achieved racial balance at the junior high school level, a number of plans had been deemed unacceptable for its ten elementary schools because they were nebulous, lacking in specificity, or showed little prospect of improving racial balance because of the limitations of available space. She also testified that the Board's various plans included no spur to encourage voluntary transfer of pupils such as magnet schools and programs which have proven effective in achieving racial balance in other school systems.

The Superintendent testified that he believes OEEO and certain of its personnel have distorted the facts, failed to credit the district for progress it has made, and unfairly rejected proposed programs submitted by the Board. In this regard he cites the district's success in achieving racial balance at the junior high schools and the increase of minority faculty members achieved during a time of declining pupil enrollment and resultant reduction of staff. He further testified of the district's adoption of texts reflecting Linden's multi-racial makeup and of the increase at some elementary schools which once had no minority pupils to as much as twelve, fifteen and twenty-eight percent minority enrollment. He testified further that every pupil and class, regardless of minority enrollment, is treated equally in terms of supplies, expenditures, teacher quality, class size and extra curricular activities. This opinion was corroborated by the Board's director of elementary education and by a principal who had previously had district-wide supervisory responsibilities. The Superintendent testified that he believes substantial progress has been made and that on the basis of the good faith thus far shown the district should be allowed to proceed within its own time frame to achieve the yet unattained goals of racial balance.

Both the Superintendent and the Assistant Superintendent testified that the increased number of white pupils entering parochial schools of the area has resulted in a substantial decline of white pupils enrolled in the public schools.

The Board's ESEA Title I supervisor testified that 74 educationally disadvantaged pupils in Schools 2, 4 and 5 are now provided remediation by Title I teachers. She testified that, since most of those served are minority pupils, their disperal into other schools would require Title I teachers to travel from school to school thus reducing the Title I teachers' available time to work with pupils.

The Assistant Superintendent testified that, during a period of declining enrollment and reduction in force, the Linden School District has increased the number and percentage of minority members in both its professional and nonprofessional staffs. He testified also of the numerous major highways and railroads which bisect Linden and create hazardous conditions for pedestrian pupils. These routes include but are not limited to U.S. Route 1, N.J Route 27, the New Jersey Turnpike and two major railroads. He testified further that the Board had been reluctant to expose pupils to the hazards which would ensue from redistricting which would compel pupils to cross those busy thoroughfares.

The Assistant Superintendent testified that citizens from both minority and majority racial groups have consistently urged the Board not to mandate busing or attendance in schools other than the neighborhoods where pupils live. He testified that, when the Board redistricted the junior high schools by implementing a mandated plan to achieve racial balance, that mandate was accompanied by severe disturbances within the student body.

This testimony concerning residents' opinions on redistricting was corroborated by one Board member who testified that although the Board stood fast with its redistricting of and busing to the junior high schools, police protection was necessary to protect both pupils and physical property from the temporary upheaval and turbulence. In this regard the Board member testified as follows:

> "***The feeling was that we had had in Linden quite a unique thing that I first found out when my daughter started, and that was that we have a school situated in every ward of the city, and every child that was of school age to attend school could walk from his front door and be within blocks of his school. To suddenly think that that would take a change for whatever reason to them at that time seemed the first traumatic reaction, and they were objecting to it. That is the main thrust.***"
>
> "***I really think the only reason that the Linden Board over the years kept running into a conflict was not because they weren't trying to settle that but rather because as I stated with the unique setup of these neighborhood schools just the thought of any type of movement upset them, and for that reason it created such a stir each time that we tried to follow the directive through.***"
>
> "***In my opinion in having met them through the PTA's *** over the years I would say the majority of the minority still would prefer the neighborhood school concept.***"

Both the Board member and the Assistant Superintendent testified of the Board's reluctance to precipitate white flight and/or repeated school and community turbulence which the Board believes would result from a plan mandating racial balance in the elementary schools.

The Assistant Superintendent testified that in July 1978 the Board, by closing School No. 7 and reassigning its pupils to School No. 2, improved the racial balance in those schools by reducing the preponderant majority of minority pupils enrolled. He testified also that effective in the 1979-80 school year the Board closed School No. 4 and

reassigned its 120 pupils to schools 6, 8 and 9 thus reducing the preponderance of white pupils at those schools as follows:

		% White	% Black	% Other
School 6	Without School 4 Pupils	91	5	4
	With School 4 Pupils	73	23	4
School 8	Without School 4 Pupils	94	7	3
	With School 4 Pupils	80	17	3
School 9	Without School 4 Pupils	80	18	2
	With School 4 Pupils	74	24	2

(R-11)

The Board called as an expert witness Dr. David James Armor, a senior social scientist of the Rand Corporation, a nonprofit research corporation based at Santa Monica, California. He testified that his studies of Linden's demographics convince him that a mandated plan superimposed on the school district by a state agency would accentuate white flight which he defines as "***an abnormal unexpected loss of white enrollment that follows implementation of certain kinds of desegregation plans.***" He testified that white flight frequently results "***in a school district which over the long run essentially attains less desegregation because the entire school district becomes predominantly minority.***"

Dr. Armor testified that he believes a mandated plan would increase the actual loss rate of whites (which ranged from 5.1% to 9.0% between 1969 and 1978) to annual losses of between 9.8% and 14.8% in the four years following such a mandate. (R-10) In this regard he testified as follows:

> "***What I have observed in my national studies is when major mandatory desegregation events take place there is an evaluated white loss above and beyond the white loss that would have been expected due to the demographic factors. The white loss is generally especially heavy in the first year or two of the implementation of the plan.***"
>
> "***By applying the elevated loss rates that I have observed nationally and that have occurred in the neighboring Roselle school district my study shows that if Linden implemented a general mandatory reassignment or racial balance plan in 1977 there would be a rapid acceleration in the loss of white students and by 1982 Linden would be basically a 50-50 white minority school district

> and I have no reason to think that trend would stop and after 1982 the chances are extremely high that Linden will become a predominantly minority school district.***"

Dr. Armor testified that he believes that the 1970 case and the instant litigation have already resulted in some "anticipatory" white flight. He stated, however, that without a mandated plan Linden has a chance to develop a stabilized majority white school district. He stated that, in contrast to mandated plans, self-imposed voluntary plans do not have any appreciable impact on white loss. When questioned whether segregated schools cause educational harm to minority pupils, Dr. Armor testified as follows:

> "***[I]t is my view that there are no specific educational harms in terms of things that we can measure with accepted quantitative tools such as achievement tests, self concept tests, aspiration measures, race relations indicators. There is no specific harm that I believe has been documented arising from segregation at least insofar that it can be documented as being impacted or remedied by racial balance. That is to say that when we compare students who are desegregated, minority students with those who are segregated or whether we compare a differential between whites and segregated minorities and desegregated minorities, the differentials that we find which are often attributed as harm coming from segregation seem to exist whether the minority students are in segregated schools or desegregated schools***."

When questioned whether he believed the then prevailing statistics, which revealed that a majority of the Board's elementary schools were within 15% of being all minority or all white, merited corrective action, Dr. Armor testified:

> "***I would want to qualify as an expert knowing that some things are counter-productive, I would want to qualify what those measures are, but I would feel that considering all factors I do think that corrective measures could be taken that would be wise under the circumstances.***"

RELEVANT FINDINGS OF FACT:

I FIND the following to be additional facts to be considered with those undisputed facts previously set forth within this record:

1. The minority enrollment in Linden's elementary schools has increased from 24.7% in 1970-71 to 38.9% in 1979-80. (C-20; C-20A)

2. Enrollment percentages in Linden's elementary schools in September 1970 and September 1979 were as follows:

School	1970 % White	1970 % Minority	1979 % White	1979 % Minority
#1	92.5	7.5	88.6	11.4
#2	59.1	40.9	51	49
#3	82.2	17.8	70.8	29.2
#4	35.5	64.5	12.6	87.4
#5	12.4	87.6	10.2	89.8
#6	96.6	3.4	66.5	33.5
#7	87.9	12.1	Closed	
#8	94.5	5.5	74.5	25.5
#9	93.1	6.9	66.5	33.5
#10	87.9	12.1	71.4	28.6
K-12 (all schools)	64.1	24.9	61.1	38.9

(C-20; C-20A)

3. In 1970 nine of Linden's ten elementary schools had minority enrollment which varied more than 10% from the then district-wide minority enrollment of 24.97%. (C-20; C-20A)

4. In 1979 only four of Linden's elementary schools had minority enrollment which varied more than 10% from the 1979-80 district-wide minority enrollment of 38.9%. These were elementary schools 1, 4, 5 and 8 which in the aggregate had 1,078 enrolled pupils of a total elementary enrollment of 2,349 pupils. (C-20; C-20A)

5. In 1979-80 the percentage of minority enrollment in only three of Linden's elementary schools varied from the district-wide minority enrollment by 15%, a tolerance level frequently cited as acceptable by experts in desegregation plans and studies. Montclair Concerned Citizens Association, et al. v. Board of Education of the City of Montclair, 1977 S.L.D. 1014 at pp. 1017-1018 These three schools enrolled 796 of the district's 2,349 elementary pupils.

6. The Board is in compliance in such areas as equal per pupil expenditures, textbook selection, co-curricular activities, curriculum adjustments, racial balance in its junior and senior high schools and has made commendable progress, while respecting the tenure and seniority rights

of its staff, toward achieving a better racial balance among its salaried employees.

DISCUSSION AND CONCLUSIONS:

It is well settled that the Commissioner of Education has both the authority and the responsibility to enforce the State's policy against segregation in the public schools. That authority and responsibility flows from Article I of the State Constitution, from N.J.S.A. 18A:36-20, from the rules of the State Board of Education, N.J.A.C. 6:4-1.5 and from numerous decisions of the New Jersey Supreme Court including Jenkins, et al. v. Township of Morris School District and Board of Edication, (1971) 58 N.J. 483; and Booker v. Board of Education of Plainfield, 115 N.J. 161 (1965).

The cooperative efforts of the Commissioner and his subordinates with the Board over a period of eight years consisted of numerous offers of assistance. Yet in January 1978 eight of the Board's elementary schools had minority enrollments which varied by more than 15% from the then district-wide minority enrollment of 34.9%.

During the lengthy period of this litigation, however, through the closing of School 7 and all but the Annex of School 4, and through certain redistricting, the Board has brought all but three elementary schools into acceptable compliance. This represents substantial and commendable progress in moving toward full compliance in achieving an acceptable level of school desegregation.

Nevertheless, it is apparent that approximately one-third of the Board's elementary school population attend predominantly segregated schools wherein the minority enrollment departs by from 28% to 50% from the district-wide minority enrollment. Such gross departures are unacceptable and must be corrected. Booker, supra; Jenkins, supra

Applicable to the instant matter is that which was emphatically stated by the Commissioner In the Matter of the Racial Imbalance Plan of the Roselle Board of Education, 1976 S.L.D. 187 at pp. 227-230:

> "***The Supreme Court of this State provided a comprehensive review of the litigation concerning pupil racial imbalance in the public schools and the applicable legal principles in Charles B.

Booker et al. v. Board of Education of the City of Plainfield, 45 N.J. 161 (1965). The Court observed that the decisions of the Commissioner and the State Board in Booker had pointed out that racial imbalance of pupil enrollment was not to be equated with invidious segregation as condemned by both the Commissioner and State Board in Volpe et al. v. Board of Education of the City of Englewood. (See 45 N.J. at 168). The Court also took cognizance of the Commissioner's finding that the cause of the concentration of the Negro population in particular schools was to be found in patterns of housing resulting from a constellation of socioeconomic factors.

"The Court stated the following:

> '***When in Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Supreme Court struck down segregated schools, it recognized that they generate a feeling of racial inferiority and result in a denial of equal educational opportunities to the Negro children who must attend them. Although such feelings and denial may appear in intensified form when segregation represents official policy, they also appear when segregation in fact, though not official policy, results from long standing housing and economic discrimination and the rigid application of neighborhood school districting.***' (45 N.J. at 168)

"The Court summarized the relationship of federal constitutional provisions in the following words:

> '***Whether or not the federal constitution compels action to eliminate or reduce de facto segregation in the public schools, it does not preclude such action by state school authorities in furtherance of state law and state educational policies. See Morean v. Board of Education Town of Montclair, 42 N.J. 237, 242-244 (1964); Addabbo v. Donovan, supra, 256 N.Y.S. 2d, at pp. 182-184; cf. Schults v. Board of Education of Township of Teaneck, 86 N.J. Super. 29 (App. Div. 1964), aff'd 45 N.J. 2 (1965).***' (45 N.J. at 170)

"The Court then summarized the State's education policy regarding pupil racial imbalance by stating that:

> 'In a society such as ours, it is not enough that the 3R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational

> advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority. It may well be, as has been suggested, that when current attacks against housing and economic discriminations bear fruition, strict neighborhood school districting will present no problem. But in the meantime the states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by. It is heartening to note that, without awaiting further Supreme Court pronouncements, some states, including our own, have taken significant legislative or administrative steps towards the elimination or reduction of de facto segregation. See Report of the United States Commission on Civil Rights 1963, pp. 55-62.***' (45 N.J. at 170-171)

"In Booker, supra, the Court pointed out that the Commissioner had previously construed the scope of his authority and responsibility when reviewing local steps to alleviate racial imbalance in too restrictive a manner, and stated that when a local plan is presented to the Commissioner

> '***he must affirmatively determine whether the reasonably feasible steps towards desegregation are being taken in proper fulfillment of State policy; if not, he may remand the matter to the local board for further action or may prescribe a plan of his own***.' (45 N.J. at 178)

"The Commissioner holds that the very necessity to offer equal educational opportunities to all school age children of every race, color, creed and national origin requires an affirmative policy to prevent isolation of ethnic groups and to alleviate racial imbalance in the public schools. This policy is founded upon the premise that a goal of the statewide educational system requires that children learn to respect and live harmoniously with one another in a multiethnic culture. This goal of citizenship education is presently set forth in the Department of Education's proposed rules and regulations for the implementation of c. 212, L. 1975 known as 'An act providing for a thorough and efficient system of free public schools, etc.' This goal is one of several which resulted from the participation of thousands of citizens in the State's twenty-one counties in the 'Our Schools Project' which was sponsored by the Department. The project resulted in the adoption by the State Board of a resolution setting forth a number of statewide goals and objectives for the system of public schools. Historically, every set of promulgated goals and objectives, sometimes referred to as cardinal principles, of public education has included a broad citizenship goal deemed not only desirable but necessary for the perpetuation and very survival of our democratic society and our democratic republic. Such efforts and concomitant results have

> not been restricted to New Jersey; they have been nationwide, and they extend back to the very origins of the common school, as the public schools were originally called. Long before this nation experienced large waves of immigration or even publicly recognized the derogation of the Negro in American society, the concept was firmly rooted that an educated man must be able to play a meaningful supportive role in the perpetuation of a government dedicated to the commonweal of the people.
>
> "Our modern era has seen many efforts made to promote equality and insure the basic civil rights of all citizens. Surely now more than ever before, the institution of the public schools, created by the people by means of the organic law and supported by the public purse, must strive to inculcate in all school age children the well known principles of citizenship embodied in a broad goal of humanitarian and civic education. The Commissioner is constrained to point out that the bridges between the races and ethnic groups are few and fragile and a strong commitment is required of all who comprise and support the institution of the public schools to bring all citizens of our nation together into a harmonious society dedicated to the elimination of bias, prejudice and discrimination. The ultimate goal at times appears to be unreachable and the task seems disproportionally difficult. But the perpetuation of a free and democratic society must transcend all obstacles, and the educational purpose is no less salutary because of the admitted difficulty of reaching the ideal goal.
>
> "The Commissioner concludes, for all of the foregoing reasons, that, although the measurable results of the State policy in regard to the improvement of academic achievement (in basic learning skills such as reading comprehension) resulting from the integration of pupils is equivocal, the broadly based goals of citizenship education, as described in the State policy, ante, and all of the values encompassed in these broad goals, constitute a reasonable educational policy, founded upon a sound educational philosophy.***"

I CONCLUDE that the Board's level of integration of its elementary schools, while vastly improved over the past two years, is unacceptable as concerns the racial imbalance in Schools 1, 4 Annex and 5. I further **CONCLUDE** that, in consideration of the great strides made by the Board in the past two years, a plan mandated by the Commissioner at this time would be inappropriate. The unrebutted expert testimony educed at the hearing from Dr. Armor raises the specter that a mandated plan could prove counterproductive.

The Board, however, has the obligation to move without unnecessary delay to devise and adapt the final phases of a plan to desegregate Schools 1, 4 Annex and 5. While it is apparent that such a plan cannot be effected before the opening of school in

September 1980, there appears no reason why an early plan cannot be devised, taking into consideration the unique divisions of arterial traffic prevailing in Linden and the Board's proper concerns over the safety of pedestrian pupils.

In view of these CONCLUSIONS, which are based on the facts in the disputed matter, **IT IS ORDERED** that the Board, with or without the aid of OEEO must devise a plan for the final desegregation of its elementary schools, with a minority component in each school which varies no more than 15% from the minority composition of the district-wide enrollment, and submit that plan to the Commissioner for his review no later than December 10, 1980. The remaining request for an order directing that the Commissioner intervene by taking action at this time to correct racial imbalance in Linden's schools is **DENIED**.

IT IS FURTHER ORDERED that, in the event the Board does not submit an acceptable plan by December 10, 1980 or that the Board refuses to implement changes the Commissioner considers necessary to implement an acceptable plan, the Commissioner shall devise a plan by April 1, 1980 which the Board shall implement effective the beginning of the 1981-82 academic school year.

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

DKT. NO. EDU 4-1/78

I HEREBY FILE my Initial Decision with FRED G. BURKE for consideration.

August 20, 1980
DATE

Eric G. Errickson
ERIC G. ERRICKSON, A.L.J.

IN THE MATTER OF THE BOARD OF :

EDUCATION OF THE CITY OF : COMMISSIONER OF EDUCATION

LINDEN, UNION COUNTY. : DECISION

_____:

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

The Commissioner observes that exceptions were filed by the Board pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board does not except to the entirety of the initial decision. The Commissioner deems it proper that the introduction to the Board's exception be set down in its entirety:

> "In many respects the Initial Decision of the Administrative Law Judge in this matter is accurate, sensitive and responsive to the case that was presented to him. It also attempted to deal judiciously with the law as applied to the facts of this particular case. For these reasons it is noted at the outset that exception is not taken to the entirety of the Initial Decision, but only to those parts specifically addressed herein."

Firstly the Board excepts to that portion of the initial decision wherein Judge Eric G. Errickson, ALJ, determined that if the Board did not develop its own policy by December 10, 1980 the Commissioner devise and implement his own plan. The Board relies on the conclusion by the Court:

> "***[I]n consideration of the great strides made by the Board in the past two years a plan mandated by the Commissioner at this time would be inappropriate." (at 15)

The Commissioner is constrained to stress that prior to the aforementioned "great strides," the history of the previous eight years (1970-78) showed that multitudinous communications between all parties took place after which eighty percent of the elementary schools were still predominately racially segregated. The Commissioner then issued the aforementioned Order to Show Cause (C-21) and the great strides herein referenced were made in the subsequent two year period. Accordingly, the Commissioner cannot agree with the Board's conclusionary statement that an order or plan developed by the Commissioner would not accomplish racially balanced schools. (Board's Exceptions, at p. 2)

In further exception the Board contends that the Commissioner has no authority in this particular case to order pupils reassigned to schools to achieve any given racial balance. (Id., at p. 5) The Board asserts that in this particular and unique case any action by the Commissioner would be counterproductive. The Board argues that a demonstration that it is not providing equal educational opportunities cannot be made today by a mere showing of racial enrollment statistics. The Commissioner cannot agree.

Such language flies in the face of that of the courts in Booker and Brown and the Statement of Policy by the New Jersey State Board of Education of November 5, 1969. In Booker the Court summarized the State's education policy regarding racial imbalance by stating that:

> "In a society such as ours, it is not enough that the 3R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multicultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority. It may well be, as has been suggested, that when current attacks against housing and economic discriminations bear fruition, strict neighborhood school districting will present no problem. But in the meantime the states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by. It is heartening to note that, without awaiting further Supreme Court pronouncements, some states, including our own, have taken significant legislative or administrative steps towards the elimination or reduction of de facto segregation. See Report of the United States Commission on Civil Rights 1963, pp. 55-62.***" (45 N.J. at 170-171)

The Board execrates the conclusions reached by such bodies because they were based on sociological studies of old. The Board cites a modern or new sociological expert whose studies purport to show that any mandated plan of school desegregation precipitates and/or accelerates white flight from that school system. The Commissioner has reviewed the report and testimony of the Board's expert and finds nothing therein that upholds the values of segregated schools or that modifies State policy regarding desegregated schools.

At the time of the initial decision three elementary schools representing approximately one third of the pupil enrollment remain segregated. The Board cannot claim any advantage to such a situation but in effect states, "We are unique, leave us alone and something will happen."

Assuming arguendo that any plan to desegregate schools creates unrest and contributes to the transfer of white pupils from the district does not and of itself cannot relieve the Commissioner of his responsibilities therein. The task laid down is a heavy one but by the same token one clearly delineated in Booker, supra, wherein was said of the Commissioner when a desegregation plan locally created was presented to him:

> "***[H]e must affirmatively determine whether the reasonably feasible steps towards desegregation are being taken in proper fulfillment of State policy; if not, he may remand the matter to the local board for further action or may prescribe a plan of his own***." (45 N.J. at 178)

In the present matter at the end of a ten year period one third of the elementary pupils still attend racially segregated schools. In the Commissioner's judgment the Board has been accorded sufficient time in which to desegregate its schools. Yet the local board of education still has until December 10, 1980 to present to him a plan, with State cooperation if desired, to correct racial imbalance in the Linden public school system.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Board is directed to present its plan to the Commissioner by December 10, 1980. Alternatively, in the absence of such action the Commissioner shall present his own plan by April 1, 1981.

It is so decided.

COMMISSIONER OF EDUCATION

October 6, 1980

Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

"C.G." (PARENT) AND "B.G." (STUDENT),	INITIAL DECISION
PETITIONERS,	**OAL DKT. NO. EDU 3862-80**
V.	
BOARD OF EDUCATION, DAVID BREARLY HIGH SCHOOL, UNION COUNTY,	
RESPONDENT.	

APPEARANCES:

"C.G." and "B.G." Pro Se

Frank Skok, Esq., for Respondent.

BEFORE THE HONORABLE **ROBERT P. GLICKMAN**, A.L.J.:

This matter comes before the Court by way of petition filed pursuant to N.J.S.A. 18A:6-9 vesting the Commissioner of Education with jurisdiction to hear or determine all controversies and disputes arising under the school laws. This matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Because of the nature of the relief sought, this matter was set down for an expedited hearing on June 18, 1980 and continued on June 30, 1980.

Prior to the commencement of the hearing on June 18, 1980 the following issues were identified:

1. Was the Board's action in permanently removing petitioner, "B.G." from the physical education class on April 21, 1980 arbitrary, capricious, and/or unreasonable and/or in violation of Board policy?

2. Is the Board's action in not allowing petitioner, "B.G." to graduate on June 19, 1980 arbitrary, capricious and/or unreasonable and/or in violation of Board policy?

3. If petitioner should prevail, what relief, if any, is she entitled to?

At the hearing, 28 exhibits were admitted into evidence, which are set forth on the attached exhibit sheets.

"C.G.", "B.G." and "W.G." testified on behalf of petitioners. Joseph Malt, George Cuzzolino and William Blakely testified for respondent.

Post hearing summations and briefs were to be filed by August 15, 1980 on which date the hearing was deemed to be concluded. See N.J.A.C. 1:1-16.1.

Many of the facts dealing with "B.G's" failure to graduate are uncontroverted.

The respondent, in removing petitioner, "B.G." from her physical education class on April 21, 1980 and not permiting her to graduate, relies on a Board policy found in section of the Parent and Student Handbook (J-1) entitled, "Administrative Guidelines for Student Attendance," IV, Procedures, B, Excused Absences, on page 46 which states, in pertinent part:

> "...Repeated absences may result in withdrawal from a course or from school."
>
> There are two types of absences recognized by respondent:
>
> 1. Unexcused absences, or truancies wherein students are absent from class without authorization;
>
> 2. Excused absences wherein students are absent for some permissible reason.

"B.G.'s" attendance record for the 1979/80 school year was admitted into evidence (R-4) and testified to at length. From all sources of information, it appears that "B.G." was absent 47 days from school from the beginning of school in September, 1979 until April 15, 1980.

The following chart will illustrate the number of days and in which months "B.G." was either absent or tardy:

Month	Days	
	Absent	Tardy
September	2	2
October	4	1
November	6	0
December	9	0
January	6	0
February	10	0
March	8	0
April	2	0
Total	47	3

The respondent promulgated administrative guidelines for Saturday (or Sunday) school (R-6) which indicated, among other things, that if a student is truant, for the first truancy he shall either serve one Saturday school day from 8:30 to 12:30 or three days out of school suspension; for a second truancy, the student shall either serve two Saturday days or six days out of school suspension.

On September 17, 1979 "B.G." was truant and as a result served a Saturday session on September 29, 1980. On September 24, 1979 "B.G." was again truant and served a Saturday school session on October 6, 1979. On November 13 and November 19, 1979 "B.G." was truant but no action was taken by respondent. On December 3, 4 and 5, 1979 "B.G." was truant but did not attend any Saturday school sessions. The respondent treated each of the three days as a second time truancy and required "B.G." to serve an out of school suspension of six days for each day she was truant on a total of 18 days. Thus, "B.G." served out of school suspenion on the following days for her truancy on December 3, 4 and 5, 1979:

December 18, 19 and 20, 1979;
January 22, 23 and 24, 1980;
January 28, 29 and 30, 1980;
February 11, 12 and 13, 1980;
February 25, 26 and 27, 1980;
April 1, 2 and 3, 1980;

Additionally, on March 5, 6 and 7, 1980 "B.G." served an additional three days out of school suspension for excessive tardiness. As a result of her missing three days from school on December 3, 4 and 5, 1979 without an excused absence and as a result of her being tardy on three days, "B.G." served a total of 21 out of school suspension of days.

"B.G." was absent from school because of excused absences on the following dates:

December 21, 1979;
January 9, 1980;
January 14, 1980;
February 1, 1980;
February 15, 1980;
February 28, 1980;
and April 15, 1980.

On March 24, 1980, the following letter (J-13) was sent to "B.G." from Joseph Malt, Principal, which states:

> "During our conference in mid-February, we discussed your attendance at school this year. At that time, you were told that if you did not attend school on a regular basis, you would be removed from all full-year classes and you would be in danger of being removed from second semester classes, based on the amount of instruction missed.
>
> Since that time, you have been absent three more times. To date you have missed 41 days of school. Unfortunately, you have not lived up to your responsibility. This letter is to inform you that if you miss one more class, for any reason, you will be removed from full-year classes. ..."

On April 21, 1980, "B.G." cut her gym class because she had a stomach virus. However, she did not report to the health officer as required by the appropriate school rules. As a result of her cutting this class, she received a first class cut notice (J-14). She was withdrawn from this class because of her repeated absences. Since physical education is a mandatory course which is required for graduation (see N.J.S.A. 18A:35-5 and N.J.S.A. 18A:35-7), "B.G." did not graduate with her class in June.

On May 6, 1980, "B.G." and "C.G." filed a grievance with Principal, Joseph Malt (J-15), which was denied by him on May 13, 1980. On May 16, 1980, "B.G." and "C.G." wrote to Dr. Donald Merachnik, Superintendent, indicating that they were dissatisfied with Mr. Malt's decision and wanted to take the matter to the second step of the grievance procedure. On May 23, 1980, Dr. Merachnik wrote to "B.G." sustaining Mr. Malt's action. (J-18). On May 29, 1980 "B.G." and "C.G." appealed Dr. Merachnik's decision to the Board of Education. (J-19). On June 3, 1980, at a Board of Education meeting, "B.G." and "C.G." appealed with regard to the grievance. By letter of June 6, 1980, the Board of Education denied their grievance appeal. (J-20).

It should be noted that "B.G." had a passing mark in physical education when she was withdrawn from class. As a matter of fact, "B.G." was doing academically well in school and was participating in the Cooperative Work Experience program wherein she attended school in the morning and worked on a job in the afternoon.

As a result of the following written communications, "B.G. and "C.G." were notified by respondent of "B.G's" absences from school:

1. Letter dated September 18, 1979 from George Cuzzolino to "C.G." (J-2);

2. Letter dated September 25, 1979 from George Cuzzolino to "C.G." (J-4).

3. Letter dated December 10, 1979 from George Cuzzolino to "C.G." (J-6);

4. Letter dated January 29, 1980 from Joseph R. Malt to "C.G." (J-8);

5. Letter dated February 6, 1980 from George Cuzzolino to "C.G." (J-9);

6. Letter dated February 11, 1980 from Joseph R. Malt to "C.G." (J-10);

7. Letter dated February 13, 1980 from Joseph R. Malt to "C.G." (J-11);

8. Letter dated March 24, 1980 from Joseph R. Malt to "B.G." (J-13);

Besides written communications, conferences were held about "B.G.'s" absences between Principal Joseph Malt and "B.G." in December, 1979 and March, 1980; between Assistant Principal George Cuzzolino and "B.G." in December, 1979; and between Guidance Counsellor William Blakely and "B.G." in September, 1979 and January, 1980.

Based upon a careful consideration of the aforegoing, including a careful review and study of the pleadings, exhibits, stipulations and an assessment of the credibility and demeanor of the witnesses and the inherent probability of their testimony, this Court **FINDS:**

1. On April 21, 1980 "B.G." was removed from her physical education class and as a result thereof not permitted to graduate with her class in June. Respondent, in removing petitioner "B.G." from her physical education class, relied on the following section of the Parent and Student Handbook

entitled, Administrative Guidelines for Student Attendance, IV, Procedures B, Excused Absences on page 46 which states in pertinent part:

"... Repeated absences may result in a withdrawal from a course or from school."

2. Between September, 1979 and April 15, 1980 "B.G." was absent from school 47 times and tardy 3 times.

3. Respondent identifies two types of absences:

   A. Unexcused absences or truancies wherein students are absent from class without authorization;

   B. Excused absences wherein students are absent for some permissible reason.

4. Respondent established a system of punishments for truancies as follows:

   A. For a student's first truancy, the student shall either attend a Saturday school session from 8:30 to 12:30 or serve three days out of school suspension;

   B. For a student's second truancy, the student shall either attend two Saturday school sessions or serve six days out of school suspension.

5. On September 17, 1979 "B.G." was truant and as a result served a Saturday session on September 29, 1979.

6. On September 24, 1979 "B.G." was truant and served a Saturday school session on October 6, 1979.

7. On November 13, 1979 and November 19, 1979 "B.G." was truant, but no disciplinary action was taken by respondent.

8. On December 3, 4 and 5, 1979 "B.G." was truant but did not attend any Saturday school sessions. The respondent treated each of the three days of truancy as a second offense and required "B.G." to serve an out of school suspension of six days for each day she was truant, or a total of 18 days.

9. "B.G." served out of school suspensions on the following days for her truancy of December 3, 4, and 5, 1979:

   A. December 18, 19 and 20, 1979

   B. January 22, 23 and 24, 1980

   C. January 28, 29 and 30, 1980

   D. February 11, 12 and 13, 1980

E. February 25, 26 and 27, 1980

F. April 1, 2 and 3, 1980

10. On March 5, 6, and 7, 1980 "B.G. served an additional three days out of school suspension for excessive tardiness in September and October, 1979.

11. As a result of her being truant on December 3, 4 and 5, 1979 and also being tardy on three days in September and October, 1979, "B.G." served a total of 21 out of school suspension days.

12. "B.G." was out of school on the following dates because of excused absences:

A. December 21, 1979

B. January 9, 1980

C. January 14, 1980

D. February 1, 1980

E. February 15, 1980

F. February 28, 1980

G. April 15, 1980

13. On March 24, 1980 Principal Joseph Malt wrote to "B.G.", in essence, that if she missed one more class, for any reason, she would be removed from full year classes.

14. On April 21, 1980 "B.G." cut her physical education class and as a result was withdrawn from that class because of repeated absences.

15. Physical eduation is a mandatory course which is required for graduation.(See N.J.S.A. 18A:35-5 and N.J.S.A. 18A:35-7)

16. "B.G. did not graduate with her class in June, 1980.

17. "B.G. and her mother "C.G." filed a grievance with Principal Joseph Malt. An appeal was taken from Mr. Malt's denial of their grievance to Dr. Donald Merachnik, Superintendent. As a result of Dr. Merachnik's denial, an appeal was taken to the Board of Education, which, also denied their grievance.

18. Between September and March, letters were sent by school officials to "C.G." about "B.G.'s" absences.

19. Several conferences were held between "B.G." and Joseph Malt, George Cuzzolino and William Blakely with regard to her absences.

20. Of the 47 days that "B.G." was absent from school, 21 of those were for out of school suspensions.

21. Of the 47 days "B.G." was absent from school, 26 of those were unrelated to out of school suspensions.

22. 26 days of absences constitute "repeated absences" pursuant to the Administrative Guidelines for Student Attendance.

The law is clear that a Board of Education's actions are in most instances entitled to a presumption of correctness. Quinlan v. Bd. of Ed. of North Bergen, 73 N.J. Super 40 (App. Div. 1962). Only where a Board of Education has acted arbitrarily, capriciously, or unreasonably will its actions be upset. Quinlan, supra, at 47; Thomas V. Morris Township Board of Education, 89 N.J. Super 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966)).

The reasons for discouraging student absences has a well established educational basis. As stated in Wheatley, et. al v. Board of Education of the City of Burlington, Burlington County, 1974 S.L.D. 851, 864:

> "Frequent absences of pupils from regular classroom learning experiences disrupt the continuity of the instructional process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra after-school instruction. Consequently, many pupils who miss school frequently experience great difficulty in achieving the maximum benefits of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic progams. The school cannot teach pupils who are not present. The entire process of education requires a regular continuity of instruction, classroom participation, learning experiences, and study in order to reach the goal of maximum educational benefits for each individual child. The regular contact of the pupils with one another in the classroom and their participation in well-planned instructional activity under the tutelage of a competent teacher are vital to this purpose. This is the well-established principle of education which underlies and gives purpose to the requirement of compulsory schooling in this and every other state in the nation."

Although some pupil absences are unavoidable, repeated absences call for some type of punishment. The disturbing feature of the punishment to petitioner in the instant case is that she was withdrawn from her physical education class based on repeated absences, 21 of which were for out of school suspensions. In other words, "B.G." for her truancy on December 3, 4, and 5, 1979 and for her tardiness in September and October, 1979 received a total of 21 days out of school suspension. These 21 days also were

counted in determining that she was repeatedly absent from class. This is clearly a double penalty and is condemned by this Court. However, this Court is also cognizant of the fact that of the 47 days that "B.G." was absent between September and April, 26 of those were not the result of out of school suspensions. Respondent, thus, had a factual basis, apart from the out of school suspension days, to conclude that "B.G." was repeatedly absent under respondent's guidelines.

Both petitioners had ample notice of "B.G.'s" absences. Additionally, "B.G." was counseled as suggested by the Board guidelines. Based on her repeated absences, "B.G." should have expected the imposition of some penalty. As stated in Linda Wetherell and Norma Carnivale v. Board of Education of the Township of Burlington, Burlington County, 1978 S.L.D. (decided October 20, 1978):

> "It is reasonable to expect the imposition of penalties for unjustifiable tardiness, improper absences from classes, truancy, and absences considered to be inexcusable due to the nature of the cause. ..."

See also Debra Rubertone v. Board of Education of the Township of Lyndhurst, Bergen County, 1979 S.L.D. -(decided May 17, 1979).

Based on the totality of the circumstances, this Court concludes that the Board's action in permanently removing "B.G." from the physical education class on April 21, 1980 and not allowing her to graduate on June 19, 1980 was not arbitrary, capricious, unreasonable or in violation of Board policy.

However, because implementation of the excused absence policy may result in a double penalty when out of school suspensions are counted as part of the "repeated absences", the respondent is hereby directed to promulgate such new policy forthwith which will eliminate any double penalty being imposed upon a student. This Court rejects the argument of respondent that "B.G." brought about such out of school suspension by electing not to attend a Saturday session.

For the reasons just enunciated, it is **HEREBY ORDERED** that the petition be and is **HEREBY DISMISSED** with prejudice.

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

August 26, 1980
DATE

Robert P. Glickman
ROBERT P. GLICKMAN, A.L.J.

"C.G.", parent of "B.G.",	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE UNION COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b, and c.

Petitioner in her exceptions to the initial decision by Judge Robert P. Glickman, ALJ, makes minor corrections in several dates and alleges errors were made in B.G.'s attendance record. She contends that the lack of specificity as to what constitutes excessive absenteeism mitigates in B.G.'s favor.

The Board's reply exceptions deny the accuracy of petitioner's exceptions and affirm the accuracy of the initial decision. Respondent admits that the "Parent and Student Handbook" does not specify the number of absences considered excessive but contends that B.G. had received counseling and warning, both orally and written, regarding her poor attendance record. The Commissioner agrees. He finds that B.G. was properly counseled and warned of her repeated absences and knew, or should have known, that some penalty would be forthcoming. Wetherell and Carnivale, supra

The Commissioner is in total agreement with the Court that no absence policy promulgated by the Board shall within its structure cause any pupil to be placed in double jeopardy.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

October 14, 1980
Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060 AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND ROSEANN SPIEKERMANN, PETITIONERS, V. BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY, RESPONDENT.	)	INITIAL DECISION **OAL DKT. NO. —** **AGENCY DKT. NO. 235-7/77**

APPEARANCES:

Victor P. Mullica, for petitioner

Robert J. Pompliano, for respondent
(Joseph J. Ryglicki, attorney)

BEFORE THE HONORABLE **BRUCE R. CAMPBELL**, A.L.J.

This matter was opened before the Commissioner of Education on July 25, 1977. Petitioners claim that Roseann Spiekermann was employed by the Board of Education of North Bergen Township (Board) in March 1974 and continued in that employment until June 30, 1977, a period in excess of three years. The Board did not continue the services of Spiekermann for the school year commencing September 1, 1977. Petitioners allege this action violates N.J.S.A. 18A: 28-5 et seq. and other applicable law. Petitioners requested an order reinstating Spiekermann with full back pay and all other benefits and emoluments inuring therefrom.

The Board filed an answer on August 26, 1977, essentially denying petitioners' claims.

A prehearing conference was held in the Office of the Assistant Commissioner of Education in charge of Controversies and Disputes on July 18, 1978. The matter did not proceed to hearing upon representation that it could be amicably resolved. On April 2, 1979, counsel were contacted and asked to report on the status of the matter.

Settlement appeared still to be a possibility but the Board's counsel failed to respond to communications from petitioners' counsel.

On July 2, 1979, the matter was transferred to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. On February 2, 1980, petitioners' counsel again reported he had been unable to elicit any response from Board's counsel concerning the case. On April 28, 1980, a second conference of counsel was held and a prehearing order issued. That order, which is here incorporated by reference, set forth that the parties had agreed the matter could be amicably settled. In the alternative, petitioners were directed to submit a motion for summary judgment with supporting brief on or before June 2, 1980, respondent's brief in opposition to be due on or before June 30, 1980.

Board's counsel again failed to reply to petitioners' counsel's attempts to properly execute a written agreement. Accordingly, petitioners' motion for summary judgment was timely filed. No answer, brief in opposition or cross-motion has been received from the Board.

The brief in support of motion for summary judgment states that Spiekermann is a qualified and properly certificated teacher of the handicapped, she taught from March 18, 1974 to June 30, 1977 in respondent's schools as a regular teacher and she was served a notice dated April 22, 1977 that her contract would not be renewed for the 1977-78 school year.

I note that the notice served upon Spiekermann was dated some 35 days after she had served "the equivalent of more than three academic years within a period of any four consecutive academic years" as provided at N.J.S.A. 18A:28-5 which governs acquisition of tenure by teaching staff members.

It appearing that Spiekermann had met the requirements for tenure acquisition before being noticed of nonreemployment, the notice is a nullity. Spiekermann enjoyed tenure status and could not be removed except through a legitimate reduction in force (N.J.S.A. 18A:28-9) or under the provisions of the Tenure Employees Hearing Law (N.J.S.A. 18A:6-10 et seq.) The record is barren of any indication that either was invoked.

I FIND that Petitioner Spiekermann gained tenure status on March 21, 1977 and could not be removed thereafter except as provided by law. I FIND FURTHER that the Board's notice of nonreemployment to Spiekermann was void, null and ultra vires.

In consideration of these findings, I CONCLUDE that the nonrenewal of Petitioner Spiekermann's employment contract was an improper act.

Accordingly, IT IS ORDERED THAT Roseann Spiekermann be reinstated in the position she held prior to the nonrenewal of her contract with full back pay mitigated by amounts earned by her in other employment during normal school hours since the nonrenewal and with all other benefits, emoluments and rights, including seniority rights, accruing.

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

I HEREBY FILE my Initial Decision with FRED G. BURKE for consideration.

28 AUGUST 1980
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, A.L.J.

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060 AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND ROSEANN SPIEKERMANN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the matter controverted herein including the initial decision rendered by Bruce R. Campbell, ALJ, through the Office of Administrative Law.

It is observed that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:16.4a, b, and c.

The Commissioner affirms the findings and determination as rendered in the initial decision of this matter and adopts them as his own.

Accordingly, the Board is ordered to reinstate Petitioner Spiekermann as a teaching staff member with a tenure status pursuant to the conditions set forth in the directive of the initial decision of this matter.

COMMISSIONER OF EDUCATION

October 20, 1980

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1895-79
AGENCY DKT. NO. _____

IN THE MATTER OF:

ARTHUR L. PAGE,
Petitioner
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON

Record Closed:
Agency Received: 9/4/80

Decided: 9/4/80
Mailed to Parties: 9/8/80

APPEARANCES:

Harold J. Ruvoldt, Jr., Esq. for the Petitioner
(Ruvoldt & Ruvoldt, Attorneys)

Robert B. Rottkamp, Jr., Esq. for the Respondent
Board of Education of the City of Trenton (Merlino, Rottkamp & Grillo, Attorneys)

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

In this case the Petitioner, Dr. Arthur L. Page, presently Executive Director for Personnel for the Trenton Board of Education, seeks to establish that he is entitled to tenured status as Assistant Superintendent for Personnel. In the course of his petition, and in his proofs at trial, Dr. Page also alleges that the Board of Education has discriminated against him both by reason of his race and as an individual. Dr. Page seeks

an order compelling the Board to cease and desist from such discriminatory practices and also requests further relief which will be discussed below.

Following the filing of the petition and the Board's answer, the matter was transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. The matter was pre-tried and heard before Administrative Law Judge Jeff S. Masin, the hearing taking place on March 11, 12, and 13, at the Office of Administrative Law in Trenton. Following the hearing and receipt of transcripts, counsel filed briefs with the Court and the hearing was declared completed and the record closed on July 21, 1980.

THE ALLEGATIONS

The Petitioner, both in his petition and in the Pretrial Order, has contended that the Trenton Board of Education has engaged in a course of conduct which has been discriminatory in nature and which has resulted in him being denied both the title which he believes that he is entitled to by the nature of his duties and the tenured status which he believes his length of service in that position would entitle him to under the terms of the Tenure Act, N.J.S.A. 18A:28-1 et seq. The Petitioner contends that the discriminatory actions of his employer have been manifested in several ways, especially with respect to what he perceives as a denial of certain benefits to which he would be entitled if no discrimination had occurred and he was in fact treated properly. In the course of his trial memorandum, the Petitioner pinpoints the legal issue as one of whether he has suffered from "disparate treatment" as that term is used in Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843, 52 LEd 2d 396 (1977) and Peper v. Princeton University Board of Trustees, 77 N.J. 55 (1978).

THE PETITIONER

Dr. Arthur Page has been employed by the Board of Education in Trenton since September 1, 1957. In 1968 he became Coordinator of the Model Cities Program for the Board and served in that capacity until January 3, 1971. At that date, Dr. Page became Assistant to the Assistant Superintendent until August 14, 1973. On that date, the Board of Education purportedly abolished the position of Assistant to the Assistant Superintendent of Personnel. When this occurred, the Petitioner entered into administrative litigation with the Board and the Commissioner of Education subsequently determined that the Petitioner was in fact entitled to tenure in the position of a school principal.

Page v. Board of Education of the City of Trenton and Pasquale A. Maffei, Mercer County 1975 S.L.D. 644 Aff'd State Board of Education, 1976 S.L.D. 1158. As a part of that litigation, the Commissioner also ruled that the purported abolition of the position of Assistant to the Assistant Superintendent had not taken place in "good faith" and restored the Petitioner to his position. Decision on Motion, 1973 S.L.D. 710. Following the above actions, the Petitioner remained in the position of Assistant to the Assistant Superintendent of Personnel until July 1976. At that time, the school system began to function under a reorgainzation plan adopted July 1, 1976. Under this plan the organizational chart for the system provided for a position of Assistant Superintendent of Negotiations/Grievances and also established a position of Director of Personnel Services. As of July 1976, Dr. Hiltenbrand became Assistant Superintendent for Negotiations/Grievances and Dr. Page became Director of Personnel Services. It should be noted that Dr. Hiltenbrand was white and Dr. Page, Black. Dr. Hiltenbrand continued to serve in his position until he retired June 30, 1977. After that date, no new Assistant Superintendent for Negotiations/Grievances has been named although the duties of the office were undertaken for some time by Mr. Walker, who also held the position of Assistant Superintendent for Support Services. The Board of Education did advertise the position of Assistant Superintendent/Labor Relations (apparently the same as Assistant Superintendent for Negotiations/Grievances) as of May 27, 1977 (see announcement of vacancy, P-6) but did not fill the position. On February 27, 1979, Mr. Samuel B. Cortina, who had previously been employed as a junior high school principal, assumed the position of School Board Employee Relations Officer. Mr. Cortina is white.

While further evidence as to these positions will be discussed below, at this point it should be noted that on December 13, 1978 the Board rejected a proposal made by the School Superintendent which would have made Dr. Page the Assistant Superintendent of Personnel and Negotiations/Grievances, effective January 2, 1979. The vote on this motion was 5 "no", 2 "yes", and 1 abstention (see Minutes of Board Meeting on December 13, 1978, P-13).

THE TESTIMONY OF DR. PAGE

Dr. Arthur L. Page testified as the sole witness for the Petitioner. He presented evidence with respect to the duties of his office as Executive Director of Personnel. In so doing, he identified two exhibits which purport to establish the duties of the position, both by way of a Board approved Job Description and one which he prepared,

which he testified up-dates the older description and more accurately reflects the duties actually performed. P-2 in evidence is a staff questionnarie which Dr. Page filled out in connection with a study of the salary scales in the system, known informally as the Williams' Report. This document was reviewed and signed by Dr. Jean Franklin Emmons, Superintendent of Schools, on June 2, 1977. P-1 is the Job Description drawn up by Dr. Page several weeks before the hearing. In Page's view, the two documents establish his duties as being the recruitment and selection of all personnel for the system, both professional and otherwise, evaluation of all personnel, administration of the personnel program, reductions in force, terminations, promotions, preparation of personnel recommendations, preparation of the school board personnel agenda, preparation of job descriptions, etc. Dr. Page testified that he has district-wide responsibility in his job and that he reports directly to the Superintendent.

Dr. Page testified that prior to 1976, he had been Dr. Hiltenbrand's assistant and had, in fact, performed the duties of the Assistant Superintendent for a period when Dr. Hiltenbrand was out of work. During the period of Dr. Hiltenbrand's absence, Dr. Page was paid $25 a day for the added responsibilities involved. After the reorganization in July 1976, Dr. Hiltenbrand took some of the duties of the Assistant Superintendent for Personnel with him to the new position of Assistant Superintendent for Negotiations/Grievances. These related to the labor relations portion of the job, a part which Dr. Page estimated to have been 10-20 percent of the duties of the Assistant Superintendent for Personnel. Since that time, the responsibilities of the Personnel Department have increased as a result of Board directives and negotiated agreements. Among the increase in duties were those relating to the establishment of a comprehensive personnel department. According to Dr. Page, prior to 1976 most of his office's work dealt with certificated personnel, not with classified employees. In 1976 the Superintendent decided to have a more complete personnel department. Dr. Page also explained that increases in negotiated benefit programs added to his office's responsibilities.

Dr. Page testified that as part of his job, he assigns duties to his chief assistants, Calvin Taylor, Director "B" Classified Personnel/Affirmative Action Officer and Kathleen Fitton, Acting Coordinator for Certificated Personnel (See P-3 and P-4 in evidence). These positions were originally created by the Board.

Dr. Page stated that he had prepared exhibit P-6, the announcement of vacancy which the Board used when Dr. Hiltenbrand retired. Page reviewed the list of

duties involved therein and stated that he performed many of these tasks in his role as Executive Director for Personnel. Specifically, he has been performing items 2, 3, 4, 6, 7, 8, 9, 10 in whole or in part. He does not perform the other responsibilities listed for the position of Assistant Superintendent for Labor Relations.

According to Dr. Page, prior to his becoming Executive Director in 1976, all those who had performed the duties he is assigned to were white and held the title of Assistant Superintendent.

Dr. Page testified with respect to his prior problems with the Trenton Board, specifically those which were the subject of the above noted administrative litigation. He also noted that about the same time as he was demoted by the Board in 1973, other minority staff members were reduced in rank and some were terminated. Of these, he was the only Black with district-wide duties.

As part of his case, Dr. Page introduced into evidence an agreement between the Board of Education and the Office for Civil Rights, U.S. Department of Health, Education and Welfare, which was adopted and approved by the Board of Education on September 2, 1975 (P-14, 15, 16 in evidence). He asserted that this agreement resulted from a pattern of racial discrimination in employment in the district.

With respect to his claim of disparate treatment, Dr. Page contended that he had been treated differently from the way in which white male administrators had been. This discriminatory conduct occurred in several areas. He pointed out several instances in which he believed the Board, or members thereof, had acted in a discriminatory manner towards him.

THE DEMOTIONS

As noted above, the Petitioner was originally appointed to the position of assistant to the Assistant Superintendent for Personnel (P-30). The history of the subsequent purported abolition of the position and the litigation which restored Dr. Page has already been related. However, Dr. Page argues that the subsequent actions of the Board and some of its members show the kind of discriminatory attitude taken against him arising either from his race or his action in opposing the Board's prior improper activities, or both.

After the Commissioner's Decision on Motion of December 27, 1973 restored Dr. Page to the post of Assistant to the Assistant Superintendent, the Board, on April 23, 1974, adopted a motion directing the administration to issue a teacher contract to Page, prior to April 30, 1974, for the "appropriate" teacher position for 1974-75. As a result, Page asserts, he was again removed from the position of assistant to the Assistant Superintendent for Personnel by this Board action as of June 30, 1974.

According to the Petitioner's testimony, on June 22, 1974, Mr. Halbert, a white, was brought in by the Board to replace him and was paid $25 an hour for doing the work (P-37). Page asserts that he only received an additional $25 a day when he had filled in for his boss, Dr. Hiltenbrand, during Hiltenbrand's absence in 1973.

On October 21, 1974, Board minutes reflect that a motion was made to establish, screen, and fill the position of assistant to the Assistant Superintendent in charge of personnel. The Chair, President Potkay, originally ruled that the motion could not be acted upon, but this ruling was challenged and the Chair was over-ruled. The Chair then ruled that the motion had to receive a 2/3 vote to carry because it was a motion to rescind a previous action abolishing the position. Legal argument on this ruling ensued, a motion to postpone was made and defeated. Statements were made by the Board President and other Board Members with respect to Dr. Page's qualifications and the need for the position. In the course of her lengthy remarks, President Potkay charged that Page had been insubordinate when he had failed to report for work as a teacher or sign a contract following the April Board action. Following further discussions, the Board voted on a renewed motion to re-establish, advertise, and fill the position. The first vote was 5-4 in favor, but President Potkay ruled that a 2/3 vote was needed to rescind a previous action of the Board. This ruling was challenged and over-turned and the Board finally adopted the motion. Page testified that he had received no notice of the meeting.

On February 13, 1975, the Board again dealt with Dr. Page. This time the Superintendent recommended that Page be appointed to the position of assistant to the Assistant Superintendent for Personnel, effective February 18, 1975. Again, substantial discussion took place. President Potkay charged that Page had never acted in "good faith" and had never accepted the teaching position given to him. The motion was amended to make the date of appointment effective September 11, 1974 and was adopted as such by a 5-4 vote (P-34).

OFFICE MANPOWER

Another area in which the Petitioner believes he has suffered the affects of discrimination is with regard to manpower for his office. In 1977, the Mercer County Chamber of Commerce conducted a study of the Trenton public schools (P-38). In that study, which was accepted and adopted by the Board on February 16, 1977 (P-39), the Chamber of Commerce found that the Personnel Department was "badly understaffed if it is to carry out the responsibilities set forth in the Superintendent's plan for reorganization". Among the Chamber's recommendations were the creation in the Department of the position of Executive Secretary and two additional Secretaries. Page testified that following the adoption of this plan, which called for an increase in personnel for the Department, the Board has, instead of filling the necessary positions, actually reduced the size of the staff by abolishing positions of Senior Secretary (temporary), relief Secretary, and Administative I Secretary, by Board resolution of April 27, 1978 (P-48 in evidence). Page stated that this was done even though the obligations of his office had increased substantially since the 1976 reorganization and the January 1977 presentation of the Chamber of Commerce study. He points to among other areas of increased work-load, the added responsibilities imposed on Ms. Fitton with respect to an attendance improvement program in keeping with the guidelines proposed by the Chamber of Commerce. (See P-42) According to this memorandum, it was recommended to the Board that it appoint two persons to assist Ms. Fitton with her increased tasks. However, the Board voted on January 14, 1980 to reject the recommendation to add personnel for the attendance program. (P-43 in evidence.) According to Dr. Page, where white administrators have received new duties, they have gotten the needed personnel.

Page also points to the defeat of a proposal which would have provided for microfilming of records, which he stated was needed. The monies were to have been obtained from the State Department of Education. (P-44).

Another example of what Dr. Page views as disparate treatment is with respect to the recommendation of the Chamber of Commerce study that an Executive Secretary be appointed for the Executive Director of Personnel. While white administrators such as Mr. Fischella and Mr. Cortina, respectively Executive Director of Buildings/Grounds and School Board Employee Relations Officer, have one. Dr. Page has none. The reason for this lack of an Executive Secretary has been stated to be as a result of an arbitration decision of May 16, 1977, In the Matter of the Arbitration Between

Trenton Educational Secretaries Association and Trenton Board of Ed. (P-20). Although the position was approved for budget on September 5, 1979, it has not been filled (P-22). Dr. Page testified that the reason given to him why the budgeted position has not been filled was a threat by the secretaries association to file a law suit if the position were filled. The Doctor noted that the arbitration award had not held that he was not entitled to an Executive Secretary but only that the position of secretary to the Executive Director of Personnel had to be posted. (See exhibits P-17 through 24.) Dr. Page points out that on the same day as the Board approved the creation of his Executive Secretary, it approved the creation of a media specialist aide, a position in Dr. Maffei's office. This position was filled "immediately".

EVALUATION OF HIS POSITION

Dr. Page testified that he has tried for some time to get his position evaluated with respect to status and title. He stated that no such evaluation has ever occurred and that while he has been unable to obtain one, the Board did have Mr. Cortina's position as School Board Employer Relations Officer evaluated shortly after Mr. Cortina's appointment to that position. Mr. Cortina is white (P-25 in evidence). The Board also allegedly refused to evaluate the position of the Black Coordinator of Home Economics, Miss Stubblefield.

SALARY

As a result of the alleged discrimination, Dr. Page argues that he has suffered financial loss due to receiving salary at a rate less than that which would be applicable if he were correctly titled. He points out that Pasquale Maffei, Assistant Superintendent for Curriculum, receives $48,255 for the 1979-80 school year. Dr. Page receives $35,877. They both hold doctorates. Maffei has been Assistant Superintendent since 1969, Page, Executive Director since 1976. Maffei is in the system 35 to 37 years and Page, 24 to 25 years. Page was in the service for two years and is entitled to increments as a result of this service. Page contended that under the confidential memorandum of understanding which the unclassified administrators have with the Board, they are entitled to a "most favored nations" clause which assures them that the benefits of the best of all contracts would be given to them. As such, he believes that after ten years in the district, administrators are entitled to go to maximum pay. He bases this assertion upon the terms

of Article VI, Section 8 of the agreement between the Board of Education and the Trenton School Custodians, effective July 1, 1979 - June 30, 1980, which provides for that benefit (P-46, 47).

As an alternative position, Dr. Page believes that he is entitled to be paid per diem monies for additional duties performed as Model Cities' liaison for the Board.

PAYMENT OF LEGAL EXPENSES

As a last example of discrimination against Page, apparently arising out of the Board's ill will toward him as a result of prior events, Dr. Page argues that he should have been reimbursed for his legal expenses arising out of the prior litigation between the Board and himself. He points out that the Board has previously reimbursed employees who have had legal expenses in cases which they won and specifically points to the reimbursement of Dr. Copeland, a Black administrator who was sued by one of his administrative assistants. The Board reimbursed Dr. Copeland for legal expenses after initially refusing to represent Copeland. Copeland was a member of the Administrators Bargaining Unit. Page believes that the previously noted most favored nations clause entitles him to the same benefit as Copeland received (P-62, 63, 64). With respect to this matter, Dr. Page does not seek the actual payment of the legal expenses at this time, nor does he contend that this amounted to discrimination against him as a Black, but rather discrimination against him as an individual.

On cross-examination, Dr. Page was queried as to the nature of his office's involvement in various personnel actions such as transfers, reductions in force, personnel problems and evaluations. He acknowledged that he had never acted as chief negotiator for the Board of Education in union matters but had been called on for background information to assist in the negotiations. His office was asked to cost out contracts by establishing how many employees are located on each step in the salary scale.

With respect to grievances, Page explained that there were three levels in the grievance procedure. He stated that in 95 percent of salary complaint matters, the

grievance first comes to his office. He said that there are a substantial number of these. He admitted that he does not handle either level two or three grievance or arbitration (level four).

Page discussed the several job descriptions previously mentioned. He explained that his office now handles such added tasks as super maximuns and letters of intent contracts which had previously been done by the Superintendent's office.

The witness agreed that the Chamber of Commerce report, which had reviewed the functions of his office, had not recommended that his title be changed to Assistant Superintendent. He also acknowledged that the reorganization plan did not contain the position of Assistant Superintendent for Personnel. As of May 1977, the announcement for the vacancy created by Dr. Hiltenbrand's retirement was for an Assistant Superintendent for Labor Relations. Page insisted that although the title of Assistant Superintendent for Personnel did not formally exist after 1975, the position was never formally abolished and the position did exist in fact and he occupied it.

The doctor asserted that his office's function in such activities as evaluation, transfers, reductions in force and terminations was far from mere "paper processing". While each of these personnel related actions requires actions by other Board employees, i.e., Principals, Elementary or Secondary Education Directors, the Superintendent, the Board, each involves an active review and recommendatory role for Dr. Page and his staff. In some areas such as evaluations, Page's office has had to limit its role to review of negative evaluations because of manpower limitations. According to the doctor, he personally recommends action on each and every negative evaluation.

Page also contended that his role in supervision of the system's personnel includes a great deal of informal "conflict resolution" such as where a principal or teacher or other employee would contact his office about a conflict with a supervisor or subordinate. While this kind of problem will often require the involvement of other employees, i.e., Building Principal, Supervisors, etc., Page and his subordinates often play a significant role in adjusting the situation.

Dr. Page acknowledged that other Board employees have received the $25 a day figure for additional work performed when temporarily filling in for absent administrators. Thus, Dr. Maffei, Assistant Superintendent for Curriculum, received $25 a day

for acting as Assistant Superintendent for Personnel from April or May 1973 until August 1973. Mr. Walker also filled this job on a temporary basis for awhile at $25 a day. When Maffei was out, Mr. Love, Director of Elementary Education, filled his spot at $25 a day. Maffei and Walker are white; Love, Black. When Mr. Halbert filled the personnel spot in June 1974 at $25 an hour, he came to that post from retirement.

Page reviewed the differences between the work performed by Dr. Hiltenbrand and that now done by Mr. Cortina. Because Hiltenbrand had a personnel background, he did many things himself, such as scattergrams, which now are performed by the personnel office. Thus, Mr. Cortina, as well as Mr. Walker, who held the job in an interim position following Hiltenbrand's retirement, performed less functions than Dr. Hiltenbrand.

On redirect examination, Page pointed out that as assistant to the Assistant Superintendent of Personnel, he received the $25 a day as extra compensation. When he was "promoted" to Executive Director for Personnel, he got no increase in pay as a result of the promotion. Thus, his salary has increased at the same rate and on the same level as if he had not been promoted, although in fact, he now does the job for which he once received $25 a day and now receives a basic salary.

The School Board presented two witnesses on its behalf. The first, Mr. Samuel Cortina, School Board Employee Relations Officer, was queried by counsel for the Board as to his role in grievances negotiations. He stated that when he needed information and background he would go either to the business office or the personnel office.

On cross-examination, Mr. Cortina was questioned as to various documents marked in evidence (P-66, 68, 69) which indicated requests made by him to Dr. Page's office for advice, information, action, etc. and also memorandums from Dr. Page regarding personnel procedures in differing situations, such as where charges of inefficiency are leveled against a teacher (P-67). He also acknowledged that such matters as transfers are processed through Dr. Page's office but he did not relate any specific knowledge as to what recommendatory role, if any, Page might play in the process.

Mr. Cortina opined that five out of ten complaints revolved around money, transfers, or personnel actions which fall within the general subject matter with which the personnel department is involved.

The second witness for the Board was Robert E. Boose, Mercer County Superintendent of Schools since July 1, 1979 and prior thereto Assistant County Superintendent following a post as Deputy Assistant Commissioner of Education. Dr. Boose was called to testify with respect to the classification of the position held by Dr. Page. It should first be noted that in the course of his role as County Superintendent and pursuant to State regulations, Dr. Page has the responsibility to review all unrecognized job titles within a school district. The position of Executive Director is a title unrecognized by New Jersey statute. As such, at some point Dr. Boose will be called upon to review the functions of this position and determine what the minimum required certification is for one holding the position. According to testimony received from Dr. Boose, there is no record that the Trenton School Board has ever submitted this unrecognized position of Executive Director for Personnel to the County Superintendent's office for evaluation. Thus, Dr. Boose has never been called upon in the course of his duties to pass upon a submitted unrecognized title and he has also not had the opportunity in the course of his relatively short tenure in his position to reach the point where he would have reviewed this unrecognized title on his own, without submission by the Board, as a result of his normal review of the line item entries on the School Board's budget. Dr. Boose indicated that because it had been presumed that this title had previously been submitted by the Board at some time in the past, he had no occasion to review the title on his own. Thus, as a result of the failure of the Board to submit the unrecognized title and the inability to be certain as to what information would have been conveyed to Dr. Boose by the Board had it sought review of the title, it was determined that Dr. Boose's testimony in this proceeding was limited to that of an expert, reviewing a title submitted to him for the purposes of litigation, rather than that of a public official testifying as to his performance of his publicly mandated review function.

In the course of his testimony, Dr. Boose indicated that in determining whether a certification is proper for a specific job title, he would "look at the scope of involvement of authority, span of control, the educational requirement to perform the job, how many people does one supervise, what titles do they hold, what classification do they hold." Dr. Boose had, in the course of reviewing this title for this case, only had access to the job description contained in the 1976 reorganization plan and the questionnaire contained in the 1977 Williams Report. No other information had been submitted with respect to present duties of the personnel department.

Dr. Boose testified that from his review of the information submitted to him, he had concluded that, at a minimum, a Principal certificate would be necessary for one holding the position described in the above noted job description and questionnaire. This was in part because of the suggestion that the person holding this position would be involved in the evaluation of staff. The Doctor further testified that the title suggested to him a focus on personnel functions and that affirmative action was a part of this. In his testimony, Dr. Boose noted what he saw to be a lack of power on the part of the Executive Director for Personnel to initiate personnel actions such as transfers, upgrades promotions and other personnel actions. He saw the position as involving "review and advise on some of these actions to make sure that they were within, maybe, contractual things or Board policy, whatever it may be."

Dr. Boose was asked to express an opinion, from his reading of the job descriptions, as to whether the position of Executive Director/Personnel was equivalent to an assistant superintendency. He answered that he would equate the position to a "Director of Personnel". He stated that

> "whether a district chooses to call it that, is something that they have a prerogative to do it, but if I were responding from the standpoint of looking at the assignments of titles and saying what kind of certificate does it need in order to function, basically, it would be a Principal certificate, which does not necessarily mean it's an assistant superintendent's position. It appears from that job description it was specifically designed and tailored, again on those four pages, to suggest direct involvement of the personnel function, and not getting into direct instructional kinds of involvement."

On cross-examination, Dr. Boose was asked whether it would be improper to title the job described in the 1976 job reorganization plan as an assistant superintendency. He responded that when he looked at titles he was doing so to determine what certification was necessary for the title. "I wouldn't care if it was called X,Y,Z." During cross-examination, on questioning from the Court, Dr. Boose agreed that what he was really concerned with in performing his function of reviewing the title was whether the title required an appropriate minimum level of certification in light of the job responsibilities involved. Thus, assuming that the job description fit within the area for which the certification would cover, it did not matter what the title was. Boose testified that if he had been given the 1976 job description with the title for the position as Assistant Superintendent for Personnel rather than Executive Director for Personnel or Director for Personnel, he would not have considered the title to be inappropriate. Since the title was

an administrative title, it could be called a lot of things. The doctor agreed that the title was an appropriate administative title for the position described.

Analysis

TITLE AND TENURE

As was noted above, the Petitioner seeks an order determining him to be the tenured Assistant Superintendent for Personnel and directing the Trenton Board of Education to make the appropriate title change and salary adjustments. The Respondent Board of Education has contended that the title which Dr. Page seeks, Assistant Superintendent for Personnel, does not exist within the Trenton school system and that, therefore, all Dr. Page is entitled to is the tenure status as a principal which was conferred on him by order of the Commissioner in the prior litigation between the parties.

The Tenure Act, N.J.S.A. 18A:25-5 provides:

"The services of all teaching staff members including all teachers, principals, assistant principals, vice-principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators and any other employees as are in positions which require them to hold appropriate certificates issued by the Board of Examiners, serving in any school district or any Board of Education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in a manner prescribed by Sub Article B of Article 2 of Chapter 6 of this title."

N.J.S.A. 18A:28-6 provides:

"Any such teaching staff member under tenure or eligible to obtain tenure under this chapter who is transferred or promoted to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:

(a) the expiration of a period of employment of two consecutive calendar years unless a shorter period is fixed by the employing board for such purpose; or

(b) employment of two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

(c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;

provided that the period of employment in such a new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion."

In order to receive tenure, an employee must hold a recognized title under the statutes. Thus, as a directorship or a executive directorship is not a recognized title under N.J.S.A. 18A:28-5, one holding such a position cannot normally receive tenure in that post. Therefore, the initial question which must be determined in this case is whether there is within the Trenton School District a position of Assistant Superintendent of Personnel which has been filled for the requisite period of time by the Petitioner. If such a position exists and Dr. Page has held it for long enough, he is entitled to tenure. If the position does not exist, then Dr. Page cannot receive tenure. It should be noted in connection with this issue that the case law in New Jersey clearly establishes that it is not the title which is important, but the duties of the job fulfilled. Tenure rights are determined by the nature of the work done, not the title given to the person performing the work. Boeshore v. Board of Education of the Township of North Bergen, Hudson County, 1974 S.L.D. 805; Page v. Board of Education of the City of Trenton and Pasquale A. Maffei, Mercer County, Decision on Motion, 1973 S.L.D. 710.

Other rules which have some application with respect to the determination of this issue are contained in the New Jersey Administative Code and have been referred to in this case. N.J.A.C. 6:11-3.6 reads as follows:

(a) School districts shall assign position titles to teaching staff members which are recognized in these regulations.

(b) If a local board of education determines that the use of an unrecognized position title is desirable, or if a previously established unrecognized title exists, such board shall submit a written request to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his/her discretion regarding approval of such request, and make a determination

> of the appropriate certification and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year."

Prior to November 1, 1977, the above rule was recommendatory, rather than mandatory.

It was then numbered N.J.A.C. 6:11-10.5 and read:

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

While the New Jersey Administrative Code contains no history as to the reason for the amendment of the above regulations, it appears reasonable to imply that the series of cases decided by the Commissioner in the mid-1970's dealing with claims for tenure by personnel who had been employed by boards of education in unrecognized titles led to the decision to amend the regulations to require boards of education to submit unrecognized titles for approval. A reading of the decisions in Boeshore and Page as well as an analysis of the purposes of the tenure statute and the cautions expressed by the Commissioner in Quinlan v. Board of Education of the Town of North Bergen, 1959-60 S.L.D. 113 as reinforced by the reference in Boeshore lead to the conclusion that the change in the administrative rules was made to attempt to eliminate the use of unrecognized titles except where special circumstances warranted their existence.

In this case it is clear from the evidence submitted through the testimony of Dr. Boose that the Board of Education of Trenton never submitted Dr. Page's unrecognized title of executive director for personnel (or any of the other director or executive director titles) for the approval of the Commissioner, either during the pre-November, 1977 recommendatory period or following the adoption and effective date of the amended rule. Further, as Dr. Boose testified, after coming into office in July of 1979, he had assumed that the executive director title had previously been submitted and approved and, therefore, had put off review of the title as required by the regulation until some later date. Thus, at the time he was called to testify he had not exercised his authority to review the title.

With all of the above in mind, it is necessary to determine whether the functions performed by Dr. Page are such as to rise to the level of the work of an assistant superintendent. While counsel for the Board urges that this is a situation different from that in which a previously existing position is abolished and the Petitioner comes before the Board seeking reinstatement and redress as a result of that abolition and a demotion, I am not at all certain that the distinction is meaningful. It appears that the purpose of the tenure statutes and the concerns expressed by the Commissioner in Quinlan and Boeshore exist whether the situation involve the abolition of a previous title or the creation of an unrecognized title. Either way, the effect of the existence of the unrecognized title is to create a situation where one fulfilling the functions normally associated with a recognized position may be denied the protection of tenure merely because the title is different from that which is recognized in the applicable statute. Thus, I believe that if the function fulfilled by Dr. Page is such as to be appropriately termed that of an assistant superintendent, he is entitled to receive tenure in that position, assuming he has met all other requirements regardless of whether the Board of Education has chosen to use the actual title to designate the position. The determination must be made without reference to whether the reason for the designation by unrecognized title arose from or has continued because of some discriminatory intent, racial or otherwise. Even if Dr. Page's title of executive director was created during the reorganization in 1976, in an atmosphere completely devoid of and untainted by any discrimination against Dr. Page, racial or otherwise, the impact of the statute and regulations, as interpreted by the case law, appears to require the granting of tenure if Dr. Page in fact performs the duties of an assistant superintendent.

With the above as background, it is now necessary to consider the nature of the job performed by Dr. Page, regardless of its title. A review of the evidence presented appears to clearly demonstrate that at least since he became the head of the personnel department on July 1, 1976, Dr. Page has performed district-wide duties of a broad scope, relating to personnel matters of all sort and touching in many ways on the educational process itself. He has done so in a capacity which, from all the evidence before me, appears to require a substantive review, analysis, and input into such diverse matters as staffing requirements, hiring, assignment of personnel, evaluation, transfers, terminations, reductions in force, etc. While the Board has attempted to characterize Dr. Page's role in these matters as "paper processing', his testimony, which I found to have been direct and credible, refutes this claim and nothing in the testimony of either Mr. Cortina or Dr. Boose serves to effectively demonstrate such a limitation. While it is

correct to say that Dr. Page does not personally initiate many of the personnel actions which he ultimately is required to become involved in, in a large hierarchial organization such as the school district, it is not unusual for actions to begin at a lower level and eventually work their way up to those with significant review functions. Further, I am convinced that Dr. Page has sufficient significant day-to-day contact with informal personnel complaints, relational difficulties, and the like, to justify his claim that his office plays a substantive role in these types of less-than-formal "grievances". While the personnel office generally serves as an informational fount in the more formal grievance machinery operated by Mr. Cortina, the office is not totally devoid of involvement in the overall "complaint" process.

I am not dissuaded from the view that Dr. Page's position involves significant district-wide substantive involvement in such educationally relevant areas as evaluation due to the limits which manpower shortages and numbers have placed on the office's ability to undertake these tasks.

In respect to the question of whether the job which Dr. Page holds could and should properly be designated as an assistant superintendency, the testimony of Dr. Boose is significant. Although called by the Board, the County Superintendent's testimony seems to effectively support the Petitioner's position, at least to the extent that Dr. Boose testified that in review of the job descriptions contained in the 1976 reorganization plan and the 1977 Williams Report Questionnaire, he found the described position to be of such a nature that it could appropriately be labeled as an assistant superintendency. With respect to Dr. Boose's testimony, it should be noted that his role in reviewing the job title, as County Superintendent, is, in his words, limited to a review aimed at determining what minimum certification the job described requires. Where the certificate required is appropriate to the position's duties, Dr. Boose cares not what the title is. However, when directly asked by Petitioner's counsel on cross-examination whether, if the title in the 1976 job description had been assistant superintendent rather than executive director, it would have been an apropriate designation, Dr. Boose responded in the affirmative.

The sum and substance of Dr. Boose's testimony seems to support a finding that the job held by Dr. Page could appropriately be entitled assistant superintendent for personnel without offending either the review standards of the County Superintendent or any other regulation. While Dr. Boose was careful to express the view that the job's role seemed properly characterized by the title executive director for personnel, he also

conceded that assistant superintendent for personnel would have been a proper designation. Further, Dr. Boose was reviewing information as to the job function which was several years old. The uncontradicted testimony of Dr. Page establishes that his job function has expanded, rather than contracted, since 1977.

I CONCLUDE that if the Trenton Board of Education had, in 1976, designated the head of the personnel department, charged with the same duties as those assigned to Dr. Page, as assistant superintendent for personnel, such designation would have been an appropriate one. Of course, the Board did not so act in 1976, and the consequences of this must be assessed along with all other relevant evidence in order to determine whether the doctor is entitled to the assistant superintendency despite both the general discretion given to the Board of Education and the actual lack of such a designation in the 1976 reorganization.

It has been argued by the Board that the 1976 reorganization effectively eliminated the position of assistant superintendent, whether a formal resolution to this effect was passed by the Board or not. It has further been noted that the position which had previously existed as head of the personnel department, that is assistant superintendent for personnel, had included the negotiations and grievances function. Thus, the argument seems to be that given the reduction in the duties caused by splitting the workload of the department between Dr. Page and Dr. Hiltenbrand in 1976, the job given to Dr. Page was something less than that which would merit a designation as assistant superintendent. Since Dr. Hiltenbrand already had tenure as assistant superintendent, his continued job, while significantly less involved than the one which he had had prior to the reorganization, had to continue as an assistant superintendent's spot since the law would not have allowed a reduction in Dr. Hiltenbrand's title. While it is recognized that this may have been the legal context in which the designations arose, I cannot believe that the mere fact that the Board reshuffled the job responsibilities in 1976 could properly have the effect leaving Dr. Page in a position of limbo with respect to future tenure. Since I find that the job which he has today is more involved than the one which he received through the reorganization in 1976, I cannot say that he is less busy, or performs significantly less important duties than those who held the assistancy prior to 1976.

In light of the above, **I CONCLUDE** that since assuming the position as head of the personnel department in 1976, Dr. Page has functioned as an assistant superintendent in fact, if not in name. His role in the system is similar to Dr. Maffei's role as assistant

superintendent for curriculum, although of course, in a different sphere of activity. While I make no attempt to offer a view as to the status of others holding title as executive directors or the equivalent, their existence and the possibility of their also being entitled to relief does not lessen Dr. Page's position. If the Board of Education has chosen to have a group of administrators bear an unrecognized title, it assumes the risks which may arise from a failure to submit the same as required and establish a case, if one can be made, for the existence of an unrecognized title having no tenure status.

While it may well be that the head of a department may function in a role somewhere between that of a principal and what properly is an assistant superintendency, in the existing regulatory context a Board is forewarned to seek approval for the unrecognized title. Here Page performs, in my view, what can properly be described as an assistant's job (a view which Dr. Boose seems to accept) and in the absence of any special approval given to the Board to make the job non-tenure bearing he deserves the title as well as the tenure which goes with it.

Since Dr. Page assumed the executive directorship on July 1, 1976 and has held it since, he has tenure in the equivalent recognized title as assistant superintendent for personnel. He became tenured on June 30, 1978.

SALARY

As Assistant Superintendent for Personnel, Dr. Page was entitled to receive a salary commensurate with the position. The existing Assistant Superintendent in the system, Dr. Maffei, receives a salary considerably in excess of that which Dr. Page receives as Executive Director of Personnel. Dr. Page has argued, and I agree, that the "most favored nations" clause contained in the Memorandum of Understanding for Confidential Administration adopted by the Board of Education on August 31, 1976 (P-46) provides that the confidential administrators are to receive fringe benefits in no case less than those accorded to any other employees in the district. In 1976, the Board adjusted the salaries of Mr. Walker, the then Assistant Superintendent for Support Services and Dr. Maffei, Assistant Superintendent for Curriculum, in accordance with the then effective agreement between the Trenton Administrators and Supervisors Association and the Trenton Board of Education which provided for maximum pay for employees with 30 years of service and at least 7 years of service in their present positions. Subsequent to that action the Board agreed with the Trenton School Custodians, in a contract effective

July 1, 1979 through June 30, 1980, for employees covered by that contract to go to maximum pay after having 10 years or more in the system. It appears that the Memorandum of Understanding for Confidential Administration would apply the 10 years or more of service portion of the school custodians' contract to the confidential administrators and that therefore at least as of the effective date of the school custodians contract, Dr. Page was entitled to move to the maximum salary for his position as assistant superintendent. It has been pointed out in the evidence, and **I FIND** that Dr. Page and Dr. Maffei have the same essential qualifications for their positions, i.e., doctorates and certifications, and that the only difference between them is the difference in longevity pay arising from Dr. Maffei's longer period of service in the system (and therefore entitlement to additional stipends for longevity) and the difference in the length of time which they served in the military service. Thus, **I CONCLUDE** that Dr. Page should receive a present salary equivalent to Dr. Maffei's with the exception of a reduction for the lesser number of stipends and military pay to which Dr. Page is entitled.

The Board of Education is **ORDERED** to pay the Petitioner any salary and other benefits to which he is entitled in accordance with this decision. Such payments will be made in light of applicable contract provisions affecting assistant superintendents for the period July 1, 1976 until the present and shall require the payment to Dr. Page of all salary and fringe benefits which have been withheld.

PETITIONER'S OTHER CLAIMS

As noted in the Prehearing Order, the Petitioner has sought to establish his entitlement to the position of Assistant Superintendent for Personnel and has alleged that the Board failed to provide him with this title and the tenure associated with it as the result of racial discrimination and/or discrimination against Dr. Page personally because of his prior opposition to Board action. As has been noted above, in the context of the existing statutory and regulatory framework, the determination of the doctor's entitlement to title and tenure as assistant superintendent need not rest on any finding of discrimination.

In addition to seeking title and tenure as assistant superintendent, the Petitioner initially sought an order requiring the Board to cease and desist engaging in racial discrimination against him. Given the past history of his troubles with the Board

and the further incidents of apparent discriminatory conduct which led to the Office of Civil Rights agreement previously mentioned, it is not entirely surprising that Dr. Page has believed that the Board has dealt with him in a less than equitable manner and that this less than fair treatment has been the result of racial discrimination. Of course, a determination that a public body is acting in a discriminatory manner based upon racial considerations is not generally an easy determination to make. While there are, in this case, certain indications that Dr. Page is not liked at all by certain members of the Board and that their particular actions toward the doctor may have had racial and/or individual bias motivations, as a whole, it is difficult to find by a preponderance of the evidence that Dr. Page's predicaments have arisen as the result of unlawful bias against him. First of all, with respect to the failure of the Board to provide him with the title of assistant superintendent, it must be recognized that his position of Executive Director for Personnel was created as a result of the 1976 reorganization, a plan put forth by the black Superintendent of Schools, Dr. Emmons. At no time during this proceeding has that reorganization plan been directly attacked as having been motivated by racial considerations and while the impact of the plan and the subsequent failure of the Board to seek approval for the unrecognized titles may have resulted in preventing Dr. Page from reaching his proper status, I cannot find anything in the evidence which would justify a conclusion that the Board acted in these matters for discriminatory reasons.

In connection with the determination of whether discrimination has occurred, I have concluded that while the events occurring prior to Dr. Page's appointment as Executive Director for Personnel in July 1976 provide a relevant picture of the background of activity, they are not determinative of whether he has suffered discrimination since assuming his newest position. Therefore, with respect to the question of whether he has been the victim of racial discrimination in the course of his employment I have limited consideration to the post-1976 period.

Dr. Page has pointed to several specific instances where he believes discrimination has occurred against him. As a first example of alleged past discriminatory action, he has pointed to the practice of the Board of paying him $25 a day when he served in the place of the absent Dr. Hiltenbrand and the paying of $25 an hour to Mr. Halbert when he took over that temporary job. Since Halbert came out of an unsalaried retirement and other regular administrative employees received the same $25 a day when they filled in for absent personnel, I do not find any prima facia showing of discrimination in the setting of these pay rates for additional work.

Secondly, the Petitioner argues that the Board has withheld personnel from his office, particularly an executive secretary. Although the position of executive secretary to the executive director of personnel was authorized for budget purposes by the Board in September 1979, Page has not been permitted to advertise for applicants for the position, allegedly due to threats of suit arising because of the aforementioned arbitration decision. A review of that decision, rendered May 16, 1977, indicates that the arbitrator held that the filling of the position of secretary to the executive director of personnel by a member of the Trenton Educational Secretaries Association, without a formal posting of the vacancy, violated the contract for that unit. In and of itself, this decision does not appear to preclude the creation of an executive secretary's position to be filled by a member of the Executive Secretaries Association unit. The November 5, 1979 memorandum agreement between the Board of Education and the Executive Secretaries Association lists recognized titles for that unit. Presumably, the Board, upon a finding of need, could create a new position and fill it, subject to such determinations of the appropriate unit membership for the employee as might be required. Since the Board has apparently recognized the need for the position, I see no significant reason why the Executive Director was not permitted to advertise and fill the position.[1]

It has been pointed out by the doctor that at the same time that the position of executive secretary was authorized for his office a position in Dr. Maffei's office was both authorized and subsequently filled. This seemingly different treatment with respect to these created positions is viewed as a showing of discrimination. I cannot, on the basis of this limited type of evidence, which was not presented with any full picture of the reasons for the creation of the position in Dr. Maffei's office, the urgency of filling the same, or the total circumstances surrounding that position, find that discrimination has occurred against Dr. Page. While it may be that the Board has dragged its feet in filling this position and giving to Page the manpower his office needs, I cannot find on the basis of the evidence before me, that this was done out of racial bias or personal animosity toward the holder of the office. It should, of course, be noted that since Dr. Page now would be recognized as having the status of an assistant superintendent, his entitlement to

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[1] In his post trial brief, counsel for the Board refers to an arbitration decision, confirmed by Judge Drier. This decision is not in the record before me and has therefore not been considered in this opinion.

an executive secretary and the filling of that position will presumably be considered by the Board of Education with his clarified status in mind.

Dr. Page has also complained that the Board of Education failed to pay his legal expenses arising from the previous administrative action between the Board and himself. He claims that the Board should have done this as a result of language in the memorandum of agreement and the administrator's contract. Counsel has indicated that the purpose of attempting to demonstrate this alleged discrimination is not in order to obtain an order against the Board directing them to pay the costs of the previous litigation but solely to show that Dr. Page was treated in a discriminatory fashion. Further, as the testimony indicated, payment of legal expenses has been previously afforded to Black administrators and, therefore, counsel indicated that the basis of the claim of discrimination here was not one of racial discrimination but rather one of individual bias.

Dr. Page testified that the Board has a policy of paying administrator's expenses where the administrator "won" the case. He points to one specific example involving a Dr. Copeland, a Black administrator sued by a subordinate when Dr. Copeland failed to select the individual for a summer position. Although the Board initially refused to allow its counsel to defend Copeland, the Board eventually paid the doctor's legal fees. Page averred that he knew of other administrators whose legal expenses had been paid but could neither name them or give any factual information as to the circumstances involved.

On the basis of the very limited testimony presented, I can find no clear cut basis for a finding that the Board discriminated against Dr. Page when it refused to pay, on a discretionary basis, the fees incurred by Page in his suit against the Board. The specific contract language referred to in the doctor's letter of April 25, 1977 (P-63 in evidence) to Mr. Ruvoldt, which presumably defines the Board's obligations, was, apparently inadvertently, not submitted in evidence. However, counsel for the Petitioner has referred to the Board as having some discretion in the matter (the Commissioner of Education had refused to order the payment of fees in the prior litigation). While perhaps a discretionary decision to pay the fees may have been in order in view of the Board's bad faith action in that matter, the mere failure to pay, coupled with the payment to Dr. Copeland in a matter of a dissimilar nature, and without any other comparative

examples, does not permit a conclusion that the Board's action was the result of unlawful bias.

Finally, Dr. Page believes that the Board's failure to have his position evaluated arose out of unlawful discrimination. He points to the evaluation afforded for Mr. Cortina's position as Employee Relations Officer, an evaluation which occurred subsequent to a letter of September 14, 1979 (B-25 in evidence) from Peter Contardo, President of the Boarc of Education, to Mr. Richard Harclerode, of New Jersey Bell Telephone. Dr. Page testified that he had sought evaluation of his position for some years and offered in evidence P-26, a letter of June 16, 1977, in which Page told Dr. Emmons that he accepted the position of Assistant Superintendent, pointing to Title 18A and decisions of the Commissioner of Education whioch he felt supported his claim to the assistant superintendency. It should be first noted that the request by Mr. Contardo in the September 1979 letter was for an evaluation with respect to equitable salary schedules for Mr. Cortina's position and was in essence a follow-up for that position to the prior William's Report which had evaluated the salary schedules for other administrators. Dr. Page was seeking, in essence, an entirely different sort of evaluation, i.e., an evaluation with respect to the nature of the position which he held, the title which would properly apply, the tenure rights associated therewith, and also the salary that would be associated with the position. The evaluations sought were, in my view, not the same. At any rate, it is clear that Dr. Page has for some length of time sought to have the Board grant him what he felt he was entitled to, the assistant superintendency. What the Board presumably should have done, and what Dr. Page never specifically requested be done, was to have submitted the entire situation to the County Superintendent both for an evaluation of the needed credentials for the particular job and further for approval of the unrecognized title, or in the alternative a direction from the County Superintendent that the person holding the particular position would have to be given an authorized title and tenure as earned. Since the position of executive director arose from the reorganization plan and since others besides Dr. Page were placed in this unrecognized title and were also subject to the same disability that Dr. Page suffered because he held an unrecognized title, and in light of the failure of the Board to submit any of these titles for approval or to change anyone's position to that of assistant superintendent, I am unable to find that the Board's failure to "evaluate" the position constituted an act of bias.

In summary, while I find some of the Board's actions somewhat disturbing with respect to the overall treatment of Dr. Page and while it may be that individual Board

members have been motivated by either anti-Black or anti-Page motivations, I cannot find on the basis of the limited evidence before me a sufficient picture of disparate treatment between Dr. Page and others similarly situated to form the basis of a finding that Dr. Page has been the victim of racial or individual discrimination since he assumed his position as executive director of personnel in 1976. Establishing a claim of discrimination is difficult in even the best of circumstances. In this type of case, where the motivations of a public body made up of a varying membership are held to scrutiny, the burden on the party seeking to establish discrimination is particularly heavy. While it may be that Dr. Page's belief as to the bias of the Board against him is in fact true, I am just not satisfied that the evidence before me is sufficient to meet the standard of proof necessary to support such a finding.

CONCLUSION

In summary, **I CONCLUDE** that Dr. Page has, since July 1, 1976, served in a capacity equivalent to that of assistant superintendent of schools for personnel and that he is entitled to tenure in that position, having achieved the tenured status on June 30, 1978. Further, **I CONCLUDE** that the Board of Education must pay to Dr. Page all monies, by ways of salary or otherwise, to which he would have been entitled as an assistant superintendent since July 1, 1976 and which have not previously been paid to him. This includes salary, stipends, military pay, etc.

The request for counsel fees in this action cannot be granted. The Commissioner has consistently held that he has no power to grant such relief. Winter v. Board of Education of North Bergen, 1975 S.L.D. 236, 240-243, Page, Supra at 1975 S.L.D. 649, 651.

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

OAL DKT. NO. EDU 1895-79

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

September 7, 1980
DATE

JEFF S. MASIN, A.L.J.

ARTHUR L. PAGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed in a timely fashion by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner, a black male, in his exceptions inexplicably alleges that the evidence clearly demonstrated a systematic pattern of discrimination against white male administrators. This issue was not raised nor argued and the Commissioner finds no merit therein. Petitioner's argument, that because neither the Superintendent of Schools nor any member of the Board was called to testify infers discrimination against him, must fall. It is clear that petitioner bears the burden of proof in his claim of discriminatory treatment. He could have, by appropriate measures, called these people as witnesses and elicited testimony from them. That petitioner chose not to do so does not now permit him to draw any inference regarding such a "non-witness".

Petitioner requests counsel fees for litigation prior to the present matter. There is simply no authority for the Commissioner to make such awards. Fred Bartlett, Jr. v. Township of Wall, 1971 S.L.D. 163, 165-166.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Petitioner, having served since July 1, 1976 in a position tantamount to that of Assistant Superintendent of Schools, acquired a tenure status on June 30, 1978. The Board is forthwith directed to pay him accordingly, mitigated by the salary actually received by him during this period.

COMMISSIONER OF EDUCATION

October 20, 1980
Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4732-79

AGENCY DKT. NO. 386-10/79A

IN THE MATTER OF:

RICHARD BOEHLER,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,
Respondent

Record Closed: July 29, 1980 Decided:

Agency Received: Mailed to Parties:

APPEARANCES:

Nancy Iris Oxfeld, Esq., for the Petitioner

Frank J. Rubin, Esq., for the Respondent

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

Richard Boehler alleges that the Board of Education of the Township of East Brunswick (hereinafter referred to as "Board") improperly changed his job title and responsibilities. Petitioner formerly held the position of English Department Chairman and now holds the position of English Department Chairperson for Administration. Mr. Boehler requests that he be reinstated to his former position or be given the job of English Department Chairperson - Curriculum and Instruction, a position now held by Robert Lawson.

The matter was referred to the Office of Administative Law for a determination as a contested case pursuant to N.J.S.A. 52:14F-1, et seq.

In preparing my Initial Decision, I noted discrepancies in the use of the job titles in issue. In the Petition and the August 8, 1979 minutes of the Board (P-2), Mr. Lawson's title was stated as English Department Chairperson-Administration and Supervision. In the stipulation of fact read into the record at the hearing and the briefs submitted by the parties, Mr. Lawson's title was stated as English Department Chairperson-Curriculum and Instruction and Mr. Boehler's title was stated as English Department Chairperson for Administration. By letter dated July 8, 1980, I brought these discrepancies to the attention of the parties and reopened the record to clarify the matter. Thereafter, I received letters from both parties stating that the correct titles were those set forth in the stipulations of facts and that the August 8, 1979 minutes of the Board (P-2) contained a clerical error as to Mr. Lawson's title.

At the hearing, the parties stipulated to the following facts:

(1) Petitioner, Richard Boehler, was initially employed by the Respondent, East Brunswick Board of Education, in September 1959 as an English teacher.

(2) Petitioner has required tenure with Respondent as an English teacher.

(3) Petitioner was appointed the Chairman of the English Department at East Brunswick High School in September 1966 and served in that position until September 1979. A supervisor certificate was required to serve as Chairman of the English Department.

(4) Petitioner's job duties as Chairman of the English Department were set forth in the Department Chairperson job description of December 18, 1975.

(5) On March 23, 1979, John R. Mansfield, Principal of East Brunswick High School, requested the creation of two positions: Department Chairperson-Administration-English and Department Chairperson-Curriculum and Instruction-English.

(6) On August 8, 1979, Respondent voted to appoint Robert Lawson to the position of English Department Chairperson-Curriculum and Instruction. No prior vote was taken to create the position of English Department Chairperson for Administration. The Board arrived at a consensus to create the position and directed the administation to create the position. This action is not reflected in the Board minutes.

(7) The job duties of the English Department Chairperson-Curriculum and Instruction are set forth in the job description dated REV.6/79. A supervisor certificate is required to hold that position.

(8) Prior to the appointment as English Department Chairperson-Curriculum and Instruction, Robert Lawson was employed as a tenured English teacher at East Brunswick High School. He held no prior supervisory positions nor does he hold a supervisor's certificate.

(9) Respondent voted in April 1979 to appoint Petitioner to the position of English Department Chairperson for the school year 1979-1980.

(10) Subsequently, John Mansfield informed Petitioner that he would serve as English Department Chairperson for Administration during the 1979-1980 school year. The job duties of the English Department Chairperson for Administration are set forth in the job description dated REV.6/79.

(11) The class schedules of Richard Boehler and Robert Lawson are set forth in the attachments (P-5 and P-6).

John Robert Mansfield, Principal of East Brunswick High School, testified that he recommended that the position of Chairperson of the English Departments be split into two jobs in order to increase the efficiency of the departmment. He discussed this division of responsibility with the Petitioner (Tr. p. 11). Mr. Mansfield stated that a Chairperson also teaches and that the classroom teaching load will vary depending on the number of students and available instructors.

On cross-examination, Mr. Mansfield stated that Mr. Boehler wanted the position which involved the evaluation of teachers and suggested that the Chairperson for Administration be given this responsibility (Tr. p. 14).

Brenda A. Witt, Assistant Superintendent for Personnel, testified that she informed the Board that Mr. Mansfield recommended splitting the responsibilities for the supervision of the English Department. She stated that Mr. Boehler's salary was not diminished or effected by his transfer to the new position (Tr. p. 16).

The facts as set forth above, are not in dispute.

It is clear that the Board has the managerial prerogative to abolish and create positions. Dunellen v. Bd. of Ed. v. Dunellen Ed. Assn., 64 N.J. 17 (1973), Ross v. Bd. of Ed. of the Borough of Elmwood Park, 1978 S.L.D. _____ (decided on October 16, 1978). In this matter, there was no formal action of the Board to abolish the position of English Department Chairman nor to create the positions of English Department Chairperson-Curriculum and Instruction and English Department Chairperson for Administration. The fact that the Board intended to do this is clear and its actions were not so procedurally defective as to render them null and void. De Bold v. Bd. of Ed. of East Windsor Reg. School District, 1977 S.L.D. 1118, Wexler v. Bd. of Ed. of the Borough of Hawthorne, 1976 S.L.D. 309 affirmed by State Board of Education, 1976 S.L.D. 314.

Also it is clear that the Board had the discretionary power to transfer the Petitioner to another position within the scope of his certification provided there was no reduction of his salary nor a violation of his tenure rights. Dunellen Bd. of Ed. v. Dunellen Ed. Assn, supra., Williams v. Bd. of Ed. of the City of Plainfield, 1979 S.L.D. _____ (decided on June 1, 1979) partially reversed by the State Board of Education, 1980 S.L.D. _____ (decided on January 9, 1980), Trenton Ed. Assn. v. Emmons, 1979 S.L.D. _____ (decided on May 17, 1979), Dinumzio v. Bd. of Ed. of the Twp. of Pemberton, 1977 S.L.D. 24. The Petitioner's argument that the position of English Department Chairperson for Administration is not within the scope of his certificate is not persuasive and I agree with the Respondent's representation that both of the new positions fall within the Petitioner's certification. Mr. Boehler's salary was not changed and no evidence was presented to show that his tenure rights were violated or that the transfer was an arbitrary or unreasonable act.

The only issue that remains is whether the Board transferred the Petitioner to the position of English Chairperson for Administration. No evidence was introduced to show that the Board, formally or informally, took such action. However, since the Board had eliminated the Petitioner's former position and had formally appointed Mr. Lawson to one of the new positions, the only logical conclusion is that the Board intended to transfer Mr. Boehler to the position of English Department Chairperson for Administration. See, De Bold v. Bd. of Ed. of East Windsor Reg. School District, supra., Wexler v. Bd. of Ed. of the Borough of Hawthorne, supra. If this action of the Board is held null and void because of the procedural defective, Mr. Boehler would have no specified job. Clearly, this was not the intention of the Board.

I CONCLUDE that Mr. Boehler was transferred by the Board to the position of English Department Chairman for Administration, and this transfer was within the scope of his certification and his tenure rights were not violated. Therefore, the Petition is **DISMISSED**. Also, **I CONCLUDE** that the Board shall take formal action, in conformity with the Final Decision in this matter, at its next meeting.

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

OAL DKT. NO. EDU 4732-79

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

September 8, 1980
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, A.L.J.

RICHARD BOEHLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

In his exceptions petitioner alleges that Administrative Law Judge Beatrice S. Tylutki erred in finding that petitioner's transfer to the position of English Department Chairperson for Administration is within the scope of his certification. The Commissioner cannot agree. It is stipulated that petitioner holds a supervisor's certificate. N.J.A.C. 6:11-10.4. This certificate enables him to direct and guide the work of instructional personnel and also authorizes an appointment as assistant superintendent in charge of curriculum and instruction (which is an administrative function). Petitioner contends that his present assignment is essentially administrative. (Petitioner's Exceptions, at p. 11) The Commissioner finds petitioner has properly been assigned duties within the scope of his certificate which expressly authorizes such responsibilities.

Petitioner excepts further to the Court's failure to attach greater import to the failure of the Board to:

1. Abolish the previous position of English Department - Chairperson to which petitioner had been assigned.

2. Create the position of English Department Chairperson - Curriculum and Instruction.

3. Create the position of English Department Chairperson for Administration.

4. Take action to transfer petitioner by a recorded roll call majority vote of the Board.

Petitioner contends that the failure of the Board to vote on all these matters renders his transfer illegal and he should be restored. The Commissioner agrees.

There is no question of the managerial prerogative of the Board to establish programs and restructure its administrative and supervisory organization, Dunellen, supra Reference is made herein to the intent of the Board. Nothing in the record purports to establish malice or frivolity on the part of the Board. However in the opinion of the Commissioner mere intent is not sufficient herein. The Legislature has prescribed statutes establishing procedure which shall not be ignored. Significantly the Court has determined teacher transfers to be an inherent managerial responsibility. Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144, 393 A.2d 278 (1978) This does not, however, preclude the Board from compliance with N.J.S.A. 18A:25-1 which states in its entirety:

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

Nothing in the record shows that to this date the Board has acted to abolish the old position of English Department Chairperson, establish two new ones and transfer petitioner to one of them as prescribed by law. Accordingly, its action in naming petitioner English Department Chairperson for Administration is deemed to be illegal. Petitioner is to be restored to the still existent position of English Department Chairperson. The decision of the Court is accordingly set aside and petitioner is granted the relief which he seeks.

It is so directed.

COMMISSIONER OF EDUCATION

October 24, 1980

Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE TENURE	)	INITIAL DECISION
HEARING OF **JOHN GISH**, SCHOOL	)	**OAL DKT. NO. EDU 64-2/78**
DISTRICT OF PARAMUS, BERGEN	)	**AGENCY DKT. NO. EDU 64-2/78**
COUNTY	)	

APPEARANCES:

For the Petitioning Paramus Board of Education: Winne, Banta, Rizzi & Harrington (**Joseph A. Rizzi**, Esq., of Counsel)

For Respondent John Gish: Rothbard, Harris & Oxfeld (**Emil Oxfeld**, Esq., of Counsel)

BEFORE THE HONORABLE **ERIC G. ERRICKSON**, A.L.J.:

DOCUMENTS IN EVIDENCE:

Petitioner's Evidence:

P-1	Tenure Charge Nos. 1-13, 15-18
P-2	Shelly to Gish, June 14, 1972
P-3	Shelly Notes on Conference of June 14, 1972
P-4	Bergen Record (Record) Article, June 15, 1972
P-5	Reprint of P-4 above
P-6	Groves to Montemorro, June 16, 1972
P-7	Newark Evening News (News) Article, June 28, 1972
P-8	Record Article, June 29, 1972
P-9	New York Times (Times) Article, July 3, 1972
P-10	Record Article, July 7, 1972
P-11	Board Minutes, July 10, 1972
P-12	Board Resolution, July 10, 1972
P-13	Record Article, July 11, 1972
P-14	Record Article, July 13, 1972
P-15	Shelly to WINS, July 17, 1972
P-16	WINS to Rohrer, July 18, 1972
P-17	Change of Address of Gish
P-18	Paramus Post (Post) Article, July 19, 1972
P-19	Shelly to Gish, July 19, 1972
P-20	Record Article, July 20, 1972

P-21 News Article, July 23, 1972
P-22 Post Article, July 26, 1972
P-23 Record Article, August 10, 1972
P-24 Times Article, August 10, 1972
P-25 Shelly to Gish, August 25, 1972
P-26 Shelly to File, September 8, 1972
P-27 Shelly to Gish, September 6, 1972
P-28 Record Article, September 7, 1972
P-29 Record Article, September 10, 1972
P-30 Record Article, November 1, 1972
P-31 Arbitration Award, September 13, 1973
P-32 Gish to Steppers, April 12, 1973
P-33 Record Article, May 3, 1973
P-34 Record Article, May 7, 1973
P-35 Gish to Record Editor, May 10, 1973
P-36 Shelly to File, May 16, 1973
P-37 Record Article, June 3, 1973
P-38 Times Article, June 3, 1973
P-39 Shelly to Gish, June 7, 1973
P-40 Board Resolution, June 28, 1973
P-41 Galinsky to Gish, August 9, 1973
P-42 Lowell to Shelly, August 16, 1973
P-43 Record Article, August 23, 1973
P-44 Shelly to Gish, August 28, 1973
P-45 Record Article, August 30, 1973
P-46 Shelly to Van Pelt, September 13, 1973
P-47 Board Minutes, September 17, 1973
P-48 Van Pelt to Gish, September 18, 1973
P-49 Van Pelt to Kilpatrick, September 19, 1973
P-50 Board Resolution, September 17, 1973
P-51 Record Article, September 18, 1973
P-52 Star Ledger Article, September 20, 1973
P-53 Times Article, October 21, 1973
P-54 Record Article, April 9, 1974
P-55 Record Article, April 16, 1974
P-56 Record Article, October 11, 1979
P-57 Star Ledger Article, December 4, 1974
P-58 Times Article, December 4, 1974
P-59 Herald News Article, December 4, 1974
P-60 New York Post Article, December 4, 1974
P-61 Record Article, December 8, 1974
P-62 Record Article, December 30, 1974
P-63 Record Article, April 10, 1975
P-64 Record Article, May 22, 1975
P-65 Record Article, Undated
P-66 Record Article, June 26, 1975
P-67 Star Ledger Article, June 15, 1975
P-68 Drug Charge Indictment, December 2, 1975
P-69 Supervisory Treatment Court Order - Gish, February 13, 1976
P-70 Record Article, March 9, 1976
P-71 Record Article, November 5, 1976
P-72 Post Article, March 13, 1977
P-73 Record Article, March 8, 1977
P-74 Record Article, October 4, 1977

P-75	Record Article, October 4, 1977
P-76	Times Article, October 4, 1977
P-77	Johnston to Board, August 19, 1974
P-78	Gish to Galinsky, April 14, 1972
P-79A-D	Evaluation of Gish, 1965-66
P-80A, B	Evaluation of Gish, 1966-67
P-81	Evaluation of Gish, February 20, 1968
P-82	Evaluation of Gish, May 22, 1970
P-83	Observation of Gish, February 1, 1972
P-84	Hypothetical - Not in Evidence
P-85	Hypothetical - Not in Evidence
P-86	Times Article, April 23, 1979
P-87	Hypothetical - Not in Evidence
P-88, 88A	House Diagram, Gish-Hanna Residence
P-89-93	Police Pictures of Suspected Drug Specimens
P-94	House Diagram, Gish-Hanna Residence
P-95	Laboratory Report, August 11, 1975
P-96	Packet (Including R-9)
P-97	Galinsky to File, November 7, 1972
P-98	Forum Press Article, March 1979
P-99	Forum Press Article, June 1979
P-100	Forum Press Article, November 2, 1979
P-101,101A	Hypothetical - Not in Evidence
P-102-105	Police Photographs Taken on Drug Raid
P-106	Request for Analysis of CDS Specimens
P-107	Search Warrant for Gish Residence, April 9, 1975
P-108	Dr. Hammer's Psychiatric Report on Gish
P-111	Record Article, May 22, 1977
P-112	Record Article, October 16, 1978

Respondent's Evidence:

R-1	Times Article, June 19, 1979
R-2	Negotiated Agreement, pp. 42-47
R-3	Introduction to Stern Monograph
R-4	Paramus High School Educational Goals
R-5	Paramus High School Philosophy
R-6	Paramus High School English Department Philosophy
R-7	Stern to Galinsky, September 7, 1972
R-8	Gish to Galinsky, September 27, 1972
R-9	Wonacott to Gish, November 10, 1972
R-10	Shelly to Gish, February 2, 1979
R-11	Rizzi to Oxfeld, June 13, 1979
R-12	Rizzi to Breslin, February 4, 1976
R-13	Tape Transcript - A Special Gift
R-14	Family Living Course Outline
R-15	Dr. Kern's Psychiatric Report on Gish, December 28, 1977
R-16	Dr. Mann's Psychological Report on Gish, December 1977

DEPOSITION TRANSCRIPTS ENTERED BY AGREEMENT:

D. Tr. I	(Entire)
D. Tr. II	(p. 2 to p. 160 l. 22; p. 170 l. 14 to p. 171 l. 1; p. 171 l. 15 to p. 177 l. 7; p. 181 l. 24 to p. 183 l. 2)
D. Tr. III	(p. 20 l. 4 to p. 21 l. 14; p. 23 l. 2 to p. 85 l. 4)
D. Tr. IV	(p. 54 l. 19 through p. 76 l. 2)

TRANSCRIPTS OF THE HEARING:

Tr. I	October 9, 1979
Tr. II	October 11, 1979
Tr. III	October 22, 1979
Tr. IV	October 23, 1979
Tr. V	October 26, 1979
Tr. VI	October 29, 1979
Tr. VII	November 13, 1979
Tr. VIII	December 17, 1979
Tr. IX	December 18, 1979
Tr. X	January 16, 1980
Tr. XI	February 5, 1980
Tr. XII	February 7, 1980
Tr. XIII	March 10, 1980
Tr. XIV	March 11, 1980
Tr. XVI	April 14, 1980
Tr. XVII	April 23, 1980 (Oral Argument on Motion)

Note: There is no Transcript XV

The Paramus Board of Education (Board) pursuant to the provisions of N.J.S.A. 18A:6-10, et seq., in January 1978 certified eighteen tenure charges of insubordination and unbecoming conduct against Respondent John Gish, whom it had employed as a secondary school teacher of English from September 1965 through June 1972 and to whom it assigned thereafter duties other than teaching during the lengthy period of litigation. Seventeen of those charges remain viable, the Board at a conference of counsel held on October 17, 1977 having withdrawn Charge No. 14. Essentially the Board charges that respondent was insubordinate, exhibited conduct unbecoming a teaching staff member, and is unfit to resume the duties of a classroom teacher.

The Board, seeking an order dismissing respondent from his tenured position, alleges that his conduct has been such that his return to the classroom would disrupt the

normal operation of both his classes and the Paramus High School. Respondent denies that such result would ensue or that his conduct has been such that he should be subjected to either dismissal or reduction in salary.

PROCEDURAL HISTORY OF CASE:

This case has in various forms been in litigation since 1972 when respondent became president of the Gay Activist Alliance of New Jersey. The following are salient events which transpired since June 1972.

On June 14, 1972 the Board's Superintendent of Schools, having learned that respondent was to assume the presidency of the Gay Activist Alliance of New Jersey on the next day, advised respondent orally that any adverse publicity generated by him in that post which could adversely affect his teaching or the operation of the school could also result in disciplinary action. Thereafter, on July 10, 1972 the Board, after considering its consulting psychiatrist's opinion (based on hypotheticals rather than examination) voted to require respondent to submit to a psychiatric examination pursuant to the provisions of N.J.S.A. 18A:16-2, 3. (P-10-11) Respondent opted not to do so and challenged the constitutionality of the cited statutes.

On August 25, 1972 the Superintendent notified respondent that he was transferred to the Board administrative offices effective at the opening of the 1972-73 academic year. (P-25) When the academic year began on September 6, 1972, the Superintendent advised respondent that he would thereafter report to the assistant superintendent and perform duties of a professional nature involving, but not limited to, the development of course outlines and objectives (R-7). He also instructed respondent that he should neither enter the high school nor have contact with pupils. (P-26) Respondent grieved, as a violation of the negotiated agreement, this restriction which prevented him from entering high school and its faculty cafeteria. One year later an arbitration award was issued on September 13, 1973 directing that this territorial restriction be lifted. (P-31) It was lifted.

On May 31, 1973 Judge Lane's decision was issued on the aforementioned constitutional challenge to N.J.S.A. 18A:16-2, 3 in James V. Kochman and John N. Gish, Jr. et al. v. Keansburg Board of Education and Paramus Board of Education, et al.,

124 N.J. Super. 203 (Chan. Div. 1973). Therein, the provisions of N.J.S.A. 18A:16-2,3 allowing school boards to compel employees to undergo psychiatric examinations were upheld as necessary for protection of the interests of society and, therefore, constitutional. (P-19)

In John Gish v. Board of Education of the Borough of Paramus, 1974 S.L.D. 1150, aff'd State Board of Education 1975 S.L.D. 1085, aff'd 145 N.J. Super. 96 (App. Div. 1976) (1976 S.L.D. 1140), cert. den. 74 N.J. 251 (1977), cert. den. 434 U.S. 879 (1977), the Commissioner on December 2, 1974 ordered respondent to submit to a psychiatric examination. In a separate decision issued on the same date the Commissioner at 1974 S.L.D. 1168 also ordered the first set of tenure charges, which had been certified on September 17, 1973 by the Board against respondent, set aside without prejudice pending completion of a psychiatric examination and review of its results. (P-46-50)

On April 9, 1975 a search warrant was issued and a search conducted for controlled dangerous substances at respondent's residence in Hackensack (P-107). The results of that search, as reported below, became the subject of additional tenure charges certified by the Board. In an unreported Decision on Motion dated March 3, 1977 the Commissioner denied respondent's Motion to Dismiss those charges.

On January 30, 1978 the Board, pursuant to an agreement reached at a prehearing conference conducted on October 17, 1977 by the undersigned, then a hearing examiner for the Commissioner, withdrew all previous charges and certified eighteen charges, seventeen of which remain viable in this proceeding.

Thereafter, the State Board of Education on February 7, 1979 directed respondent, who had submitted a psychiatric report from a psychiatrist of his own choosing, to submit prior to hearing to a second psychiatric examination by a psychiatrist of the Board's choosing. The Appellate Division of the Superior Court, Dkt. No. A-2027-78, on March 20, 1979 denied respondent's application for leave to appeal.

Most of the deposition testimony of respondent was entered into the record in lieu of further extensive testimony, (D. Tr. I, II, III) as was the deposition testimony of John M. Hanna with whom respondent resided at 32 Bridge Street, Hackensack.

The matter was transferred on July 2, 1979 to the Office of Administrative Law for processing as a contested case pursuant to provisions of N.J.S.A. 52:14F-1, et seq. A hearing of sixteen days duration was conducted thereafter at Newark between October 9, 1979 and April 23, 1980. Briefs of counsel were filed completing the record on July 25, 1980.

THE CHARGES (as paraphrased and abbreviated):

Charges 1-4, 7-9, 11-12 assert that respondent, contrary to his Superintendent's directive, was insubordinate and exhibited unbecoming conduct by seeking and generating publicity allegedly adverse to the operation of the school after he assumed the presidency of the Gay Activist Alliance of New Jersey (GAANJ) on June 15, 1972.

Charges 5-6 assert that respondent after his transfer to the Board office was insubordinate in that, contrary to directives by his superiors, he continued to have contact with high school pupils and used the school's telephones to promote the cause of GAANJ.

Charge 10 asserts that respondent exhibited unbecoming conduct by requesting a personal leave day to attend a college conference on sexual alternatives with the alleged intent of transmitting information from that conference to pupils.

Charge 13 asserts that respondent exhibited unbecoming conduct by being arrested and placed under supervisory treatment and probation for allegedly possessing in his home controlled dangerous substances in the form of L.S.D. and marijuana in excess of twenty-five grams in violation of N.J.S.A. 24:21-20(a)1.

Charges 15-18 assert that respondent's actions referred to in Charges 1-13 constitute deviation from normal mental health which so adversely impairs his ability to teach, discipline and associate that he is rendered unfit to perform the duties of a teaching staff member.

TESTIMONY OF WITNESSES:

The Superintendent testified that, after a staff member had informed him that respondent had announced to a unit of the Education Association of Paramus his intent to accept the presidency of GAANJ, he summoned respondent to his office on June 14, 1972, asked him why he had not consulted with his superiors on such a sensitive matter and warned him that publicity adverse to the school could lead to disciplinary action. (P-2, 3) He testified that respondent, who told him he preferred to be called "gay" rather than a homosexual, stated that he felt compelled to take a public stand and was prepared to take the consequences. The Superintendent testified that he took no further action at that time since the school year was ending and he wanted to see if respondent would abide by his directives. He testified that when respondent was transferred from the classroom to the Board office effective September 1972, he accepted the assignment without protest and performed the duties to which he was assigned satisfactorily.

The Superintendent testified that he thereafter overheard respondent in a nearby office discussing by telephone a GAANJ demonstration. He testified further that, at a dinner faculty meeting on April 12, 1973 for STEP (System Training for Educational Participation) members, respondent had without authorization placed at the table copies of a one page position paper in which he advocated inquiry into the nature of the sexual revolution, trust between participants of different life styles, and acceptance of current sexual attitudes. (P-32) The Superintendent testified that, when respondent formally moved that the one hundred teaching staff members endorse that position paper, he was met with silence from the assemblage. This testimony was corroborated by that of the assistant superintendent who stated that the position paper was extraneous to the STEP process.

The Superintendent testified that he believes a teacher must be a role model in a position of influence to mold attitudes, values and opinions of pupils by precept and example. He testified that, although he does not believe the mere presence of a gay teacher who has not announced his life style to be a cause for disruption, that:

> "***a gay teacher who publicly makes his life style known and then comes into the classroom, can create confusion, anxiety and so forth among children in that classroom. And could affect that teachers ability to function effectively in that classroom. And I don't think the Board of Education being aware of that has to wait for that to happen before it acts.***" (Tr. III-75)

> "***I think it could be viewed by the community and by students that this is an approval of that kind of life style and those kinds of belief and values represented by the gay life style.***" (Tr. III-82)
>
> "***[T]he public schools hold the children of the people in trust for the State. And as such, they have an overwhelming responsibility for exercising every due care and controlling all influences that might adversely affect the children in the public school setting.***" (Tr. III-85)

When asked whether he believes respondent should be returned to the classroom the Superintendent testified as follows:

> "***I think the fact that he violated other directives of the Board and Superintendent and that he insisted on bringing his personal life style and views about sexuality into the public arena to that degree, I think it would create disruption and make it impossible for him to teach.***" (Tr. III-93)
>
> "***I believe that Mr. Gish would encounter great difficulty, getting the respect that he needs to function effectively in a classroom of younger and older adolescents.***" (Tr. III-107)
>
> "***I think it is extremely clear that whatever students learn about a teacher, whatever they hear and see, whatever experience they have had in relation to that teacher, all has an impact on the ability of that teacher to relate to those students and to teach and discipline those students.***" (Tr. IV-29)
>
> "***I don't believe he could serve adequately as a guide or a measure or role model for students because I think, by his behavior, by his statements, by manifesting publicly for all to see and hear about his own personal point of view about sexuality, I think has destroyed for all time his ability to serve in that function.***" (Tr. IV-31)

The Superintendent also identified and testified at length about the voluminous flow of demonstrations, newspaper articles, pictures, radio and television programs and events in which respondent was a principal figure after his assumption of the presidency of GAANJ. (P-4-5, 7-10, 13-16, 18, 20-24, 28-30, 33-39, 43, 45, 51-62) He also testified of later articles in which respondent was referred to in relation to a drug raid and continuing litigation. (P-63-67, 70-76, 86, 111) Three articles carried by the Paramus High School Forum Press during 1979 which report on progress of this case were also identified by the assistant superintendent and marked in evidence. (P-98-100)

The assistant superintendent testified of his similar concerns as follows:

> "***I was concerned about the fact that we had a teacher who by his actions assuming the presidency of the gay liberation, identified himself as a gay, synonymous to an avowed homosexual indicating to the public, that this is what I am. And I want to continue to teach. And I want to espouse my cause. It was certainly a concern of mine.***" (Tr. VI-125)

The assistant superintendent testified that, when respondent requested approval of a "G personal day" (which required approval) to attend a sexual alternatives conference at Middlebury College, he refused on grounds that the conference would not enhance the Paramus curriculum. He testified that he later learned that respondent, who then took an "H personal day" (which requires no approval), had in fact been a presenter from the GAANJ speakers bureau rather than an observer at that conference. (P-96-97; R-8-9) The assistant superintendent also testified that respondent on numerous occasions generated publicity by accepting speaking engagements at college and university classes and at caucuses and forums after June 1972.

When questioned whether he believes respondent should be returned to the classroom, the assistant superintendent expressed identical views to those of the Superintendent and added that he believes the expressed views of a teacher can affect the psychological orientation of a pupil's sexual attitudes. In regard to the drug charges and the school's attempts to create a drug-free environment, he testified:

> ""***How can he carry out Board policies and talk to the negative aspects of drugs when at the same time he himself would be in possession of the very items that we as part of our entire approach to students using them would be there professing that they shouldn't be using them?
>
> "I don't see how a teacher could come back and be effective and discipline students.***" (Tr. VII-67)
>
> "My professional opinion given all the facts, all the information presented to me, is that John Gish is not fit to return to the classroom." (Tr. VII-73)

In regard to the charges that he was responsible for generating publicity and thus advocating a gay life-style, respondent asserts that it was in pursuit of his constitutional rights rather than a disregard of the Superintendent's advice that he engaged in, organized and personally helped finance demonstrations at the Statue of Liberty, on the George Washington Bridge and a candlelight parade in Hackensack. He

testified that he had ambitious hopes to create an effective national organization advocating gay rights. He testified that after June 1972 he was active as a delegate and a speaker at gay caucuses, at college classes, conferences and seminars at the N.E.A. Atlantic City convention. He testified that it was his goal to secure rights for gay people in areas of housing accommodations, job security and social acceptance.

Respondent testified that he occasionally wrote articles, granted interviews, manned at his residence a hot-line to assist gays with problems, and appeared on radio and television programs as an advocate of gay rights. He testified that, in his view, American society is dominated by male heterosexuals who not only dominate females but consign gays to the status of an abused ethnic minority. In this regard he stated:

> "***[Male Heterosexuals] are the dominant power in society and they want to retain that power and it gets very tied up into capitalism, warfare; they want to maintain their values. They are the dominant class. They subjected women in the past and probably still in the present. They subject anyone who threatens their power***." (D. Tr. III-60)

> "***Because [gays] are accorded a special status by the larger society, they are discriminated against. The fact of discrimination makes them an ethnic group. Whenever you single out a significantly large group and treat them differently than the major group, that is discrimination***." (D. Tr. III-63)

Respondent denied that with his classes, individual pupils or groups of pupils he had ever referred to his own sexuality or that he would do so in the future. He further stated that he had never had pupils query him in that regard. He testified also that no pupil or fellow faculty member had ever exhibited overt disrespect toward him. This testimony stands unrebutted in the record.

In regard to his relationship with GAANJ, respondent testified that his presidency, which lasted only from June 1972 through December 1972, was fraught with rampant factionalism which ultimately resulted in the demise of the organization.

A Paramus High School faculty member who teaches family living testified that she teaches short optional units which treat sexual deviations from the norm without getting into the psysical aspects of sex. She testified that her pupils' attitudes are strongly oriented toward traditional monogamy. She testified that, when she discusses alternate life-styles, she perceives that the pupils reject lesbianism and homosexuality much as does the general population. Another faculty member who teaches psychology

testified that, while her classes consider such topics as homosexuality and lesbianism, no value judgments are made.

A faculty member from another school who identified himself as a founding member of GAANJ testified that in 1972 he had appeared with respondent on a radio broadcast and on a public television program which discussed the place of gays in society. He testified that no problems have arisen in his relationship with pupils or parents or his employers as a result of his having revealed his gay affiliation.

The Paramus Board's school psychologist testifed that he is unaware of any pupil ever reporting a problem from having been in respondent's class. He testified that he believes respondent's return to the classroom would not result in disruptions because of his alleged involvement with controlled dangerous substances or his affiliation with the gay rights causes. In this regard he testified as follows:

> "***I think he should return to the classroom because in my experience, the students have always referred to John as a good teacher. And so have the faculty members.***
>
> "***John would be another teacher whom we would feel comfortable placing the students with because of the sensitivity to students and his good teaching skills from my point of view.
>
> "There is another reason why I would like John to be back in the classroom and that is, for the very fact, that these facts have been made public.
>
> "I feel that the student who has a problem with sexual identity as it has been referred to in this case or especially the area of homosexuality, very often sees himself as different or crazy or something is wrong***. The outline identification of someone who can stand up to this, can be viewed as a competent, well integrated, good teacher I think is something that can be pointed to and can help a student who finds himself in this condition.
>
> "For those students who may be upset by the fact that John is gay, in my experience, they can compartmentilize the gayness from his teaching activities and could be in his classroom without any adverse effect.***" (Tr. XIII 17-18)

Four Hackensack narcotic squad policemen who conducted a drug raid on April 19, 1975 at the home of respondent testified that they seized in the kitchen, living room and bedrooms, specimens which later tests proved to be L.S.D., marijuana in excess of 25 grams, and pipes containing marijuana residue. (P-89 through P-93)

They testified that a plastic bag containing marijuana and another container of tablets which proved to be L.S.D. were found in the top dresser drawer in respondent's first floor bedroom. They testified that they found clothing in the middle drawer of the dresser, and in the bottom drawer devices often associated with aberrant sexual activity together with photographs of males engaged in homosexual acts..

The police officers testified that, when they announced that they were arresting the two residents of the house and their two guests, respondent requested that their two guests be released since everything that was found on the premises belonged to him and his fellow resident. Respondent corroborated that he had made that request. The officer in charge of the raid, however, testified that all four were arrested, one guest found guilty and the other not guilty of possession of controlled and dangerous substances.

The forensic chemist who spent two days analyzing the twelve specimens submitted to the New Jersey State Police Laboratory for analysis testified that she identified samples from the top dresser drawer in respondent's bedroom as being L.S.D. and marijuana. She testified that her analyses of all the twelve specimens taken throughout the house revealed three positive identifications of L.S.D. and six positive identifications of marijuana (P-95, 106)

Respondent testified that the dresser in his bedroom was not his, that he had never used it or looked into it, that he was unaware of controlled dangerous substances in the top drawer or of any of the other contents. He testified that the dresser in his room was used by the other occupant who used an upstairs bedroom. Respondent further testified that he himself used two dressers on an unenclosed porch and a dresser in the living room which was too large for his small bedroom. He testified that he had frequently observed his fellow occupant procure from that dresser in his bedroom clothing, seeds, gardening tools, home repair equipment, correspondence and bills. Respondent testified that this arrangement resulted from the occupants having switched bedroom locations some years earlier. (P-88, -88A, -94)

The other occupant testified that the dresser in question was indeed used by him exclusively, and that the aforementioned photographs and devices in the bottom drawer as well as the controlled dangerous substances found therein had been left there or given to him by others. He also testified that, although the drugs were his, neither he nor

respondent had ever admitted possession or use of controlled dangerous substances nor used them in each others presence.

Respondent admitted that he and the other occupant were arrested, indicted, applied for and were placed on probation and supervisory treatment as first offenders in lieu of standing trial. He also stated that, whereas he was placed on probation for two years, his fellow occupant was placed on probation for only two months. (P-68, P-69, P-100 through P-105) Respondent also testified that he neither knew of, used, nor was responsible for controlled dangerous substances anywhere in his home and that his purpose for submitting to supervisory treatment was to avoid the publicity of a trial and the expense of litigation.

Dr. Stanley Kern, a psychiatrist selected by respondent, testified that his one hour examination of respondent revealed no evidence of psychosis, neurosis, or mental deficiency. He testified that, in his opinion, respondent is capable of conducting his classes. He testified that, while there is a possibility, there is little likelihood that his return to the classroom would have an adverse impact on the school.

Dr. Kern, in his psychiatric report on respondent, in which he relied both on his own examination and the report of a psychologist, Dr. Edward Mann, noted no psychiatric disorders or disorientation, pathological suspicions or anything else that "***would preclude him from performing his regular teaching duties***." (R-15)

The written report of the Board's psychiatrist, Dr. Harvey Hammer, based on his four hour examination of respondent, stands in marked contrast to that of Dr. Kern. Therein he stated:

> "***The point of reference that emerged throughout our interview with repeated and exaggerated illustrations was a scenario of a man who felt rather overwhelmingly threatened by masculine values in society and who, because of his own latent anger and rage, has attempted to deal with these feelings of conflict by a diffuse identification with all groups of persons who Mr. Gish perceives as being non-threatening. His frequent references to the lumping together in a unified form of the identity of homosexuals, transvestites, women, children, blacks, Chicanos, bi-sexuals and especially effiminates further indicated a more deep seated sense of identity diffusion and the need for advocacy as a means of dealing with unexpressed feelings of rage and anger.

> "***The underlying theme of angry paranoid thinking was manifested on frequent occasions. Orientation for time, place or person was within normal limits. There was no evidence of delusions or hallucinations. No evidence of abnormal psychomotor activity was noted. There was no evidence of a cognitive disorder, and intelligence appeared to be above average.
>
> "***When we discussed Mr. Gish's intensity of feelings on those various issues which have brought him into the 'public light', he indicated to me that 'they are strong' and; in fact, the underlying feelings of disapproval and anger appeared to impair reasoning and judgment. Mr. Gish spoke of his mission of 'bringing an issue which has been shrouded in mystery and taboo into the open.' I am hard pressed, considering the intensity of Mr. Gish's advocacy, to perceive how these issues of conflict could be kept out of the classroom.***
>
> "***The combination of Mr. Gish's notoriety and his personality functioning as it now exists can only lead to confusion and increased anxiety potentials for those students of the Paramus School System who might have Mr. Gish as a teacher.***" (P-108)

Dr. Hammer testified that he perceived that respondent's sexual identity conflicts and sense of mission took on an obsessional quality. He testified that, since respondent appears unable to separate that obsession from his teaching duties, he would be an inappropriate role model with the potential for adverse impact on pupils establishing their sexual self-identity in their adolescent years.

FINDINGS OF FACT:

Having thoroughly reviewed the parol and documentary evidence, **I FIND** the following to be relevant facts to be considered, together with those uncontroverted facts which were set forth above in the procedural recitation, when reaching determinations on the seventeen charges the Board has certified against respondent:

1. The record is barren of evidence that respondent ever discussed with his Paramus High School classes or with groups or any individual pupil enrolled in Paramus High School either his own sexual preferences, his viewpoint or advocacy of alternative lifestyles or the rights or problems of gays in society.

2. There is no convincing evidence in the record that respondent's performance as an English teacher from 1965 to June 1972 was less than

satisfactory. (P-79A through P-83) Nor is he charged with unsatisfactory work performance.

3. Respondent, after being cautioned by the Superintendent on June 14, 1972 not to generate undue publicity in his leadership role in GAANJ, was personally responsible for and actively sought a large volume of publicity in the months and years which followed. This publicity was the direct result of his leadership role of public demonstrations, his speaking engagements on rights and problems of gays in American society, his appearances on television and radio programs and his news releases to reporters.

4. The extensive and sustained volume of publicity during the summer of 1972 was such that Paramus High School pupils and their parents could be expected to have become aware of respondent's identity as a proponent of a gay rights and lifestyle.

5. After his reassignment to the Board offices effective September 1972, respondent was cited by his superiors for actual violation of their directives not to use the telephone on GAANJ business and not to associate with pupils of Paramus High School. Although these actions were factual, their number was minimal and respondent quickly acceeded to his superiors' directives to refrain therefrom.

6. Respondent, by presenting the previously mentioned position paper at the STEP dinner on April 12, 1973, actively (but unsuccessfully) solicited support of his fellow educators at Paramus High School for his advocacy of gay rights.

7. On September 29, 1972 respondent requested a personal leave "G" day to attend a conference at Middlebury College, representing that as a participant at that conference on sexual alternatives he would gain insight which would enhance the Board's curriculum. When permission was denied, he took a personal leave "H" day and attended the conference as a presenter from the speakers bureau of GAANJ. While respondent's reference at that time to establishing a Paramus High

School club to disseminate information gained at the conference may have been injudicious, I believe respondent when he states that the remark was made in jest. He was, however, less than candid with the assistant superintendent when seeking his approval to attend.

8. Respondent, on April 9, 1975 was aware of and possessed in his home, controlled dangerous substances in the form of L.S.D. and marijuana in excess of 25 grams, together with openly displayed pipes and other paraphernalia associated with the smoking of marijuana. As such, he was in violation of N.J.S.A. 21:20a(1) and (4) which term such possession as unlawful and the offender guilty of a misdemeanor. After being arrested and indicted, respondent, with no previous conviction, was admitted to a program of supervisory treatment in lieu of standing trial and was placed on probation for two years.

In arriving at the above finding, I have considered, but rejected, the testimony of both respondent and his fellow resident. Both gratuitously accepted responsibility for the full contents of the house on the day of the drug raid. Respondent now seeks to disclaim that responsibility. I find their testimony to be self-serving, contradictory, inconsistent and totally incredible. Pipes for the smoking of marijuana which yielded residue therefrom on analysis were in plain sight on the table in the kitchen where respondent ate. Additionally, I find beyond reasonable belief their testimony that for a three-year period both occupants would have endured the inconvenience of exclusively using dresser drawers in rooms other than their own bedrooms. Nor does the testimony of the police officers corroborate that they saw any such items as gardening or household tools which both occupants testified were routinely kept in the dresser in respondent's first floor bedroom. Further indication of the unreliability of the testimony of respondent's fellow tenant is found in his deposition testimony. Therein, he was hesitant and unsure when asked to recall the location and arrangement of the very dresser which he claimed to have used daily for years to store his clothing and personal effects.

The preponderance of credible evidence within the record leads to the conclusion that respondent was fully aware of and thus responsible not only for L.S.D. and marijuana in the upper drawer of the dresser in his bedroom but also for additional

controlled dangerous substances and paraphernalia associated therewith which were in plain view on the kitchen table, on a shelf of the hutch and other locations in the kitchen, and on the piano.

Light is shed on the question of possession by the following words of Justice Handler in the opinion in State v. Brown, 80 N.J. 587 (1979):

> "***There were other evidential circumstances lending distinctive color to the character of defendant's presence at the scene. It is important to stress that defendant lived in the apartment. It was he who allowed the officers into the apartment, and, by his own admission, he resided there.***
>
> "***There is nothing to suggest an occupancy by others in such numbers or circumstances sufficient to dilute defendant's control over his own residence. In the context of the evidence, as presented, one can readily draw the inference that the occupant of such premises would have knowledge and control of its contents.***
>
> "***The inference of knowledge and control of the concealed heroin is further strengthened by the presence of other heroin-related materials in the apartment.***
>
> "***here there was little to dissociate or insulate defendant from the contraband found in his living quarters. It would defy logic and human experience, indeed foist upon the Courts an unwarranted naivete, to believe that one, likely aware of the presence of heroin paraphenalia in his own apartment, would be oblivious to the immediate whereabouts of the heroin itself and ignorant of its true nature.***
>
> "***In this case, however, there was no evidence to detract from the natural inference that the narcotics were in areas controlled generally by defendant. An inference of knowledge and control of personalty found in a room commonly lived in or used by an occupant is well-grounded in our every day experience and is available to a jury as fact finder in a criminal case." 80 N.J. at 594-596

The holding in State v. Brown with its strikingly parallel factual context further bolsters the inescapable conclusion that respondent was in possession of controlled dangerous substances as charged.

While the contents of the three lower dresser drawers in respondent's bedroom are not at issue, the unbelievable testimony of both respondent and his fellow tenant indicates a lack of credibility of their testimony in respect to charge No. 13.

DISCUSSION AND DETERMINATIONS OF TENURE CHARGES:

CHARGES 1-4, 7-9, 11-12:

The findings set forth above relevant to these charges establish as fact that respondent sought and otherwise generated substantial amounts of publicity. Therein the general public was made aware by the media that he was a self proclaimed gay and that he was actively championing the rights of gay persons in society. It is similarly clear that he actively espoused at the STEP dinner and in his conversations with the assistant superintendent the incorporation into the curriculum of Paramus High School of information concerning the life styles of gay persons and their rights in society.

This being so, the factual allegations in each of these nine charges are proven to be factually correct. It remains, however, to determine whether respondent was insubordinate or in any way culpable as the result of these expressions for which he admittedly accepted full responsibility.

Respondent, as a citizen, had the unfettered right to seek and generate all of the publicity for which he was responsible in his efforts to foster the rights of gay persons. Such expression is guaranteed by the United States Constitution and in the ultimate, could be limited neither by admonition nor directive of the Superintendent. This is not to say, however, that the prudent caution recommended by the Superintendent was frivolous or otherwise inappropriate.

It is well established that the constitutionally protected right of free expression is not absolute. Thus, Kathleen Pietrunti who had vilified her superintendent in an attack before the assembled teaching staff members was found to have forfeited her tenured status as a teacher. Pietrunti v. Brick Township Board of Education, 128 N.J. Super. 149 (App. Div. 1974); cert. den. 65 N.J. 573 (1974); cert. den. 419 U.S. 1057 (1974) Therein, the Appellate Court stated:

> "***A teacher is expected to exhibit loyalty to the district in which he or she is employed and to cooperate with the administration in seeking the educational goal. Appellant would relegate a teacher to a 'rank and file' member of an organization who seeks some communal goal of self-

> aggrandizement. It is the individuality each teacher brings to the educational scheme that contributes to educational success; that individuality, however, must be sublimated to the educational goal. A teacher is expected to show a reasonable respect for the authority of his or her employer and to maintain a civility commensurate with his or her professional status.***"(Emphasis added.) (128 N.J. Super. at 165)

> "***Unquestionably, as we have noted before, appellant had the right to speak out publicly on such matters of public interest as the policy of the board of education with respect to textbooks, the hiring practices with respect to black teachers and the lack of due process accorded to nontenured teachers. We find, however, that appellant chose to ignore those issues as a matter of public concern and distorted them into a vehicle to bring scorn and abuse on the school administration in general and the superintendent of schools in particular. In doing so she forfeited her claim to First Amendment protection. See Duke v. North Texas State University, 469 F. 2d 829 (5 Cir. 1972), cert. den. 412 U.S. 932, 93 S. Ct. 2760, 37 L. Ed. 2d 160 (1973). ***" (at p. 168)

In the Tenure Hearing of Genevieve Rinaldi, 1976 S.L.D. 345 the Commissioner, in ordering a financial penalty for a teacher whose loud and indiscreet expressions in a public diner resulted in a parent-pupil boycott of her school, stated:

> "***In the matter herein controverted, respondent was indiscreet. Rather than expressing her displeasure in a professional manner to her supervisors or to the Board, she displayed it in a public place. The end result was at least a temporary public loss of confidence in her as a teacher and in the school in which she taught. Such result is, of course, contrary to the constitutional mandate of a thorough and efficient education.
>
> Respondent's indiscretion, however, must be viewed with the context of her commendable teaching service for the Board which extends over a period of twenty-six years. Without question, respondent's suspension of service has itself been a painful ordeal. See In the Matter of the Tenure Hearing of William H. Kittell, School District of the Borough of Little Silver, Monmouth County, 1972 S.L.D. 535, 542. The Commissioner determines that dismissal of respondent would be an unduly harsh penalty which is not warranted in this instance. Accordingly, it is determined that her penalty shall be limited to the forfeiture of one month's salary.***" (at p. 355).

Similarly, the Court in Chitwood v. Feaster, 468 F. 2d 359 (4 Cir. 1972) stated:

> "***A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the head of the department. If one cannot or does not, if one undertakes to seize the authority and prerogatives of the department head, he does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct are verbalized.***" 468 F.2d at 360-361.

In Schmidt v. Fremont County School District No. 25, State of Wyoming et al, 406 F. Supp. 781 (1976) the Court said of a nontenured principal whose strident comments were directed at his peers, his school and his employing board:

> "***He was permitted to say what he wished to, but in so doing he hurt his image in the board's eyes.***" (406 F. Supp., at p. 784)

And,

> "***[T]he evidence shows that the reasons of the defendant board for his termination were a disappointment in his performance, a lack of confidence in him, and a conclusion that it was in the best interests of the school to seek stronger leadership. These are matters in which the defendant school district, as an employer, had a legitimate interest. The right to unfettered speech, to say one's mind without reserve and in strong tones, does not include a concomitant privilege of stoppering the ears of one's listeners to prevent them from using their faculties to make a judgment of the speaker, especially when they are public officials charged with a duty to do so.***" (Emphasis supplied) (406 F. Supp., at p. 787)

It must, however, be recognized, in the instant matter that respondent is not charged with overt acts involving moral turpitude. It is also clear that respondent's conduct toward his superiors and the Board has not been characterized by disrespect, bickering, argumentation, vilification or such other conduct as that found present in Pietrunti or Schmidt, supra. The apparent social amenities which were exhibited by both respondent and his superiors at the hearing are indicative of the absence of personal animosity, inability to communicate, contentiousness, or clash of personalities. It must also be recognized that respondent is not charged with, nor shown to have committed or advocated or solicited overt illegal acts sometimes associated with homosexuality. The publicity centering about respondent has been that of a self-proclaimed advocate of the rights of gay persons to openly profess and pursue alternative lifestyles in American society without loss of economic, political or social status.

Accordingly, the appropriateness of respondent's actions must be examined solely from the standpoint of whether his fitness to teach was altered thereby or whether the orderly operation of the school and normal psychological development of any of its pupils is threatened.

The Supreme Court in Pickering v. Board of Education of the Township High School District, 391 U.S. 563 (1967), 88 S. Ct., 1731, 20 L. Ed. 2d 811 (1968) succinctly stated the considerations that must be weighed in such matters, as follows:

> "***[I] t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of its citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.***" (391 U.S. at 568)

Respondent has consistently resisted the application by others of the appellation homosexual to himself. Rather he has insisted on being referred to as "gay," a term which he avers includes a milieu of homosexuals, bisexuals, transvestites, lesbians and effeminate heterosexual men. Respondent has not, within this record, publicly admitted to being a homosexual nor has he denied that he is a homosexual. His employers and many members of the public, however, could be expected, when considering the statements he has made and the publicity his actions engendered, to conclude that he is not only an admitted gay but a homosexual.

Respondent's public announcement of his sexual orientation as a gay was made after seven years of successful service to the Board as an English teacher.

Public announcement of a teacher concerning his sexual orientation, even in the absence of overt acts involving moral turpitude has been recognized by the Commissioner and the Court as a legitimate concern. Thus, In The Matter of the Tenure Hearing of Paula M. Grossman, 1972 S.L.D. 144, relying on the testimony of psychiatrists presented at the hearing, the Commissioner determined that a teacher who had undergone sex-reassignment surgery and openly displayed to the public and school pupils an altered sexual orientation was "***incapacitated to teach children***because of the potential for psychological harm to the students***." (at p. 156) In its review and approval of that dismissal, In re Tenure Hearing of Grossman, 127 N.J. Super. 13 (App. Div. 1974), the Court stated:

> "***We think it would be wrong to measure a teacher's fitness solely by his or her ability to perform the teaching function and to ignore the fact that the teacher's presence in the classroom might, nevertheless, pose a danger of harm to the students for a reason not related to academic proficiency. We are convinced that where, as has been found in this case, a teacher's presence in the classroom would create a potential for psychological harm to the students, the teacher is unable properly to fulfill his or her role and his or her incapacity has been established within the purview of the statute. In fairness to Mrs. Grossman, we emphasize that the Commissioner's conclusions relate only to her fitness to continue teaching in the Bernards Township school system. We express no opinion with respect to her fitness to teach elsewhere and under circumstances different from those revealed in the present case.***" (at p. 32)

I CONCLUDE that the concerns of the Superintendent and the Board in the instant matter which resulted in respondent's removal from the classroom and the preferment of charges 1-4, 7-9 and 11-12 were neither without basis nor frivolous. I further **CONCLUDE** that these charges have been proven to be true in fact to the extent that respondent generated such undue amounts of publicity in his advocacy of gay rights that ordinary administrators and Board members could reasonably reach the conclusion that the orderly operation of the school and respondent's classes would be threatened by his retention in the classroom. I am, however, unable to reach the conclusion that respondent was, in his zealous advocacy of gay rights, willfully or intentionally insubordinate.

Nevertheless, **I CONCLUDE** and **DETERMINE** that respondent's almost total disregard of the Superintendent's advice on June 14, 1972 constituted unbecoming conduct which threatened the orderly operation of his classes and the school in that it could be expected to cause parents to lose confidence out of concern over the psychological welfare of pupils assigned to respondent.

CHARGES 5 and 6:

The findings were minimal as set forth above, concerning charges 5 and 6. Respondent quickly complied with his superior's directives to refrain from contacting pupils and to cease using the telephone for GAANJ activities. **I CONCLUDE** that he neither exhibited unbecoming conduct nor was insubordinate in respect to his limited contact of pupils and minimal use of the telephone for GAANJ activities after his

reassignment to the Board offices. Accordingly, **CHARGES NUMBERS 5 and 6** are **DISMISSED**.

CHARGE 10:

In consideration of Finding No. 7, above, wherein it is seen that respondent intentionally withheld pertinent information from the assistant superintendent when asking for a personal leave day, **I CONCLUDE** and **DETERMINE** that respondent's conduct, to this limited degree, was unbecoming.

CHARGE 13:

Finding No. 8, above, demonstrates and **I CONCLUDE** that respondent was guilty of unbecoming conduct as a teaching staff member in regard to his possession of controlled dangerous substances, which possession resulted in his arrest, arraignment, pretrial intervention and two-year period of probation with supervisory program.

The Education statutes and the rules of the State Board of Education require that teaching staff members be knowledgeable and teach about the harmful effects of alcohol and narcotics and controlled dangerous substances. It is uncontroverted that the Paramus Board makes similar requirements and expects its teachers to be proper role models for pupils in this respect. Such requirement is not unreasonable. While respondent's undue volume of publicity regarding his gay rights advocacy may not, in the absence of proof of illegal acts, rise to the level of notoriety, his illegal possession of controlled dangerous substances did bring him a measure of notoriety. As such his action in connection with the possession of illegal controlled dangerous substances constitutes unbecoming conduct.

Nor is respondent, by reason of entering into a supervisory program in lieu of standing trial, free from culpability under existing education law. In the Matter of the Tenure Hearing of Jeffrey Wolfe, School District of the Township of Randolph, 1980 S.L.D. ____ (decided July 8, 1980), the Commissioner, in dismissing Wolfe, stated:

> "***The charges brought by the Board are predicated on criminal complaints involving as they do a substance classed as a controlled dangerous substance. They were confirmed by the unrefuted testimony of the State Police and are of a serious nature of such magnitude that the Commissioner holds respondent must forfeit his right to tenure in his position.

> "In making this determination the Commissioner recognizes respondent's successful completion of a pretrial intervention program. The Commissioner notes with approval the laudatory purposes of such programs recognized in part by the Legislature in establishing N.J.S.A. 24:21-27:
>
> > 'Main purpose of this section relating to suspended proceedings for a first offender charged with or convicted of use or possession of a controlled dangerous substance is to provide a method whereby a youthful offender may avoid a lifetime criminal record for possession of a controlled dangerous substance. State v. Grochulski, 133 N.J. Super. 586, 338 A.2d 26 (1975).
> >
> > 'Included among the legislative goals in providing a drug offender with a viable alternative to rehabilitation other than incarceration are the protection of the offender, the prevention of contamination of others and the protection of the public. State v. DiLuzio, 130 N.J. Super. 222, 326 A.2d 78 (1974).'
>
> "Despite respondent's participation in the program descibed above, the Commissioner finds the facts in the matter forming the prerequisite for respondent's participation sufficient evidence of conduct unbecoming a teacher.***" (at p. _____)

Similarly, the record of the instant matter presents valid reasons for holding that respondent's conduct was unbecoming a teaching staff member.

CHARGES 15-16:

The opinions expressed by Dr. Lowell and Dr. Roukema were not the result of examinations of respondent but based solely on hypotheticals posed to them by the Board during 1972. While their advice as consultants appears to have properly served the Board in its deliberations over what action if any to take regarding respondent, no evidentiary value may be attached to their opinions absent testimony at the hearing subject to cross-examination procedures. Accordingly, **CHARGES 15 and 16** are **DISMISSED**.

CHARGES 17-18:

Dr. Kern, whose psychiatric practice does not ordinarily encompass the treatment of children, testified that he found respondent presently fit to return to his

teaching duties. He stated that he considered it unlikely but possible that respondent's return to the classroom would have adverse impact on the school. A diametrically opposed opinion was presented by Dr. Hammer, whose fourteen years of psychiatric practice included wide experience with evaluation of children of all ages both in his private practice, his service with the juvenile evaluation and treatment system of the courts and his position in charge of the child evaluation center at Morristown Memorial Hospital. I am unable to ascribe credence to the testimony of the school psychologist who expressed no concern whatever over respondent's actions or his return to the classroom. **I CONCLUDE** that the weight of credible evidence found in the sharply divergent testimony and reports of the two psychiatrists and that of the school psychologist emanates from Dr. Hammer. Essentially, he perceives respondent, who has openly proclaimed himself as a gay and who has been found in this record to have possessed controlled dangerous substances, to be an improper role model for pupils in Paramus High School. He also opined that respondent's compulsive advocacy of gay rights could be expected to insert itself into respondent's performance as a teacher with potential adverse impact on the development of sexual self-identity of adolescent pupils. The expressed opinion of Dr. Hammer, a professional with an impressive experience record in the areas of adolescent psychiatry, forms a basis of genuine concern over possible adverse impact on adolescent pupils which could result from respondent's return to the classroom at Paramus High School. To this extent the Board has within this record proven, by a preponderance of the credible evidence, Charges 17-18 which assert that respondent's actions evince deviation from normal mental health rendering him unfit to teach.

DETERMINATION OF THE CASE

I have carefully reviewed the pleadings, the parol and documentary evidence, the factual findings, and the arguments of law set forth in Briefs of counsel. I find no validity in respondent's assertion that the Board's certification of tenure charges was so faulty as to require their dismissal. **I CONCLUDE** that respondent, by reason of his injudicious generation of great amounts of publicity which displayed to the public his sexual orientation as a gay, (Charges 1-4, 7-9, 11-12), by reason of his unbecoming conduct when requesting personal leave (Charge 10), and by reason of his possession of controlled dangerous substances in his home (Charge 13) has violated the public trust placed in him and severely impaired his ability to function as a teacher in Paramus High School. By his actions he has forfeited his tenure. Apropos is that which the

Commissioner stated In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97 that:

> "Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully violates the law, as in this matter, and consequently violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner." ***
>
> "The public interest demands the public trust of those teachers entrusted to care for and mold the character and attitudes of the pupils of this State." (Emphasis added.) (at pp. 98-99)

Accordingly, it is **ORDERED** that respondent be and is dismissed from his tenured position effective the date of issuance by the Commissioner of Education of a Final Decision in this matter.

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

September 10, 1980
DATE

Eric G. Errickson
ERIC G. ERRICKSON, A.L.J.

IN THE MATTER OF THE TENURE :

HEARING OF JOHN GISH, SCHOOL :

DISTRICT OF THE BOROUGH OF : COMMISSIONER OF EDUCATION

PARAMUS, BERGEN COUNTY. : DECISION

:

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

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b, and c.

Firstly, respondent's exceptions complain of the brevity of the initial decision by Eric G. Errickson, ALJ. (Respondent's Exceptions, at p.1) The Commissioner does not agree. A complete examination of the entire record convinces the Commissioner that the decision by Judge Errickson represents a cogent compendium of an admittedly voluminous record.

Respondent contends that the Court erred in allegedly overruling a prior determination by the Commissioner concerning the status of the first set of tenure charges. 1974 S.L.D. 1168 (Respondent's Exceptions, at pp. 1-4) The Board's exceptions refute such contention arguing that on October 17, 1977 at a conference of counsel pending a second set of charges, an agreement was reached and confirmed in writing dispositive of this contention. Therein was said in pertinent part:

> "The Board will determine forthwith whether to recertify the first set of sixteen charges."

The Commissioner agrees with the argument advanced by the Board and finds no merit in this exception.

Respondent contends that Judge Errickson erred in determining the relative weight of testimony from a psychologist in the employ of the Board, favorable to respondent as compared with the testimony from the psychiatrist called by the Board whose testimony was not favorable to respondent's return to the classroom. (Respondent's Exceptions, at pp. 5, 15) The Commissioner finds no merit in such arguments. While the Commissioner agrees that Judge Errickson did, indeed, place greater credence in the testimony of one rather than the other of the psychiatrists, he must also observe that his reasons for so doing were clearly and rationally explained, namely the greater time duration of the one examination over the other and the greater degree of experience, expertise, and reputation in working with children of all ages.

Respondent in discussing charges 1-4, 7-9, and 11-12 in great confutation argues against the Court's finding that respondent "***was further guilty of insubordination." (Respondent's Exceptions, at pp. 7, 27) The Commissioner finds no merit in such exception; it is simply not true. Judge Errickson's determination and conclusion concerning charges 1-4, 7-9 and 11-12 in pertinent part states:

> "***I am however unable to reach the conclusion that respondent was *** willfully or intentionally insubordinate.
>
> "Nevertheless I CONCLUDE and DETERMINE that respondent's almost total disregard of the Superintendent's advice on June 14, 1972 constituted unbecoming conduct***."
>
> (at p. 23)

Similarly in discussion of charge 10 with respect to respondent's application for a day off to participate in a college level discussion respondent deplores the Court's finding that he was guilty of "***some kind of limited insubordination." (Respondent's Exceptions, at p. 21) Such inference is in error. Of charge 10 Judge Errickson states in entirety:

> "In consideration of Finding No. 7, above, wherein it is seen that respondent intentionally withheld pertinent information from the assistant superintendent when asking for a personal leave day, I CONCLUDE and DETERMINE that respondent's conduct, to this limited degree, was unbecoming." (at p. 24)

Accordingly the Commissioner dismisses this exception as having no basis in fact.

Respondent's conjecture as to the high level of sophistication of the pupils of Paramus High School and their insight, orientation and exposure to pornographic and obscene materials cannot be accepted. (Respondent's Exceptions, at pp. 8, 14) The Commissioner rejects such statements for what they are, conjectures totally unsupported by evidence in the record. To the contrary the Commissioner observes that the testimony of a faculty member with twenty-three years' experience and who teaches in the district's family living program tends to refute such claim of sophistication. This faculty member testified to a tendency on the part of pupils to reject sexual patterns other than traditional ones. (Tr. XIV-31)

To attribute an undue level of sophistication to the pupils of Paramus High School does them or the teacher therein no good service nor does the record confirm such a conclusion.

The Commissioner finds the complaint by respondent of the dearth of witnesses called by the Board to have no merit. Respondent could have properly called any or all witnesses, with whose absence he now finds fault, by simple due process. The fact that he chose not to so does not now give him cause to complain. (Respondent's Exceptions, at p. 19)

Lastly, in referring to respondent's possible return to the classroom the following exception is made:

> "***[E]ven the slightest amount of administrative competence and supervision would be a more than sufficient shield for any reasonably anticipated risk; of course, it is possible that the slight application of administrative responsibility is what is being sought to be avoided.***"
> (Respondent's Exceptions, at p. 24)

The Commissioner cannot agree with such argument. The record clearly shows respondent's rejection of administrative advice initially propounded June 15, 1972 and resulting in eight years of litigation. Respondent cannot have it both ways.

It is noted by the Commissioner that the total thrust of the reply exceptions filed by the Board refute those of respondent and submit that the initial decision is consistent with and supported by the record and comports with established principles of law.

An examination of the lengthy record developed herein, the initial decision rendered by the Court and the exceptions thereto leads the Commissioner to certain conclusions.

The issue to be determined herein by the discussion and determinations of the tenure charges filed and thoroughly investigated in sixteen days of hearing pivots not on respondent's personal life style but rather whether or not his self-avowed life style, whatever it may be, impacts on his fitness to teach. In other cases the Commissioner and the courts have previously so determined. Grossman, supra; Tordo, supra; Wolfe, supra

In rendering his determination in the instant matter, the Commissioner observes, as did Judge Errickson, that respondent is not charged with overt acts of moral turpitude as they relate to his duties as a classroom teacher nor is he charged or shown to have committed or advocated or solicited overt illegal acts in that capacity. Rather, respondent is charged with having compromised his ability to continue to function effectively within his own classes and as a member of the Paramus High School faculty by virtue of his conscious decision to actively endorse, publicize and advocate a "gay life style." The Commissioner

notes that the decision rendered herein makes no judgment relative to respondent's personal private behavior but relates only to respondent's choice in having made his private behavior a matter of public debate and thus to impact upon his relationships with parents, students, teachers and the public in general. In a case of a similar nature in the State of Washington, the Court has said:

> "***A teacher's efficiency is determined by his relationship with students, their parents, fellow teachers and school administrators. In all of these areas the continued employment of appellant after he became known as a homosexual would result, had he not been discharged, in confusion suspicion, fear, expressed parental concern and pressure upon the administration from students, parents and fellow teachers, all of which would impair appellant's efficiency as a teacher and injure the school.***" (at ___)

James M. Gaylord v. Tacoma School District No. 10 et al., 88 Wash. 2d 286 (1977)

The Commissioner in the present case finds clear and compelling reasons to hold that respondent's total conduct was unbecoming a teaching staff member. The Commissioner is constrained to note that while attention in this matter may focus almost exclusively upon respondent's sexual orientation, he was also arrested, indicted, and voluntarily placed upon probation in a supervisory treatment program for possession of controlled and dangerous substances. Charges of similar nature have in and of themselves been held by the Commissioner to be sufficient grounds for the removal of tenure. Wolfe, supra

Because of the notoriety, complexity and impact of the matter herein controverted, the Commissioner wishes firmly to record his affirmation and adoption of the findings and determination of the initial decision for the reasons contained therein.

Accordingly, it is determined that respondent be and is dismissed from his tenured position effective this 27th day of October 1980.

It is so directed.

COMMISSIONER OF EDUCATION

October 27, 1980
Pending State Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3816-80
AGENCY DKT. NO. 197-5/78

IN THE MATTER OF:

BOARD OF EDUCATION OF THE
VILLAGE **OF RIDGEWOOD,**
BERGEN COUNTY,
Petitioner
v.
ARTHUR and ELYSE HECHT,
Respondents.

Record Closed: August 17, 1980
Agency Received: 9/10/80

Decided: September 4, 1980
Mailed to Parties: 9/15/80

APPEARANCES:

Stephen G. Weiss, Esq., for petitioner (Greenwood, Weiss & Shain, attorneys)

Jay Joseph Friedrich, Esq., for respondents (Andrew, Friedrich, Marlowe, Hauptman & Kilhenny, attorneys)

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

This matter was opened by the Ridgewood Board of Education (Board) before the Commissioner of Education. The petition challenges the decision of a classification officer in a special education matter. The parents of the subject child (respondents) cross-appeal.

The matter was transmitted to the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq.

The matter is submitted for summary judgment on the pleadings and briefs. The issues to be decided are:

1. Did or did not the Chief Classification Officer, Bureau of Special Education, have jurisdiction to hear the original matter.

2. If the answer be affirmative, was or was not the decision of the classification officer in that matter proper.

3. If the decision were proper, to what relief, if any, are respondents entitled.

The original matter was set down for hearing on April 20, 1977 and, following disposition of procedural motions, continued to June 13, July 13, August 30 and 31 and September 28, 1977.

The petitioning parents, respondents here, alleged the Board had failed to meet the education needs of their son (J.H.) while he was enrolled in its schools. They claimed J.H. had been identified as needing special assistance but the Board failed to provide a child study team (CST) evaluation and proper education program planning. They sought reimbursement of tuition paid by them when they placed J.H. in the Adams School in New York City in September 1976.

The Board argued that petitioners' action placing J.H. in a nonpublic school relieved it of any responsibility to him. The Board further argued that it had met all statutory and regulatory requirements as to J.H.

The classification officer found on the facts before him that there had been serious procedural error on the part of the Board, the parents had acted involuntarily when withdrawing J.H. from the public schools and the parents had timely disputed the recommendations of the CST when ultimately they were made. It is noted that the CST evaluation of J.H. was made after he was withdrawn from the Board's schools and placed in a private institution by his parents.

The classification officer also found that he had no authority in statute or regulation to award tuition reimbursement to the parents. The parents were directed to seek reimbursement through a request for summary judgment of the Commissioner. The classification officer further found no fault with the CST recommendation for classification (emotionally disturbed) and program (regular class placement with supplemented instruction) and he further directed that J.H. have a new and current individualized education program (IEP) prepared for him at such time, if ever, he be reenrolled in the Board's schools.

The present petition challenges the decision of a classification officer. The original challenge was made in a motion to stay the classification hearing. That motion was denied by the Commissioner.

The general provisions of Chapter 28, Special Education, New Jersey Administrative Code Title 6, Education, require the application of the chapter to all agencies, whether public or private, that use public funds to provide educational services to handicapped pupils. This is true of the present Chapter 28, effective August 11, 1978, and of the chapter as it existed on February 16, 1978, the date on which the classification officer decision was rendered. Here the Board carried out a full CST evaluation in the period September 1976-February 1977. That J.H. was not then enrolled is irrelevant. Public funds were used.

I FIND accordingly that the provisions of N.J.A.C. 6:28-1 et seq. did apply and do apply to this matter. Therefore, **I CONCLUDE** the Commissioner and hence a classification officer held jurisdiction to hear and decide the matter.

In order to address the second issue, the propriety of the decision, I have listened to the tape recordings made of the hearing and reviewed the transcripts made from those recordings by the Board. The more than 20 hours of recordings and the seven volumes of transcript do not support the Board's argument that the classification officer decision was arbitrary, capricious, failed to accord proper weight to the Board's testimony, misconstrued other testimony and suggested an improper remedy.

The Board argues further that the decision incorrectly relied on K.K., by her parents v. Westfield Board of Education, 1973 S.L.D. 30. K.K. concerned an appeal for

interpretation of a prior decision of the State Board of Education, The Parents of K.K. v. Westfield Board of Education, 1971 S.L.D. 240.

In the first case, the CST was unable to classify a child in second grade because of diagnostic difficulties or the lack of data or both. The parents removed the child from the Board's schools following the second grade year. In consideration of this, the State Board held an adjudication of the issues would serve no useful purpose at that time and remanded the case to the Commissioner, directing that examination and classification be made within 30 days of the opening of the school year provided the child be properly enrolled in the Board's schools. The child was not enrolled.

In the latter case, the parents sought an interpretation that would grant them reimbursement of tuition and transportation costs for K.K. as well as "proper" classification. There, the State Board upheld the decision of the Commissioner dismissing the petition, stating

> A board's unreasonable and unjustified delay, absent parental fault, might well expose it to reimbursement liability if the parents are compelled thereby to seek private placement for the education and training that the Legislature intended should be afforded by the district. The record indicates reasonable attempts to complete the identification-examination-classification process in an unusual and difficult case... Further, it appears that had petitioners not removed the child from public school... the classification process might well have been completed.... (1973 S.L.D. at 35.)

The circumstances of K.K. are distinguishable from those of the present case only in that they are less extreme. J.H. was enrolled in the Board's schools for four school years. He was referred to the CST on October 15, 1972 while in his fourth grade year. The record is clear that the Board's school psychologist took the referral but did not pass the matter on to the full CST either for classification or for a formal decision that classification was not required. It was not until September 1976, when a full CST evaluation was ordered by the superintendent of schools, that a complete evaluation was made and a classification decision reached. In K.K., the child transferred into second grade in January and was removed at the close of that school year.

Four years is certainly distinguishable from a period of less than six months. More distinctive is the fact that here the evaluation was not undertaken until after the child left the public schools.

The classification officer miscited K.K. This is harmless error, however. The case is apposite in pertinent part to the question of tuition liability in that it speaks to unreasonable and unjustified delay.

Of greater importance than any technical flaw in the classification officer decision is the balance of testimony. From the review of that testimony it is clear that various Board employees had different perceptions of what the status of J.H. was; e.g., the elementary school principal during J.H.'s fifth and sixth grade years believed a CST evaluation had been done. (Tape 10, side 2.) From this considerable body of testimony, it was reasonable for the classification officer to conclude there had been unreasonable and unjustified delay in the handling of J.H.'s referral.

Based upon my review of the tape recordings and transcripts together with the classification officer decision, **I FIND AND CONCLUDE** that the decision was a proper one that did not reach beyond the record on which it was made.

As to the last issue, appropriate relief, the Board argues that even if a basis for tuition reimbursement be found, reimbursement should be limited to the period September-November 1976. Following the withdrawal of J.H. in September 1976, the CST commenced and completed its workup. By mid-November a suggested IEP was reduced to writing and made known to his parents. When told that it was intended to classify J.H. as emotionally disturbed and a private school placement would not likely be recommended, J.H.'s mother requested that the team proceed no further until she spoke to them again. She did not do so until sometime in January 1977 when the parents said they wanted the CST to complete its evaluation. (Board's brief at pp. 28-9.)

The Board avers the CST then completed its work as quickly as possible. The formal classification and program issued in March 1977 but the delay was caused by the parent's request. Respondents do not address the argument.

Respondents claim K.K., above, stands for the proposition that a private school placement after unreasonable and unjustified delay can be the only recourse in a proper case and the ordinary rule that voluntary placements be paid for by the parents would not apply. (Respondents' brief at p. 19.)

Respondents cite M.D. and R.D. v. Rahway Board of Education, 1977 S.L.D. 1296 in support of their claims for full tuition reimbursement for more than one school year. I believe reliance on the case to be misplaced.

In M.D., the district acknowledged it did not have in its own programs a proper placement for the subject child. In the present matter, the Board does have a proper placement, although it is not to the parents' liking. The classification officer found no fault with the final CST recommendation for classification and program. I find in the record no reason to disturb the classification officer's finding.

N.J.A.C. 6:28-1.11(b), in effect at the time pertinent here, provided no change in placement could be made by a district before a hearing was held on a parental challenge. The pertinent current language is found at N.J.A.C. 6:28-1.9e: "If the parent or school district invokes these procedures, there shall be no change in the pupil's status until a classification officer renders a binding decision;..." An appeal, of course, may be made to the Commissioner.

The former language, in order to have reasonable meaning, must be construed to mean a hearing held on a parental challenge and a finding decision rendered, as does the present language.

In the present case, a decision was rendered on February 16, 1978. J.H. had been in the private school since September 1976. His placement was not made by CST action and was not being paid for by public funds.

As held above, that placement was occasioned by unreasonable and unjustifiable delay on the part of the Board in reaching a CST determination as to J.H. When the classification officer decision was rendered, the Board was ready, willing and obligated to enroll J.H. if his parents chose to enroll him. They did not do so.

The Board's argument concerning the delay in completion of the CST evaluation and classification is not compelling. There was no formal challenge to the CST procedure at that time. The Board accommodated the parents. As it was an accommodation and not a directed or prescribed action, it is to be considered a mutually agreed upon action.

In consideration of the foregoing analysis, **I FIND** the liability of the Board for tuition for J.H. limited to the 1976-77 school year and the period September 1977 through February 1978.

I CONCLUDE the classification officer decision in this matter must be modified to relect the award of tuition for the additional period September 1977 through February 1978.

In summary, my **CONCLUSIONS** in this matter are:

1. The classification officer held jurisdiction to hear and decide this matter;

2. The decision rendered was a proper one and reasonably based on the record;

3. The liability of the Board of tuition for J.H. is limited to the period September 1976 - February 1978.

Accordingly, the Ridgewood Board of Education shall reimburse Arthur and Elyse Hecht the amount expended by them for tuition for J.H. in the period September 1976 - February 1978. **IT IS ORDERED**.

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

OAL DKT. NO. EDU 3816-80

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

9 SEPTEMBER 1980
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ARTHUR AND ELYSE HECHT,	:	DECISION
RESPONDENTS.	:	

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

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

A proper decision having been reached in an appropriate forum the Commissioner accordingly directs the Ridgewood Board of Education to reimburse respondents the tuition monies spent by them for J.H. for the period September 1976 - February 1978.

It is so directed.

COMMISSIONER OF EDUCATION

October 27, 1980

E.E., by his parent,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Wilentz, Goldman & Spitzer (Gordon Golum, Esq., of Counsel)

For the Respondent, Borrus, Goldin & Foley (James E. Stahl, Esq., of Counsel)

E.E., hereinafter "petitioner," was a tenth grade pupil enrolled in the high school of the Board of Education of the Borough of Metuchen, hereinafter "Board," from November 19, 1975 until December 19, 1975 and upon the latter date was ordered by the Honorable George T. Nicola, Judge of the Juvenile and Domestic Relations Court of the County of Middlesex, at a hearing of an incorrigibility complaint filed against petitioner by his father, to attend and complete a school selected by petitioner's father, preferably the Arlington School of the McLean Hospital located in Belmont, Massachusetts. (J-1a) Subsequently, on August 13, 1976 the Honorable Irving W. Rubin, Judge of the Juvenile and Domestic Relations Court of the County of Middlesex, at an informal hearing remanded petitioner to the Middlesex County Youth Center on complaints filed against petitioner of larceny of money and larceny of wallet (2 counts). (J-1b) Thereafter, on August 26, 1976, the Honorable Irving W. Rubin entered an order as follows:

> "***Probation one year. Condition: Complete program at Yale Psychiatric Institute.
>
> "Juvenile is remanded to Youth Center and may be released to his father on August 31, 1976 to be taken to Yale Institute for an interview and again on September 7, 1976 for placement in Yale Institute." (J-1c)

Petitioner requests that the Commissioner of Education direct the Board's Child Study Team, hereinafter "CST," to conduct an evaluation of petitioner and further order the Board to reimburse petitioner's father for tuition expenses incurred since December 19, 1975 pursuant to N.J.S.A. 18A:46-1 et seq.

The Board denies that it is responsible for petitioner's educational expenses under the particular circumstances and sets forth in its separate defenses that petitioner, inter alia, is guilty of the doctrine of laches.

A hearing in the instant matter was conducted by a hearing officer appointed by the Commissioner on February 1, 1978 at the office of the Middlesex County Superintendent of Schools, New Brunswick. Subsequent thereto, the parties filed Briefs. The report of the hearing examiner follows:

At this juncture the hearing examiner finds that the following relevant facts giving rise to the instant matter are not in dispute.

On April 24, 1970, petitioner's parents entered into a marriage separation agreement which provided, inter alia, for the custody of the four children of the marriage as follows:

> "***4. The custody of the children during their respective minority shall be divided equally between both parties except that the children shall reside during the school year with the wife in her residency and except that they shall be educated, where at all possible, in boarding schools and private schools to be selected by the husband, providing such school shall not be located outside the State of New Jersey without the consent of both parties. It is further agreed that the husband shall have temporary custody of the children at locations of his choice on alternate weekends, one-half of the school vacation and one-half of all other school holidays, as well as alternate holidays. It is further agreed that the husband shall have the right to visit the children at wife's home at all other reasonable times providing advance notice is given to the wife. This paragraph shall be subject to revision by mutual agreement and it is further understood that the children shall not reside in any state except the State of New Jersey, except with the written consent of both parties, or by court order."
>
> (J-13)

On August 1, 1972 petitioner's parents divorce decree was entered which provided for the custody as follows:

> "***3. Pending the report of the Middlesex County Probation Department and appropriate Maryland probation office as aforesaid, custody of the children of the marriage shall remain as it was prior to this hearing;

"4. All visitation rights shall be reciprocal so that when [O.E.], who presently resides with the plaintiff (wife), visits the defendant (husband), [E.E.] and [D.E.], who presently go to boarding school in New Jersey and otherwise reside with the defendant, will then visit plaintiff;

"5. During the school year, [O.E.] shall visit defendant and [E.E.] and [D.E.] shall visit plaintiff on the first and third weekends of each month or at such other times as the parties may mutually agree, provided that the rights of plaintiff and defendant for visitation of their respective children shall be reciprocal to the extent possible;

"6. Plaintiff and defendant shall alternate visitation rights for their children during Christmas, Thanksgiving, Easter and, to the extent permitted by the school schedule, the Jewish High Holidays. Such rights shall be reciprocal for each party as to the child or children residing with the other party;

"7. During the summer vacation, all children residing with one parent shall visit with the other during July and August, but if camp or other arrangements interfere with this, the parties shall make other suitable arrangements. In any event all children shall be treated equally (concerning camp or otherwise), and the parties' rights to visit and have custody of the child or children living with the other party shall be reciprocal during the summer vacation. Such arrangements shall be mutually agreed upon and shall not be unilaterally arranged by either party.***" (J-13)

Petitioner's school attendance as submitted by his mother (J-30) was not in dispute unless as otherwise noted as follows:

"GRADE	DATE	SCHOOL
K to 3	9/63* to 12/67	Campbell School, Metuchen
3	1/68 to 5/68	Dependents School, Istanbul, Turkey
3-4	6/68 to 6/69	Campbell School, Metuchen
4	9/69 to 6/70	Wardlaw School, Plainfield
5	9/70 to 6/71	Chapin, Princeton

6	9/71 to 6/72	East Brunswick
7	9/72 to 6/73	Rutgers, Prep, New Brunswick
8	9/73 to 3/74	John Hansen Jr. High Oxon Hill, Maryland
8-9	3/74 to 2/75	Glaydin, Leesburg, Virginia
9	3/75 to 4/75	Washington Psychiatric Institute
9	6/75*	Metuchen High School
9	Summer 1975	Arlington School, Belmont, Massachusetts
10	9/75 to 11/75	Glaydin, Leesburg, Virginia
10	11/75 to 12/75	Metuchen High School
10	12/75 to 6/76	Arlington School, Belmont, Massachusetts
11	9/76 to present	Yale Psychiatric Institute

(J-30)

The Board disputed two of the above dates as noted by the asterisk (*) as follows:

> "Regarding the above dates our records indicate that [E.E.] started kindergarten in September 1964 instead of September 1963. Our records also indicate that he was not enrolled in Metuchen High School in June 1975." (J-20)

Petitioner's father testified that he had been a resident of the Borough of Metuchen for approximately fifteen to eighteen years except for a brief period of two and one-half years during the divorce proceedings. He testified that he and his former wife had joint custody of the four children pursuant to the divorce decree of 1972. (J-13) He testified that petitioner was living with his mother at Oxon Hill, Maryland during 1975 and attended the Glaydin School in Leesburg, Virginia until he was expelled for drug abuse. Thereafter, he testified, petitioner attended school at the Washington Psychiatric Institute until he was "kicked out" because "***he tried to burn his way out of there, escape ***." (Tr. 25-26, 35-38, 40-41, 45)

Petitioner's father testified that petitioner in April 1975 came under his custody and that he believed that he enrolled petitioner in Metuchen High School in the spring of 1975. (Tr. 26, 37, 53-54) Subsequently, in June 1975, petitioner attended the summer session at the Arlington School of the McLean Hospital, Belmont, Massachusetts. He testified that when petitioner completed the summer school program he returned to live with his mother in Maryland and was readmitted to attend the Glaydin School in September 1975. Petitioner's father testified that petitioner was again expelled from Glaydin School in November 1975 because of the theft of a woman's purse and the illegal use of her credit cards. (Tr. 28, 30, 38, 45-46)

Petitioner's father testified that he again assumed custody of petitioner in November 1975 and enrolled him in Metuchen High School. He testified that in December 1975 he filed a complaint of incorrigibility against petitioner and that the judge ordered petitioner to attend the Arlington School of McLean Hospital for the remainder of the 1975-76 school year. (Tr. 28-31, 43, 47-48; J-1a)

The father testified that petitioner returned to his custody in Metuchen in June 1976 and remained with him until August 1976 when petitioner was arrested for robbery. He testified that, at a hearing, the judge ordered petitioner to the Cedarhurst School of the Yale Psychiatric Institute, New Haven, Connecticut, which he attends at the present time. (Tr. 30-34; J-1c)

Petitioner asserts that free attendance at public schools in New Jersey is guaranteed to any person who is aged five through twenty years domiciled within a school district. N.J.S.A. 18A:38-1 Similarly, those classified pupils domiciled within a school district for whom education must be provided in approved residential institutions are guaranteed instruction at the expense of the school district. N.J.S.A. 18A:46-13, 14 Petitioner argues that the Board has failed and refused to classify him pursuant to N.J.S.A. 18A:46-1 et seq., N.J.A.C. 6:28-1.1(c) and N.J.A.C. 6:28-1.8(b). (Chapter 28, Special Education, of the Administrative Code was amended effective August 11, 1978. The rule N.J.A.C. 6:28-1.8(b) now appears at 6:28-1.4(a)(b)(c)(d).) He contends that the Board was aware of his educational history and special problems prior to his enrollment in the high school. He asserts that the Board's Director of Special Services testified that she had a conversation with his father in June 1975 with regard to his special educational needs and the financial burden of providing residential institutional instruction. (Tr. 59-61) He also asserts that when he enrolled in the high school in November 1975, his guidance counselor was advised that he had problems in other schools he attended in the past and as a result of such problems he was brought to New Jersey under his father's care. (Tr. 78) Petitioner contends that in spite of the Board's knowledge of his prior problems, no CST evaluation was commenced during November or December 1975 while he was enrolled in the school district. He argues that such a failure by the Board could only be interpreted as an intentional avoidance of the statutory obligation placed upon it. (Petitioner's Brief, at pp. 7-8)

Petitioner contends that since he was removed from the Board's high school by Court Order on December 19, 1975, except for a brief period in the summer of 1976, he has been continuously confined to residential institutions and has been enrolled in State approved educational programs. He asserts that repeated requests were made to the Board to assume its statutory obligations with respect to tuition payments. (J-10, J-11, J-19, J-23, J-25) He contends that although confidential medical

reports from psychiatrists and psychologists were offered and made available to the Board's CST for its review, the Board failed to conduct an evaluation of petitioner and has refused to consider the confidential reports to determine whether or not such reports could be used as a basis to approve the court ordered placements in residential educational programs. He asserts further that the results of testing made by the staff at the Yale Psychiatric Institute have been offered for use by the Board's CST. However, the Board declined to consult with the professionals at Yale. (J-10) (Petitioner's Brief, at pp. 8-9)

Petitioner argues that N.J.A.C. 6:28-2.2(c)6 (subsequently amended) provides for the acceptance by a CST of reports and evaluations from an approved clinic, agency or professional in private practice in lieu of the team's own testing. He avers that N.J.A.C. 6:28-3.14 (subsequently amended) also provides for the review of medical reports in lieu of classification when a pupil's absence from school is due to physical and/or medical reasons. Petitioner admits that it would now be impossible for the CST to evaluate him to determine whether the placements made in December 1975 and August 1976 were then appropriate. He contends that because the Board delayed until June 1977 to deny responsibility for him, it thereby made it impossible for its CST to evaluate first-hand his problems which prompted the courts to require residential placement. Petitioner argues that the Board should now be directed to approve the placements and reimburse his father for tuition cost expended for the educational programs while he was in attendance at the Arlington School and the Yale Psychiatric Institute. He further argues that the Board should also be required to conduct an evaluation for purposes of assuming responsibility for present and future educational needs. (Petitioner's Brief, at pp. 9-11)

Petitioner denies the Board's allegation that the doctrine of laches applies to the instant matter. He asserts that correspondence between attorneys shows that the Board was advised as early as December 23, 1976 that petitioner was domiciled with his father in Metuchen. (J-21) He avers that the Board was aware of petitioner's living arrangements when he was enrolled in its high school in November 1975. (Tr. 78) Petitioner contends that subsequent to the Board's receipt of a letter dated March 11, 1977 addressed to the Board's legal counsel from the Middlesex County School Coordinator (J-15), petitioner provided the Board with copies of his parents' divorce decree (J-13) and confidential medical and psychiatric reports. (J-12) He asserts that after three months had passed with interim correspondence (J-6-10), the Board attorney telephoned petitioner's attorney to advise that the Board had determined not to assume responsibility for petitioner's tuition expenses. By letter dated July 15, 1977 petitioner requested a written statement of the Board's position (J-5), which was provided by a letter of July 29, 1977 wherein the Board denied responsibility

for petitioner's tuition for the time he spent at the Arlington School and the Yale Psychiatric Institute. (J-4) Petitioner asserts that he has made every good faith effort to cooperate with the Board in an effort to induce it to comply with N.J.S.A. 18A:46-1 et seq. He argues, moreover, that any delay in regard to the resolution of the instant matter is more the responsibility of the Board than his and that it cannot now assert laches against him. Allstate v. Howard Savings Institution et al., 127 N.J. Super. 479, 489 (Ch. Div. 1974) (Petitioner's Brief, at pp. 12-14)

The Board asserts that petitioner was domiciled with his mother and not within its school district. It avers that two requirements must be met in order for a pupil to be eligible for a free public education in a local school district; i.e., domicile must be established and the pupil must appear or be presented at the schoolhouse door to be legally enrolled. In the Matter of the Inquiry of the School District of the Township of Sandyston-Walpack, 1975 S.L.D. 78; Parents on behalf of "G.S." v. Board of Education of the Borough of Rockaway, 1974 S.L.D. 637 It contends that a local board of education is obligated to grant a free public education to a child between the ages of five and twenty only after both of these requirements have been satisfied. It argues that a local board of education is obligated to provide suitable facilities and programs of education for pupils who are classified as handicapped only if the pupil is enrolled in the public schools of the district. N.J.S.A. 18A:46-6 et seq.

The Board asserts that it is a general proposition that the domicile of the child is that of the father. However, such a general conclusion is not without exception where it has been held that the domicile of children may be with the mother because of arrangements made at the parents' divorce settlement. "M.A.M.," as parent and natural guardian of "M.M." v. Board of Education of the Black Horse Pike Regional School District, 1974 S.L.D. 845; Walton v. Board of Education of the City of Brigantine, 1950-51 S.L.D. 39 The Board observes that, in the instant matter, petitioner's parents were legally separated in 1970 and executed a Separation Agreement which was subsequently incorporated into and became a part of the divorce decree issued in 1972 and which provided, inter alia, that "***It is further agreed that the husband shall have temporary custody of the children***." (J-13) It relies upon petitioner's father's testimony that the Separation Agreement and the divorce decree (J-13) were not changed at any time subsequent to the issuance thereof. (Tr. 35-36) The Board argues that pursuant to such documents the mother had custody of the children while they were in school and that her residence was their domicile and place of permanent abode. It asserts that the periods of time the children spent with the father were temporary and transient and did not establish domicile. "C.K.F." et al. v. Board of Education of Upper Township, 1975 S.L.D. 723 (Board's Brief at pp. 2-5)

The Board argues that it was not responsible for petitioner's tuition costs because he did not satisfy the statutory requirements pursuant to N.J.S.A. 18A:47-1 et seq. or N.J.S.A. 18A:46-1 et seq. The Board asserts that petitioner was adjudged incorrigible by the Middlesex County Juvenile and Domestic Relations Court on December 19, 1975, subsequent to petitioner having reached his sixteenth birthday on November 13, 1975. It avers that N.J.S.A. 18A:47-1 et seq. is applicable to incorrigible children under sixteen years of age committed to a school by a Juvenile or Domestic Relations Court and that petitioner did not meet the statutory age requirement on December 19, 1975.

The Board argues further that petitioner was not a handicapped child pursuant to N.J.S.A. 18A:46-1 et seq. and N.J.A.C. 6:28-1.1 et seq. It admits that petitioner was enrolled in and attended its school for approximately four or five weeks during November and December 1975. (R-2) It asserts that petitioner was enrolled by his father and that he requested a normal school curriculum for petitioner. (Tr. 80) The guidance counselor testified that she consulted with petitioner's father and enrolled petitioner in a college preparatory curriculum with the appropriate subjects for a regular pupil at his academic level. (Tr. 78-80) The Board asserts that during the time petitioner attended its school he presented no problems to either his teachers or fellow pupils and that he functioned as a normal pupil, both academically and emotionally. It contends that at no time did petitioner give any indication to the Board's staff that would give cause for referral to its CST. The guidance counselor also testified that when she checked on petitioner's progress she received no adverse comments or criticism from his teachers and that one teacher advised her that was he a delight to have in class. (Tr. 85-86)

The Board asserts that when petitioner was enrolled in its school district in November 1975, petitioner's father advised the school officials that petitioner had some problems in the past, such as stealing, and stated that he wanted petitioner to have a fresh start in the Board's school. It contends that petitioner's father did not indicate to the school personnel that petitioner should have a special program nor did he or petitioner request an evaluation by the CST. (Tr. 80)

The Board admits that petitioner's father had a discussion with its Director of Special Services in the summer of 1975 to request financial aid for petitioner's summer program. It asserts that the Director advised petitioner's father that the Board could not assist him in the matter because petitioner was not enrolled in the Board's school. It further asserts that petitioner made no request for financial aid when he enrolled in its school in November 1975 (Tr. 59-60) The Board avers that its Director of Special Services was not aware of any problems with regard to petitioner during November and December of 1975. (Tr. 57)

The Board admits that three requests for tuition aid were made by petitioner through his attorneys. (J-21, J-25, J-27) It asserts that on July 7, 1975 petitioner's then attorney made a request to the Board for appropriate forms to permit the Board to pay petitioner's tuition for the summer enrollment, as well as tuition for the 1975-76 academic year to the Arlington School, McLean Hospital, Belmont, Massachusetts. (J-27) Subsequently, on April 26, 1976, a second attorney advised the Board that it was responsible for the tuition costs incurred by petitioner. (J-25) Thereafter, on December 23, 1976, a third attorney requested tuition aid from the Board for petitioner's education. (J-21) The Board contends that at the time of each of the three requests, petitioner was not enrolled in its schools and did not meet the requirements as set forth in N.J.S.A. 18A:46-6 and N.J.A.C. 6:28-1.8 (subsequently amended). It argues that at the time petitioner's psychiatric reports were submitted to the Board (J-12), petitioner was not enrolled in its schools and that its Child Study Team could not perform an evaluation of petitioner pursuant to N.J.S.A. 18A:46-6, 8 and N.J.A.C. 6:28-1.8. (Board's Brief, at pp. 9-13)

The Board argues that a local board of education is not responsible for tuition costs when a pupil has been placed in a State approved special education program outside of the State of New Jersey as a result of a court order. The Board asserts that there is no authority in N.J.S.A. 18A:46-1 et seq. for a judge to order a child to go to a special school. It contends that had the Legislature intended the courts to have such power, it could have specifically so stated as it did in N.J.S.A. 18A:47-4.

The Board observes that N.J.S.A. 2A:4-1 et seq. provides the authority for a Juvenile and Domestic Relations Court to commit a juvenile delinquent to a suitable institution. It specifically cites N.J.S.A. 2A:4-2 and asserts that when the court took jurisdiction of the incorrigibility complaint (J-1a), petitioner became a ward of the State and it was the obligation of the court, if it saw fit, to secure for him custody, care and discipline equivalent to that which should have been given by his parents. The Board argues that since the court did not order the local school district to pay tuition costs, such costs cannot be conferred when the order of the court was specifically silent with regard to that matter. The Board argues further that nowhere does the statute Title 2A authorize the court to require a local school district to assume the tuition costs for a juvenile coming under the jurisdiction of the court. (Board's Brief, at pp. 14-16)

The Board observes that juvenile courts were established to substitute rehabilitative treatment of the juvenile for penal incarceration and that such courts have broad power to compel governmental agencies to allocate funds so as to enforce constitutional rights. State, in the Interest of D.F. 138 N.J. Super. 383. It argues that in the instant matter the

court did not compel the Board to pay any expenses and the inference is that the court expected petitioner's father to pay such costs as he had done prior to the institution of the incorrigibility complaint against petitioner. The Board asserts that when a child steals or is declared incorrigible, such facts do not make him a handicapped child. It argues that to contend that petitioner's confinement at the Arlington School would be to attempt to stretch the provisions of N.J.S.A. 18A:46-1 et seq. Board of Education, Passaic et al. v. Board of Education of Wayne et al., 120 N.J. Super. 155, 160, 162 (Law Div. 1972)

The Board avers that the doctrine of laches applies in the instant matter as set forth by definition in the case of Flammia v. Maller, 66 N.J. Super. 440 (App. Div. 1961) at 453. It asserts that there was an inordinate delay in the instant matter from the time petitioner's legal counsel first made the request for tuition payments (J-27), to the time when the Petition of Appeal was filed before the Commissioner. It contends that a period of approximately twenty-six months elapsed between the foregoing events and that petitioner was represented by legal counsel who had the opportunity to establish petitioner's rights in the proper forum. The Board argues that if petitioner is successful in his appeal, it would work to the detriment of the Board and would be adverse to the public interest to pay tuition costs after such a delay. The Board argues that the doctrine of laches should bar relief to petitioner in the instant matter since all elements of laches were present; i.e., inaction of a party with respect to a known right for an unreasonable period of time coupled with detriment to the opposing party. Beisswenger et al. v. Board of Education of the City of Englewood, 1971 S.L.D. 489.

The hearing examiner has carefully reviewed the arguments of the parties, the documents in evidence, the transcript of the hearing and legal Briefs and recommends to the Commissioner the following:

With regard to the Board's assertion that the doctrine of laches should bar petitioner in the instant matter, the hearing examiner finds sufficient documentary evidence to show that petitioner had pursued his claim for tuition reimbursement commencing on July 7, 1975 and continuing to November 2, 1977. (J-27, J-25, J-23, J-2) He recommends, therefore, that the Commissioner dismiss the Board's motion grounded upon the equitable doctrine of laches.

In determining the question of domicile in the instant matter, the hearing examiner recommends that the Commissioner rely upon the definition of "domicile" as set forth by the New Jersey Supreme Court in the matter of Kurilla v. Roth, 132 N.J.L. 213, 215 (Sup. Ct. 1944) as follows:

> "***the relation which the law creates between an individual and a particular locality or country. In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. 17 Am. Jur. 588, 590; 28 C.J.S. 3. It is the place with which he has a settled connection for certain legal purposes, either because his home is there or because that place is assigned to him by the law.***"

In the context of such a definition, the hearing examiner finds that petitioner's father was a bona fide resident and domiciled within the limits of the Board's school district. He further finds that the father acquired custody of petitioner pursuant to the Agreement of Separation of April 24, 1970 and subsequently incorporated into the divorce decree of August 1, 1972 (J-13) which provided, inter alia, that the "***custody of the children during their respective minority shall be divided equally between both parties***." Notwithstanding the fact that the Agreement of Separation provided that "***the children shall reside during the school year with the wife in her residence,***" the credible evidence in the instant matter shows that there was the "***consent of both parties***" to have petitioner reside with his father commencing in November 1975. (Tr. 30, 38, 40, 49)

The hearing examiner further finds that the Board was not responsible for petitioner's tuition expenses from December 1975 to the present. Such a finding is grounded upon the credible testimony of the Director of Special Services and petitioner's guidance counselor wherein they stated that no referral was made to the Board's CST, either by teaching staff members, petitioner or his father. There was no indication that petitioner should have been referred to the Child Study Team during his twenty-three days of attendance at the high school in November and December 1975. (Tr. 57, 59, 63, 69, 76-83)

The hearing examiner further relies upon the orders of the court of December 19, 1975 and August 26, 1976 wherein the court either refused, failed or ignored placing the educational costs for petitioner upon the Board. The hearing examiner recommends, therefore, that the Board of Education of the Borough of Metuchen not be held responsible for petitioner's educational tuition expenses. He further recommends that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record including the hearing examiner's report and the exceptions filed by the parties in the instant matter.

Petitioner takes exception to the hearing examiner's conclusion that respondent was not responsible for petitioner's tuition expenses from December 1975 to the present. Petitioner argues that E.E. was a bona fide resident of the Borough of Metuchen enrolled in the Metuchen High School from November to December 1975 and that he had sought assistance from the Board for payment of tuition as early as July 7, 1975. The Board, on its part, argues that E.E. was never truly domiciled within the limits of its school district but was, in reality, in the custody of his mother based upon the agreement of separation dated April 24, 1970 and incorporated into the divorce decree of August 1, 1972.

The Commissioner has weighed the arguments posed by the parties relative to the residency of E.E. and has determined that E.E. by virtue of his father's unquestioned domicile in Metuchen and his enrollment and attendance at the Metuchen High School was a bona fide resident and eligible for those services available to any other such resident. The Commissioner notes that the separation agreement between the parents of E.E. specifically provided that custody of the children of the marriage was to be "***subject to revision by mutual agreement***." (J-13, at p. 3)

Having determined the question of E.E.'s residency, the Commissioner must now consider the matter of petitioner's claim for tuition reimbursement based upon the Board's alleged failure to evaluate and classify him while he attended Metuchen High School. Petitioner takes exception to the hearing examiner's determination that the Board was not responsible for petitioner's tuition expenses from December 19, 1975. Petitioner argues that the Board failed to classify E.E. pursuant to N.J.S.A. 18A:46-1 et seq. despite being aware of his educational history prior to his enrollment in the district's high school. Petitioner argues that the Board's failure to classify petitioner represents an avoidance of their statutory obligation. The Board, however, takes the position that E.E. never met the statutory requirements of N.J.S.A. 18A:46-1 et seq. and was, therefore, not a handicapped pupil. The Board specifically contends that, despite petitioner's enrollment in the Metuchen Public Schools in November 1975, petitioner's father never gave any indication to the Board's staff that he wished E.E. to be referred to the district's CST for purposes of classification. The Board argues and the testimony supports the fact that petitioner's father requested a normal school curriculum for petitioner. The Board further contends that at no time during E.E.'s short period of attendance at Metuchen High School between November and December 1975 did petitioner manifest behavior that would indicate the need or desirability of evaluating or classifying him as a handicapped pupil.

The Commissioner, in reviewing the evidence and the record before him, must conclude, consistent with the findings of the hearing examiner, that petitioner was admitted as a regular pupil into the Metuchen High School and that at no time during that period of attendance was there an official request for evaluation or classification nor did petitioner's performance and behavior reflect a need for such referral.

Petitioner's final exception is taken to the hearing examiner's conclusion that since the orders of the Juvenile and Domestic Relations Court did not specifically require the Board to pay tuition costs for E.E.'s placement at the Arlington School of the McLean Hospital in Belmont, Massachusetts and the Yale Psychiatric Institute, the Board was not responsible for such costs. Petitioner cites precedent in Harbor Hall School v. Board of Education of the Township of Weehawken, 1977 S.L.D. 342 wherein a local board claimed an inability to make an evaluation because of a court ordered placement and absent such evaluation, classification, and development of program, it was not obligated to pay for the schooling. The Commissioner, however, ruled against the board because of its failure to make a good faith effort to evaluate the child.

In reviewing the entire record and the transcript of the proceedings, the Commissioner finds petitioner's argument relative to the Board's failure to make a good faith effort to evaluate E.E. subsequent to his assignment by the court to have merit. The record is clear that petitioner's father individually and through counsel made numerous attempts to seek an evaluation by the Metuchen CST. A letter dated March 8, 1977 from the State Department of Education through the Middlesex County Regional Coordinator specifically authorized a request for classification and recommended that the Board comply with the request of petitioner's father for an evaluation. (J-15)

The Board,for its part, chose instead to insist upon its lack of jurisdiction because of its challenge of petitioner's residency. The Commissioner, having found that petitioner was a resident of Metuchen at the time of his assignment by the Juvenile and Domestic Relations Court to the two residential placements cited, ante, and also finding petitioner's argument relative to the applicability of the precedent established in Harbor Hall, supra, to be on point, determines that the Metuchen Board of Education had a responsibility to undertake an evaluation of petitioner subsequent to the court ordered placement to determine his eligibility for classification and possible tuition reimbursement. Having failed to do so, and clear and unrefuted evidence having been introduced into the record as to the unresolved emotional and behavioral disorders manifested by petitioner, the Commissioner finds and determines that the

Respondent Metuchen Board of Education failed in its obligation to undertake an evaluation for classification purposes and should therefore reimburse the parent of petitioner for all tuition costs incurred from December 1975 to November 13, 1979 when petitioner reached his 20th birthday. IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

November 3, 1980

Pending State Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4597-79
AGENCY DKT. NO. 364-9/79A

IN THE MATTER OF:

JAMES J. FLANAGAN,
Petitioner
v.
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,
Respondent.

Record Closed: August 8, 1980
Agency Received: 9/23/80

Decided: September 18, 1980
Mailed to Parties: 9/24/80

APPEARANCES:

Duane O. Davison, Esq., for Petitioner (Kaye & Davison, attorneys)

Malachi J. Kenney, Esq., for Respondent (Murray, Granello & Kenney, attorneys)

BEFORE **AUGUST E. THOMAS,** ALJ:

Petitioner is a teaching staff member employed by the Board of Education of the City of Camden (Board) who alleges that his transfer from a twelve- to a ten-month position and the resultant change in his title is a demotion violative of his salary, tenure, and seniority rights.

This matter was filed in the office of the Commissioner of Education and thereafter transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

It is stipulated that Petitioner has been continuously employed by the Board since September 1, 1968, when he was appointed as a teacher, and that he has served in other educational capacities since that time. The Board concedes that Petitioner earned tenure as a teacher and as a Supervisor of Audio-Visual. It denies his claim that he has tenure in the category of general supervisor. His service follows:

DATE	TITLE	WORK YEAR
09/01/68	Teacher	ten-month
09/01/72	Multi Media Specialist	ten-month
08/75	Adm. Ass't, Off. of Staff Development	twelve-month
10/01/76	Supervisor of Audio-Visual	twelve-month

This last position was advertised with a job description in September 1976 (R-1). The Board abolished that position effective June 30, 1979, and assigned Petitioner for the month of July 1979 as a Media Specialist for the Title I program. On September 1, 1979, Petitioner was assigned to the Environmental Center, Title I Program, a ten-month position. (Board's Brief, pp. 1-4; Petitioner's Brief, pp. i, ii)

In addition to his degrees Petitioner holds certificates as an elementary school teacher, principal, and supervisor. (P-1, P-2; Exhibit A) He contends that he qualifies as a general supervisor pursuant to the State Board of Education rule (N.J.A.C. 6:3-1; 10[K]10); consequently, he argues that he posesses greater seniority than some of the other supervisors and that he had bumping rights when his position was abolished.

The Board argues that although Petitioner holds a certificate as a supervisor, he was appointed as and accepted the position of Supervisor of Audio-Visual, a subject supervisor. Therefore, Petitioner holds tenure solely in the specific category of Supervisor of Audio-Visual, K-12. (Board's Brief, pp. 4-7; N.J.A.C. 6:3-1.10[K]22)

The record reveals that as of June 30, 1980 the Board employed at least 23 subject area supervisors. Examples are: Music, K-12; Special Education; Business Education, 7-12; Transportation; Mathematics and Afro-American Studies; Elementary Grades; Home Economics; Bi-Lingual Education; Language Arts; Health Services. (J-2) This sampling gives evidence of the nature of the Board's supervisory program. The document (J-2) shows that each of the 23 supervisory positions listed is specialized by a subject title as was Petitioner's (R-1).

To be resolved is whether or not the scope of Petitioner's certificate extends to the degree that he is and entitled to a seniority status, based on his years of service, over the holders of others serving as specific subject matter supervisors. (N.J.S.A. 18A:28-9 et seq.)

Irrespective of the Superintendent's testimony that supervisors were required to have subject area expertise, there was testimony from Dr. Fred Price, Director of the Bureau of Teacher Education and Certification, State Department of Education, that one did not need subject area expertise to be a subject area supervisor in any area. Dr. Price testified that prior to 1965 the Department of Education issued individual subject area certificates for supervisors such as; music, home economics, etc. However, the requirements were changed so that once a person had acquired a supervisor's certificate, he/she is eligible to supervise all grades and all subjects K-12.

Authorization for the Supervisor's Certificate is set forth in N.J.A.C. 6:11-10.4(c) as follows:

> "(c) Supervisor: This endorsement is required for supervisors of instruction who do not hold a school administrator's or principal's endorsement. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel. This endorsement also authorizes appointment as an assistant superintendent in charge of curriculum and/or instruction."

The State Board of Education regulations set forth the scope of seniority attached to teaching staff member certificates as stated in N.J.A.C. 6:3-1.10(K)(27) as follows:

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

Decision law support for Petitioner's tenure contention is found in Vieland v. Board of Education of Princeton Regional School District, 1976 S.L.D. 892, affirmed State Board of Education 1977 S.L.D. 1308.

Consequently, **I FIND** that:

1. Petitioner holds tenure as a teacher.
2. Petitioner holds tenure as a general supervisor.

I CONCLUDE that the Board erred when it limited Petitioner's tenure to audio-visual supervisor; therefore, Petitioner was entitled to be placed on a preferred eligibility list when his position was abolished. (N.J.S.A. 18A:23-11 et seq.; N.J.A.C. 6:3-1.10h.) Such placement would demand his assignment to any supervisory position in the district where his seniority as a supervisor is greater than that of other supervisors.

In consideration of this conclusion the Board is **ORDERED** to place Petitioner on a preferred eligibility list as a general supervisor and assign him to any position as a supervisor if his seniority so demands. Assuming Petitioner is reinstated as a supervisor, the Board is also **ORDERED** to pay Petitioner the difference between the salary he has received and that which he would have received if he had remained in its employ as a supervisor.

DOCUMENTS IN EVIDENCE

Exhibit A	Certificate of Mr. Flanagan as principal and supervisor
J-1	Positions listed
J-2	Seniority list for supervisory positions within the Camden Public Schools, dated 6/30
P-1	J. Flanagan's certification as an elementary school teacher
P-2	Photocopy of Master's Degree of James Flanagan
P-3	List prepared with reductions in force listed
P-4	Form
R-1	Document reading "Circular #7 series 1976-77,"
R-2	Document with position opening for Supervisor of Title E.S.L. and migrant project

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

18 September 80
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

JAMES J. FLANAGAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner's initial exceptions reaffirm his tenure as a supervisor and his seniority therein and his entitlement to a salary differential for the school year 1979-80 as though appointed to a supervisory position. The Board's initial exceptions deny respondent's seniority rights as a supervisor and his entitlement to any back salaries. The Board contends that his qualification and competence are limited solely to that of Supervisor of Audio-Visual, K-12 wherein he accrued tenure and seniority rights in that limited field. Petitioner's reply exceptions assert his right of tenure and seniority to a general supervisor's position. The Commissioner agrees.

The supervisor's certificate established by N.J.A.C. 6:11-10.4(c) clearly defines a supervisor as

> "***any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel.***"

Petitioner herein holds a certificate both as a principal and supervisor. (Exhibit A) Holding such a certificate entitles him to supervise any grade or subject matter area established in respondent's school district. The Commissioner so holds.

Petitioner accordingly has seniority rights over any other supervisor with fewer years of supervisory experience than his own. In accordance with this fact, the Board shall forthwith

place petitioner in a supervisory position to which he is entitled and remunerate him as though so employed as of the school year 1979-80.

It is so directed.

COMMISSIONER OF EDUCATION

November 6, 1980

Pending State Board of Education.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3930-79
AGENCY DKT. NO. 257-6/79A

IN THE MATTER OF:

DONALD L. BAILEY,
Petitioner,
v.
THE BOARD OF EDUCATION OF THE BOROUGH OF PITMAN, GLOUCESTER COUNTY,
Respondent.

Record Closed: August 15, 1980
Agency Received: 9/25/80

Decided: September 24, 1980
Mailed to Parties: 9/26/80

APPEARANCES:

Steven R. Cohen, Esq. for the Petitioner (Selikoff & Cohen)

Rowland B. Porch, Esq. for the Respondent

BEFORE **ERIC G. ERRICKSON,** ALJ:

Petitioner, a captain in the New Jersey National Guard and a teaching staff member employed by the Pitman Board of Education, appeals from an action of the Board refusing to pay his salary of $200.25 for a three (3) day period in March, 1979, during

which he attended a training session for National Guard company commanders at Fort Knox, Kentucky.

The matter was transferred to the Office of Administrative Law for processing as a contested case, pursuant to the provisions of N.J.S.A. 52:14F-1 et seq. A Stipulation of Facts was submitted by the parties. Thereafter, a hearing was conducted at Trenton on February 11, 1980 to establish additional relevant facts. Post hearing briefing ensued, during which extensions of time for justifiable reasons were granted.

The contextual setting of the dispute is revealed by the following recitation of undisputed facts:

Petitioner, on February 28, 1979, was advised by his commanding officer of the Fiftieth Armored Division of the National Guard that he deemed it necessary for petitioner and the other four (4) divisional company commanders to attend a refresher training course for company commanders at Fort Knox, March 18-21. Petitioner discussed the matter with his principal the next day and, at his direction, made written application for leave to attend. (P-1) Written permission was granted petitioner by the Superintendent for a three (3) day leave from his teaching duties with the contingent proviso that he accept the leave of absence without pay. (R-1)

TESTIMONY OF WITNESSES:

Petitioner testified that his battalion commander advised him on February 28, 1979 that he deemed it necessary that all company commanders in his battalion attend a refresher and training course of four (4) days duration at Fort Knox, March 18-21, 1979. He testified that he discussed the matter with his principal the next day and requested military leave for the three (3) days school would be in session. He testified further that he procured Form NJ DOD 33, dated March 6, which stated that petitioner had indicated his willingness to perform military duty, that that duty was considered essential to further mobilization readiness of the State's military forces, and that it was the policy of the State to seek employer's approval prior to issuance of formal orders. (R-1)

Petitioner testified that when he was advised that his leave was approved with the contingent proviso that it was without pay, he made prompt protest to his principal.

Petitioner testified that he received his official orders signed by the Governor upon arrival at Newark Airport for his flight to Fort Knox on Sunday, March 18. He testified that he participated in training part of which was of a secret nature which would not otherwise have been available to him. He testified that, after he submitted copies of his orders upon his return to the school, he again protested to his superiors the fact that he was not paid for March 19-21 and filed grievances at levels one, two, and three under the negotiated agreement. (P-2,3) That he did so was corroborated by the principal and the Superintendent.

Petitioner's principal testified that since his prior conversation with petitioner led him to believe that he was in fact asking for personal leave rather than paid military leave, he had personally written on petitioner's application the words "without pay." (P-1) The principal also testified that he assured the Superintendent that he was confident that petitioner would leave good plans for his substitute and that the educational program would be effective in his absence.

The Superintendent testified that, when on March 8 he processed petitioner's written request for leave, the principal's notation thereon that it should be without pay caused him to handle the request as one for personal leave without pay. He testified that he approved petitioner's request for leave as one without pay without referring the matter to the Board. He testified that, as a reservist himself, he had never seen such a request without formal orders from a military unit. He testified further that he understood that since "*** petitioner was volunteering for this duty, he was not required to go, it would have to be handled under personal leave.***" He testified further that when petitioner talked to him upon his return he advised him as follows: "[I] t was with your consent, *** you were not required to go and, consequently, you have no statutory rights."

FINDINGS OF FACT:

Having considered the documents in evidence and the testimony of witnesses, **I FIND** the following additional relevant facts to be considered with those uncontroverted facts previously enunciated.

1. Petitioner, when told by his battalion commander that it was necessary for him and all other battalion company commanders to attend a training course, gave his assent. That assent, however, was not an act of

volunteering for a totally optional activity. Rather, it was the assent of one who, having achieved a position of authority and leadership in a defense unit, agreed to undergo the special training deemed necessary by his commanding officer.

2. The Superintendent as an agent of the Board agreed without protest to allow petitioner to attend with the conditional unilateral proviso that the three (3) day leave be without pay.

3. Petitioner protested that proviso both before and after the leave. At no time did petitioner apply for or agree to a personal leave without pay.

4. Petitioner was in fact ordered by the Governor to training at Fort Knox for March 18-21, 1979 although those orders were not received by petitioner until March 18 at Newark Airport.

DISCUSSION AND DETERMINATION:

Petitioner had no control over the policy and the sequential events set in motion by the New Jersey Department of Defense and the New Jersey National Guard authorities, which chose to seek the approval of the Board prior to issuance of orders by the Governor. The military's good faith attempts to avoid unnecessary interruption in the conduct of public business is clear from the language of their request for his leave:

> "*** In order to avoid scheduling of this duty at a time which would provoke undue interference with the conduct of public business, it is the policy of the New Jersey Department of Defense that approval of the necessary leave of absence from employment by the Head of the Agency concerned will be obtained prior to issuance of orders directing an individual to perform this duty.***" (R-1)

Finding no reason to deny petitioner's request, the Superintendent approved his leave for March 19-21. Thereupon, orders from the Governor were issued.

It is agreed by the parties that petitioner was not engaged in field training but in special training at a military base. Accordingly, the statute of reference is as follows:

> 38A:4-4. Leave of Absence for employees without loss of pay; additional to regular vacation
>
> "(a) All officials and employees of this State or of any board or commission of the State or of any county, school district or municipality who are members of the organized militia shall be entitled to leave of absence from their respective duties without loss of pay or time on all days during which they shall be engaged in active duty, active duty for training or other duty ordered by the Governor; provided, however, that the leaves of absence for active duty or active duty for training shall not exceed 90 days in the aggregate in any one year.***"

The respondent Board argues that petitioner, by his assent to attend training, volunteered and is, for that reason, precluded from receiving pay for the three (3) days school was in session.

The statute is silent with regard to whether one assents to attend a training school. It does, however, affirmatively state that there shall be no loss of pay on all days of active duty for training ordered by the Governor. Nor does the statute specify, as the Board argues, that the orders of the Governor must be issued prior to a reservist's request for leave.

The canons of statutory interpretation require that the words found in statutes be given their ordinary meaning without usurping the Legislative function by detracting from or adding to the intended meaning. The Courts have spoken in this regard, as follows:

> "*** The purpose of (statutory) construction is to bring the operation of a statute within the apparent intention of the Legislature.***" Sperry & Hutchinson Co. v. Margetts, 15 N.J. 203 (1954) (at p. 209)
>
> "*** A statute should not be construed to permit its purpose to be defeated by evasion.***" Grogan v. DeSapio, 11 N.J. 308 (1953) (at p. 322)
>
> "*** We are enjoined to interpret and enforce the legislative will as written, and not according to some unexpressed intention.***" Hoffman v. Hock, 8 N.J. 397 (1952) (at p. 409)

No express language appears in N.J.S.A. 38A:4-4 excluding from its protection one who assents to attend a military training school for a period less than ninety days. Accordingly, **I CONCLUDE** that petitioner, having been told by his superior that the training was necessary, waived no protection of the statute by assenting to undergo that training in the line of duty. Nor is petitioner, within the above factual context, excluded as respondent asserts, from the statutory benefits of N.J.S.A. 38A:4-4, by the Court's holding in Lynch v. Borough of Edgewater, 8 N.J. 279 (1951). That case is distinguishable and inapplicable to the facts herein for the reason that it was concerned solely with field training which petitioner, admittedly, was not engaged in on March 18-21, 1979. It is further distinguishable in that it was concerned with a different statute, namely N.J.S.A. 38:23-1 which is inapplicable herein.

The protection of N.J.S.A. 38A:4-4 applies to petitioner and requires that he suffer no loss of pay for March 18-21, 1979. Accordingly, **IT IS ORDERED** that the Board within a thirty day period from the date this decision becomes final, compensate petitioner in the additional amount of $200.25, notwithstanding any military pay he may have received for the period March 18-21, 1979.

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

OAL DKT. NO. EDU 3930-79

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

September 24, 1980
DATE

Eric G. Errickson
ERIC G. ERRICKSON,ALJ

DONALD L. BAILEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PITMAN, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the Board pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent Board excepts to the initial decision by Eric G. Errickson, ALJ, alleging instead that petitioner voluntarily consented to attend the training course without pay. The Commissioner finds no merit therein, the record clearly shows petitioner's prompt protest of the "no pay" policy of the Board. Such protestation included petitioner's invocation of the grievance procedure as negotiated. Respondent's reliance on Tirri and Montrose v. Board of Education of Paterson, 1977 S.L.D. 1237 is misplaced dealing as it does with reliance on N.J.S.A 38:23-1 rather N.J.S.A. 38A:4-4 applicable herein.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, irrespective of any military pay petitioner received, the Board shall within the next payroll period compensate him the amount of $200.35.

It is so directed.

COMMISSIONER OF EDUCATION

November 7, 1980

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,

PETITIONER,

V.

D.S., by his parents,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Rubin, Lerner & Rubin (David B. Rubin, Esq., of Counsel)

For the Respondents, Theodore A. Sussan, Esq.

The above-captioned matter currently before the Commissioner is an appeal of the Chief Classification Officer's decision of February 27, 1979 in D.S. v. Board of Education of East Brunswick. Therein the principal finding was that the Board of Education, as the sole public agency responsible for determining D.S.'s placement, placed him in a private residential facility in January 1977 for educational reasons. Further, the classification officer ordered the continuance of D.S. in the private school until such time as a new plan, supported by evaluation data and clear rationale of conclusion, is developed by the CST and D.S.'s parents.

The classification officer further ordered that the parents be reimbursed for maintenance costs from January 1977 to the date of the decision, February 27, 1979, as well as prospectively, so long as D.S. was properly assigned to the private school involved.

The Board now contends that it is not responsible for maintenance expenses arising from the placement of D.S. in a private school prior to the adoption of N.J.A.C. 6:28-4.3(g) by the State Board of Education early in 1978; that the findings of the classification officer that D.S.'s placement in the private school was educationally necessary at the time and remained so through the 1978-79 school year were against the weight of evidence; and that the hearing itself was procedurally defective because the classification officer failed to clearly delineate the burdens of proof of the respective parties and the standard of review.

The Commissioner agrees that the comprehensive redraft of N.J.A.C. 6:28-1.1 et seq. adopted by the State Board of Education effective August 11, 1978 cannot be applied retrospectively

since N.J.S.A. 52:14B-1 et seq. states that rules adopted by administrative agencies become effective "upon filing with the Secretary of State." Accordingly, the Commissioner reverses the determination by the classification officer that the parents of D.S. be reimbursed for residential expenses incurred from January 1977 through August 1978. Whether or not the Board has any further financial obligations in regard to D.S.'s residential assignment to a private school will be determined later.

The Board further contends that the decision of the classification officer that the placement of D.S. in a private school in 1978-79 was educationally necessary is flawed by his not giving proper weight to the testimony of the Regional Resource Team given on August 15, 1978. The RRT said then that "placement in a private, residential facility is not necessary to meet [D.S.'s] needs."

It was held by the classification officer that the school district's IEP for D.S. determined in July 1978 did not set forth sufficient rationale for changing D.S.'s placement for 1978-79. The Commissioner, having reviewed the decision and the briefs of appeal and response thereto, finds no valid reason to overturn the conclusions therein. Inasmuch as the new rules adopted by the State Board of Education were effective in August 1978, the Board must reimburse the parents of D.S. for his maintenance at the private facility through the 1978-79 academic year. The fairness of this judgment is buttressed by the decision of the Superior Court of New Jersey, Middlesex County, on October 27, 1979 which ordered the Board to assume responsibility "for the maintenance of [D.S.] at the American Institute of Mental Studies effective February 27, 1979."

The Board entered a motion in Superior Court on February 7, 1980 seeking clarification as to whether or not it is responsible for paying maintenance invoices submitted by A.I.M.S. for the 1979-80 school year. Absent a stay by the Court or a decision negating the determination of the classification officer, the Commissioner orders the continuation of the maintenance reimbursement program provided for in the February 27, 1979 decision.

As to the Board's claim that the hearing conducted by the classification officer was procedurally defective, the Commissioner disagrees. Examination of the record indicates that the classification officer was fair and impartial and it is devoid of any indication that any attorney present, or any witness called, objected to the conduct of the hearing at the time. Failure to do so makes charges of unfairness at this time inappropriate. The Commissioner dismisses the allegations as being irrelevant and immaterial to the instant motion.

In summary, the Commissioner reverses the classification officer's decision of February 27, 1979 to the extent that he ordered the Board to reimburse D.S.'s parents for maintenance

costs incurred in educating their son at a private residential facility during a period prior to August 1978 when payment for such services by an agency of the State was not permissible under the law.

On all other points the decision of the classification officer is affirmed. Until it can develop an individualized education program (IEP) which merits D.S. being transferred from a residential facility to a day school, the Board must continue to reimburse the parents for D.S.'s maintenance costs as well as tuition incurred.

The Commissioner retains jurisdiction in this matter until the Division of School Programs, Branch of Special Education and Pupil Personnel Services is satisfied that the Board of Education of East Brunswick is meeting the constitutional and statutory requirements of providing a handicapped child with a proper public school education or its legal alternative.

COMMISSIONER OF EDUCATION

November 13, 1980

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. ——
AGENCY DKT. NO. 311-9/78

IN THE MATTER OF:

MIRIAM GOLDSTEIN,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,
Respondent.

APPEARANCES:

Edward M. Rothstein, Esq. for Petitioner (Rothstein, Mandell & Strohm, attorneys)
Robert Rosenberg, Esq. for Respondent (Russo & Courtney, attorneys)

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

Petitioner claims her assignment to a third grade teaching position upon return from approved sabbatical leave, where she had functioned before leave as a reading specialist, was punitive and without reason. She claims tenure entitlement to the reading position and asks an order so reassigning her. The Jackson Township Board of Education (Board) denies each of petitioner's claims and asks that the petition be dismissed.

The matter was timely opened before the Commissioner of Education on September 1, 1978. An answer to the petition of appeal was received and a prehearing conference was held on February 14, 1979. The matter was transferred to the Office of

Administrative Law on July 2, 1979 pursuant to N.J.S.A. 52:14F-1, et seq. One day of hearing was held on August 22, 1979 at Toms River. Posthearing submissions were filed.

Petitioner was hired by the Board effective September 1, 1970. The contract covering the 1970-71 school year (R-7c) states petitioner is to teach and no specification of grade level, area of specialty or place of assignment is made. Identical contracts for 1971-72 (R-7b) and 1972-73 (R-7a) were executed. Thereafter, petitioner having acquired tenure status, notices of employment and salary for each school year were provided her which she signed and returned to the Board. (R-1 - R-6)

From the testimonial and documentary evidence and stipulations of the parties adduced, **I FIND:**

1. Petitioner was employed as a reading teacher in an elementary school commencing September 1, 1970. (R-7c)

2. Petitioner was employed under a teacher of reading certificate issued by the State Board of Examiners in August 1970. (Conference agreements, February 14, 1979.)

3. Petitioner served as a reading teacher in an elementary school from September 1, 1970 until going on approved leave to improve professional competence in the 1977-78 school year.

4. Petitioner received uniformly positive evaluations while so serving.

5. Petitioner achieved a tenure status on September 3, 1973.

6. On January 10, 1973, N.J.A.C. 6:11-12.20 became effective and established the reading specialist certification.

7. Petitioner was issued a reading specialist certificate in April 1977.

8. Petitioner filed her reading specialist certificate with the Board in April 1977.

9. Petitioner was on approved sabbatical leave at half pay in the 1977-78 school year. She took courses relating to reading instruction and supervision. (P-7, P-8)

10. Subsequent to conclusion of her leave and prior to the beginning of the 1978-79 school year petitioner was noticed that she was assigned for that school year as a third grade teacher.

11. The Board had promulgated no job description for elementary reading teachers during the time in question.

12. The Board had established no positions of or job description for reading specialists during the time in question.

13. During petitioner's sabbatical leave the position was filled by a person who theretofore had been a classroom teacher but who was qualified to serve as a teacher of reading. This person continued to hold the position upon petitioner's return and reassignment. This person's qualifications for the position are not in contention.

14. Petitioner protested her reassignment through the proper channels to no avail. (P-10 - P-19)

A board of education has the statutory right to transfer teachers within the scope of their certificates. (N.J.S.A. 18A:25-1) This has been maintained in a long line of court and Commissioner of Education decisions beginning with Greenway v. Camden Bd. of Ed., 129 N.J.L. 461 (E.& A. 1942) aff'ing 129 N.J.L. 46 (Sup. Ct.).

In the present matter, the Board does not deny that petitioner is well qualified as a reading teacher and that her evaluations were highly positive throughout her service. It is stipulated that she had a proper reading certificate at all pertinent times and she has tenure as a teacher. The Board does deny that its action was arbitrary or capricious.

The Board's memorandum of law submitted after hearing make two arguments: that petitioner has failed to carry the burden of proof and that administrative conven

ience and expense must be considered sufficient rationale for not returning petitioner to her reading position.

Addressing the second argument, it would appear to serve little purpose and make less sense to grant a teaching staff member a sabbatical leave for study in supervision and reading instruction and subsequently reassign her to a self-contained, third grade class. Where is the greater benefit to the educational system?

Petitioner's sabbatical leave was granted without consideration for her assignment on her return. She agreed to serve at least two years following her leave. As was said in a related case, McClintock v. Englewood Cliffs Bd. of Ed., 1971 S.L.D. 277, at 283, "Certainly one intention of such a policy is to take advantage of the teacher's newly gained knowledge."

As to burden of proof, it is axiomatic that tenure is granted to teachers, not positions and there is no argument that petitioner has tenure as a teacher. Yet I cannot reconcile six years' service as a reading teacher, uniformly high evaluations of that service and a grant of leave to improve professional competence with a decision, held by the Board to be not grievable, to place the teacher in a position other than teacher of reading. In the complete absence of any reason other than administrative convenience, an elementary sense of justice dictates that this is clearly an arbitrary act. It follows, therefore, that petitioner has carried her burden.

In consideration of the above and the findings of fact in this matter, **I CONCLUDE** petitioner was wrongfully denied the position of teacher of reading upon return from sabbatical leave and thereafter.

Accordingly, the Jackson Township Board of Education shall immediately restore Miriam Goldstein to a position of elementary school teacher of reading. **IT IS SO ORDERED.**

No salary or other emolument having been withheld from petitioner there is no other relief she may be afforded.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law

is empowered to make a final decision in this matter. However, if Fred G. Burke does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

29 SEPTEMBER 1980
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

MIRIAM GOLDSTEIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board's primary exception to the initial decision by Bruce R. Campbell, ALJ argues that the Board never established a position of reading teacher or specialist and perforce was free to transfer petitioner within the scope of her certificate. Petitioner's reply exceptions refute the arguments of the Board contending that the record clearly establishes that her duties and obligations during her employment with the Board were in fact those of a reading specialist pursuant to N.J.A.C. 6:11-12.20. The Commissioner agrees.

The aforementioned provision of the Code, effective January 10, 1973, is herewith set down in full:

> "Reading specialist; certification
>
> "(a) This certificate is required for service as a reading specialist in a public school district.
>
> "(b) A reading specialist is one who conducts in-service training of teachers and administrators, coordinates instruction for individuals or groups of pupils having difficulty learning to read, diagnoses the nature and cause of the individual's difficulty in learning to read, plans developmental programs in reading for all pupils, recommends methods and material to be used in the district reading program, and contributes to the evaluation of the reading achievement of pupils.

"(c) The requirements, effective for new applicants after July 1, 1975, are:

1. A standard New Jersey certificate in any instructional area;
2. Two years of successful teaching experience;
3. Successful completion of a graduate degree program in reading approved by the New Jersey State Department of Education; or
4. A program of graduate studies of 30 semester hours or equivalent consisting of the following:

i. Reading foundations;
ii. Diagnosis;
iii. Correction of reading problems;
iv. Supervised practicum in reading; plus
v. Study in at least three areas from the following:
(1) Children's or adolescent literature;
(2) Measurement;
(3) Organization of reading programs;
(4) Psychology;
(5) Supervision;
(6) Linguistics."

An examination of the record including the exhibits therein clearly shows that petitioner's functions comport with those identified in N.J.A.C. 6:11-12.20 as listed in her supervisor's reports:

"Mrs. Goldstein displays proven competency in her role as Reading Specialist. She is to be commended for the excellent manner in which she carried out her role as R2R coordinator in all three areas - with the faculty, pupils, and in the community." (P-3)

"Because of her thorough knowledge of her subject both as an instructor and as a Reading Resource Specialist she has been able to offer expert guidance in the selection and the appropriate use of new materials and programs.

"In addition, Mrs. Goldstein has shown much talent and expertise in her other functions as a Reading Resource Leader.

> Plans and carrys (sic) out building inservice programs.
>
> Recommends and arranges out-of-district reading visitations.
>
> Coordinates parent and peer teaching aides.
>
> Meets with teachers during and after school or regularly scheduled basis.
>
> Assists in pupil placement decisions.
>
> "Also, Mrs. Goldstein's expert knowledge in the area of Learning Disabilities has indeed made her an extremely valuable asset to my building." (P-4)

The Board's inaction in establishing the position of reading teacher or supervisor does not negate the fact that petitioner's function conformed largely with the specification therein.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

The Commissioner directs that petitioner be immediately restored to a position of elementary school teacher of reading.

COMMISSIONER OF EDUCATION

November 17, 1980

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
AGENCY DKT. NO. 381-12/77

IN THE MATTER OF:

PEMBERTON TOWNSHIP EDUCATION ASSOCIATION and **ANNE T. RUSSELL, JEAN M. MEEHAN** and **LINDA B. ROYAL,**
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,
Respondent.

APPEARANCES:

Steven R. Cohen, Esq., for Petitioners (Selikoff & Cohen)

Ernest N. Sever, Esq., for Respondent (Sever & Hardt)

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

Petitioners Russell, Meehan and Royal allege that the Pemberton Township Board of Education (Board) improperly placed them on the negotiated salary schedule for the 1977-78 school year and that such placement did not reflect the salary increments to which each would have been entitled. The Board denies the allegations and avers that it placed each petitioner at the appropriate level on its 1977-78 salary schedule.

This matter having been opened before the Commissioner of Education on December 6, 1977 was subsequently, on July 2, 1979, transferred to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1

et seq. A hearing was held on October 18, 1979, at the Office of the Burlington County Superintendent of Schools, Mount Holly, New Jersey.

STIPULATIONS

The parties entered into a stipulation of petitioners' employment records as follows:

1. School Year; Anne T. Russell:

   1973-74 No prior teaching experience. Commenced employment on January 18, 1974 for the remainder of the 1973-74 school year.

   1974-75 Employed for entire school year, reemployed for 1976-77 school year.

   1976-77 Employed from September 1, 1976 until January 1, 1977. Granted a maternity leave of absence without pay from January 1, 1977 to January 31, 1977. Returned to duty and completed 1976-77 school year.

   1977-78 Employed for entire school year, reemployed for 1978-79 school year.

   1978-79 Employed for entire school year, reemployed for 1979-80 school year. (TR. 10-14)

2. School Year; Jean M. Meehan

   No prior teaching experience.

   1972-73 Employed for entire school year, reemployed for 1973-74 school year.

   1973-74 Employed for entire school year, reemployed for 1974-75 school year.

   1974-75 Employed from September 1, 1974 until November 1, 1974. Granted a maternity leave of absence from October 1, 1974 to November 8, 1974. Returned to duty and completed 1974-75 school year.

1975-76 Employed for entire school year, reemployed for 1976-77 school year.

1976-77 Employed from September 1, 1976 and continued through February 1, 1977. Granted an unpaid maternity leave of absence from February 2, 1977 to June 30, 1977, reemployed for 1977-78 school year.

1977-78 Employed for entire school year, reemployed for 1978-79 school year.

1978-79 Employed for entire school year, reemployed for 1979-80 school year. (TR. 15-19)

3. School Year; Linda B. Royal

No prior teaching experience.

1973-74 Commenced employment on January 30, 1974 for the remainder of the 1973-74 school year.

1974-75 Employed for entire school year, reemployed for 1975-76 school year.

1975-76 Employed for entire school year, reemployed for 1976-77 school year.

1976-77 Granted unpaid maternity leave of absence from September 1, through December 31, 1976. Returned to duty January 1, 1977 and completed 1976-77 school year.

1977-78 Employed for entire school year, reemployed for 1978-79 school year.

1978-79 Employed for entire school year, reemployed for 1979-80 school year. (TR. 19-27).

4. The parties stipulated that at no time did the Board take any action to withhold petitioners' salary increments pursuant to N.J.S.A. 18A:29-14. (TR. 27).

5. The parties stipulated that there was no dispute with respect to the work performance of petitioners' for the school years 1976-77, 1977-78 and 1978-79.

6. It was stipulated that the Board's Policy R5141.1 General Information Relating to the Salary Schedule was the only policy utilized by the Board with respect to salary adjustments and advancement on the salary guide. (TR. 31-32) The Board's Policy R5141.1 is set forth in toto as follows:

"R5141.1 - General Information Relating to the Salary Schedule

In adopting the Salary Guide, the Board is desirous of retaining and attracting competent teachers. The Board will consider a fair rate of compensation, recognized experience, and compensate its teachers for professional improvement.

Professional Training Requirements for Employment

The minimum standard of professional training normally required of teachers for appointment of regular positions in the Pemberton Township Schools is the possession of a bachelor's degree, in the teacher's major or minor field of study, from an accredited college or university. A teacher to be employed with less than a B.S., degree must be certificated by the State Department under a certificate outlined in the State Department Rules and Regulations for Certification of teachers.

The services of all teachers, unless otherwise determined by the School Board, shall be available during the months of September through June for 200 days, including a minimum of 180 days of classroom instruction.

Teachers may be expected to spend time each year in conferences, working on school plans or other assigned duties, without these days being designated as teaching days.

Increments are not automatic and may be withheld from a teacher if his work has been below acceptable standards according to information submitted to the Board by the Superintendent. Increments withheld for this reason shall not constitute an inequity.

Whenever a teacher desires to terminate his or her services with the School Board, a 30-day notice in writing shall be given to the Board. Whenever a teacher fails to give proper notice, and fails to get a release from the School Board, and leaves before proper termination of contract, such employee shall forfeit all money due him.

The payment of the annual salary of a teacher employed on a 10-month basis shall be in 20 semi-monthly payments, the last two of which shall be paid on the last working day in June.

A teacher who serves less than a full year is entitled to receive as basic salary only an amount that bears the same ratio to the established annual basic salary as the time in service bears to the annual school term.

Teachers employed after February 1st shall not be eligible to standard increment the following school year.

Teachers employed after February 1st shall be paid a per diem salary employment during the month of June based on 1/200 of annual salary.

For a teacher to transfer to a higher classification on the guide as a result of additional study, he must present to the Superintendent a written request for this action, together with an official transcript of the satisfactory completion of the work. Requests submitted after August 31st of the school year will not be honored." (R-1) (TR. 31-32)

STATEMENT OF FACTS

1. In determining petitioners' salary placement for the 1977-78 school year, the Superintendent applied a mathematical formula whereby he computed only those days actually worked by petitioners and did not include those teaching days away from duty by virtue of leaves of absence as follows:

2. Petitioner Russell's placement on the 1977-78 salary guide was based upon completion of three years of teaching, beginning 4th year at an annual salary of $11,450.00 (P-1 in evidence). Petitioner Russell's placement was computed upon her total work experience of 3 years, 4 months and 10 days (P-1).

3. Petitioner Meehan's placement on the 1977-78 salary guide was based upon completion of four years of teaching, beginning 5th year at an annual salary of $11,750.00 (P-1 in evidence). Petitioner Meehan's

placement was computed upon her total work experience of 4 years, 3 months and 15 days. (P-1).

4. Petitioner Royal's placement on the 1977-78 salary guide was based upon completion of three years of teaching, beginning 4th year at an annual salary of $11,450.00. Petitioner Royal's placement was computed upon her total work experience of 3 years, 1 month and 2 days (P-1).

At hearing, the Board moved to dismiss petitioner Royal from the herein Petition of Appeal because she was absent from the hearing due to illness. The Board subsequently, in its Brief, withdrew its Motion to Dismiss as follows:

> "It is acknowledged by the Respondent Board of Education that the failure of Petitioner Royal to testify in the hearing should not now preclude consideration by the Administrative Law Judge of the relief sought by Petitioner Royal. The evidence presently before the Administrative Law Judge (P-1 in evidence) fully sets forth the facts concerning Petitioner Royal's employment by the Pemberton Township Board of Education. All Petitioners are similarly situate and the Respondent therefore acknowledges that it is not prejudiced in this matter by virtue of Petitioner Royal's failure to testify." (Board's Brief at p. 8)

Accordingly, **I FIND** that the Board has withdrawn its Motion to Dismiss petitioner Royal from the herein controverted matter and **CONCLUDE** that the motion is **DISMISSED**.

Petitioners' Russell and Meehan both testified that they were never made aware by the Board that, subsequent to their return to duty from approved leaves of absence, their placement on the salary schedule would be governed by the number of actual teaching days they were employed in the school district. Petitioner Russell testified that it was her understanding that she had completed the 1976-77 school year and that she would automatically be granted the salary increment for the 1977-78 school year. Both Russell and Meehan testified that upon receipt of their 1977-78 teaching contracts they questioned agents of the Board with regard to the absences of the salary increments included thereon. Having received no satisfactory answers from the Board's administrative staff they filed grievances, which were denied and subsequently the herein Petition of Appeal.

Petitioners rely upon the Board's policy R5141.1 and specifically upon the clause "Teacher employed after February 1st shall not be eligible to standard increment the following school." (R-1) Petitioners assert that the Board admitted at hearing that this policy would ordinarily be taken to mean that anyone employed before February first would be awarded an increment for the next year, which increment he would retain in subsequent years. Petitioners aver that the Board's only witness, the Superintendent of Schools, also acknowledged there were no other express provisions in the Board's policy nor in the collective agreement concerning the computation of credit for less than a full year's service.

The Board admits that the policy itself is somewhat ambiguous and could be reasonably interpreted and applied as a mathematical computation of experience. It asserts that the record demonstrates that the mathematical computation method was uniformly and non-discriminatorily applied by the Superinintendent for at least the past 20 years. It urges that the heretofore interpretation of the salary policy should be given full effect.

The Board concedes that the Commissioner has held that salary policies adopted pursuant to N.J.S.A. 18A:29-4.1 must be literally enforced (Norma A. Ross v. Board of Education of the City of Rahway, Union County, 1968 S.L.D. 26, aff'd State Board of Education 1968 S.L.D. 29, the literal interpretation of the clause relied upon by petitioners would result in a hardship to those teachers who only worked for the Board of Education after February 1st. The Board contends that its interpretation and application for the salary policy that has been consistently in effect for the past 20 years overcomes this type of inequity.

The Board admits that as a general legal proposition it has been held that where wording of a policy is clear and explicit it will be construed according to its own terms. It is nevertheless a corollary legal proposition that where the language is less than clear and explicit a fair interpretation may be applied where the interpretation is neither arbitrary or discriminatory. Zietko v. New Jersey Manufacturers Casualty Insurance Co., 132 N.J.L. 206 at 211 (E.A. 1944); Speary and Hutchinson Co. v. Margetts, 15 N.J. 203 (1854). For these reasons it is urged that the Board's interpretation as heretofore applied be permitted to stand.

Having carefully reviewed the entire record in the instant matter, **I FIND** that the Stipulations and Statement of Facts are hereby adopted by reference as **FINDINGS OF FACT.**

It is clear that a stated policy of a board of education must be reasonable. It follows that the interpretation and implementation of that policy must also be reasonable. Guidelines for interpretation of a policy were set forth in Harry A. Romeo, Jr. v. Board of Education of the Township of Madison, Middlesex County, 1973 S.L.D. 102 as follows:

> "***In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. Lane v. Holderman 23 N.J. 304 (1957) Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. Duke Power Company, Inc. v. Edward J. Patten, Secretary of State, et al. 20 N.J. 42, 49 (1955); Zietko v. New Jersey Manufacturers Casulty Insurance Company, 132 N.J.L. 206, 211 (E. & A. 1974); Bass v. Allen Home Development Company, 8 N.J. 219, 116 (1951); Sperry and Hutchinson Company v. Margetts, 15 N.J. 203, 209 (1954); 2 Sutherland, Statutes and Statutory Construction (3rd ed. 1943), Section 4502***" (at p. 106)

Petitioners herein relied upon the Board's policy R5141.1, and had every expectation that upon their return to duty, subsequent to an approved leave of absence, they would be in receipt of the normal salary increments due them pursuant to N.J.S.A. 18A:29-13. **I FIND**, therefore, that the Board's argument that its past practice controls with regard to petitioner's commulative time as computed by the Superintendent is without merit.

In Betty Eagle, Robert Covyear, Oliver Vogel, and the Englewood Cliffs Education Association v Board of Education of the Borough of Englewood Cliffs, Bergen County Docket No. L-15025-71 New Jersey Superior Court, Law Division, February 19, 1971, the Court stated in its oral decision:

> "***It cannot be said that the language is clear and unambiguous. Under the circumstances the Court must resort to the rules of construction. First National Bank v. Burdett, 121 N.J. Eq. 277 (Sup. Ct. 1937). Professor Williston states:
>
> > 'The fundamental object of all rules of interpretation, whether primary or secondary, is to ascertain and give effect to the intention of the parties***.'***"

Further, the Court said:

> "***The court must strictly construe any agreement against Bouton v. Litton Industries, Inc., 423 F 2d 643 (3rd Cir 1970). Couched in other words, 'the language must be interpreted in the sense that the promisor knew, or had reason to know, the promisee understood it***.' American Lithographic Co. v. Commercial Ins. Co., 81 N.J.L. 271 (Sup. Ct. 1911).***"

In Russell v. Princeton Laboratories, Inc. 50 N.J. 30, 38 (1967) the Court said:

> "***A contract should not be read to vest a party or his nominee with the power virtually to make his promise illusory.***"

I CONCLUDE, therefore, that the Board improperly withheld the salary increments due petitioner's commencing the 1977-78 school year.

Accordingly, the Board of Education of the Township of Pemberton **IS HEREBY ORDERED** to reimburse petitioners' Russell, Meehan and Royal for the 1977-78 salary increments improperly withheld and to further adjust their salaries accordingly for the subsequent school years while in the Boards' employ.

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

AGENCY DKT. NO. 381-12/77

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

3 October 1980
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

PEMBERTON TOWNSHIP EDUCATION ASSOCIATION ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, petitioners' salary increments for the 1977-78 school year shall be restored with subsequent adjustment to their salaries for the school years from that time to the present as employees of the Board. The Commissioner deems it proper that such adjustment be made on or before the pay period ending in December 1980.

It is so directed.

COMMISSIONER OF EDUCATION

November 20, 1980

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3146-80
AGENCY DKT. NO. 363-9/79A

IN THE MATTER OF:

ROBERT LIVINGSTON,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,
Respondent.

Record Closed: September 29, 1980
Received by Agency: 10/17/80
Decided: October 16, 1980
Mailed to Parties: 10/20/80

APPEARANCES:

Joseph F. De Fino, Esq. for Petitioner (Morgan & Falvo, attorneys)

William C. Nowels, Esq., for Respondent (Mirne, Nowels, Tumen, Magree, Kirschner & Graham, attorneys)

BEFORE **DANIEL B. MC KEOWN,** ALJ:

Robert Livingston, employed as a full-time teaching staff member by the Board of Education of the Township of Wall, (Wall Board) complains the Wall Board arbitrarily denied him permmission to be employed by the Asbury Park Board of Education (Asbury Park) as a part time assistant football coach for the 1979 and 1980 football seasons. Petitioner seeks relief in the form of a restraint against the Wall Board from

interfering with what he perceives as a right to earn additional income by coaching part-time at Asbury Park. Secondly, he seeks from the Wall Board compensation equivalent to what he would have earned during the 1979 football season at Asbury Park had the Wall Board not arbitrarily prevented him from such employment.

The Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1, et seq. A hearing was conducted in the matter on September 4, 1980 at the Wall Township Municipal Court subsequent to which the parties filed Briefs in support of their respective positions. The record was closed and readied for dispostion September 29, 1980 the date after the last Brief was filed.

This case involves the application of the State Board rule at N.J.A.C. 6:29-6.3 in regard to those who may coach public school pupils organized for competitive sports; the discretionary authority of a board to make and enforce its own rules; an asserted "right" of a person employed full-time by one board to be employed as a part-time coach by another board for a sport in which the school districts compete against each other (in this instance high school football) and, finally, intertwined with the foregoing the interests of the pupils to be served.

Livingston is employed full-time by the Wall Board as a teacher of special education and has been so employed for seventeen years. Livingston acquired knowledge that Asbury Park was in need of an assistant high school football coach for the 1979 season. After having informed the Wall high school principal, he applied to Asbury Park during May 1979 to be considered for appointment as an assistant high school football coach for the 1979 football season which commenced that September. It is noticed that during the earlier 1976 football campaign Livingston did coach St. Joseph's high school football team, not a competitor of Wall, while employed full time by the Wall Board. He also was an assistant football coach at Wall for the 1974 season.

The Asbury Park Superintendent of Schools testified that an emergency situation existed for the 1979 football season because an insufficient number of Asbury Park teachers applied for the position of assistant football coach. He received verbal approval from the Monmouth County Superintendent of Schools to seek applicants from surrounding school districts to fill the resultant vacancies on the coaching staff for the football team.

On or about August 7, 1979 the Asbury Park Superintendent requested permission from the Wall Board, through its Superintendent, to employ Livingston as an assistant football coach for the 1979 season. The Wall Superintendent testified that he refused to recommend to the Wall Board that it consent to Livingston being a part-time assistant football coach for Asbury Park on the grounds that the Wall high school football team plays the Asbury Park high school football team. In his view, for a full time teacher at Wall to coach what he refers to as the high intensity sport of football, as compared to other sports, at a competitor school district would have a negative effect on the pupils at Wall. The Director of Athletics and the high school principal both agree with the view that Livingston should not be allowed to coach the referred-to high-intensity sport of football for a rival high school team. Accordingly, they, individually, would not recommend the Board give its required consent.

The Board at a meeting conducted August 14, 1979 determined not to consent to Livingston being a part-time assistant football coach for Asbury Park for the 1979 season. (J-1) Without the required consent of the Wall Board, Asbury Park could not employ Livingston for the 1979 football season as a part-time coach.

It is noticed here that the Wall Board asserts it offered Livingston a position of assistant football coach for the 1979 football season but that he declined. There is nothing in the record, however, to substantiate the assertion of an offer of employment as a coach. The high school principal testified he merely inquired on his own of Livingston whether he would be interested in coaching for Wall if an opening occurred for the 1979 season. Livingston was to have expressed no interest. This exchange even if it did occur does not constitute a valid offer because of its vagueness, lack of specificity, and lack of express authority by the Board to the principal to make such a purported offer.

Asbury Park again experienced an emergency in its high school football coaching staff for the 1980 football season. Once again the Asbury Park Superintendent

applied to and received approval from the Monmouth County Superintendent of Schools, this time in writing, to solicit applications for part-time coaching position from teachers in surrounding school districts.

Livingston again notified the Wall high school principal by letter dated June 10, 1980 that he applied for the position of assistant football coach at Asbury Park for the 1980 football season — the one now in progress. Six weeks later, on July 21, 1980, the high school principal advised Livingston: (P-1)

> "Dear Bob [Livingston]
>
> "At the present time, we have two assistant football coaching positions open at Wall High School. I would very much like to see you take one of these positions.
>
> "I have discussed with Mr. Weaver your request to coach at Asbury Park High School. I have expressed to him my same philosophy as discussed with you in the past. I cannot recommend anyone coaching football at another high school that is on our regular schedule. If the employment is with another team that we do not play I would certainly have no objections..
>
> "I still would be happy to see you accept one of our open positions. If you wish to discuss this with me, feel free to call or stop and see me at the high school ***"

On the same date, July 21, 1980, the Wall Superintendent also advised Livingston of the two openings for assistant coaches at Wall; that he would like to see Livingston apply for (not to "take" as stated by the principal) one of the two openings; that regardless of the fact that the principal still feels he, Livingston, should not coach football at Asbury Park with which he, the Superintendent, impliedly agrees, his request would be presented to the Wall Board. (See letter attached to Board's affidavit in opposition to Livingston's motion for interim relief)

The Board, at a meeting conducted August 12, 1980, determined not to grant consent to Livingston to coach high school football at Asbury Park and as a preamble to that resolution observed that (J-2)

> "The Administration feels that it is not advisable to allow a high school teacher from Wall Township to coach a school district football team that will be playing in opposition to a football team from Wall Township."

There is no dispute between the parties as to the foregoing essential facts of the matter. Livingston claims within that context the Wall Board refused its consent for him to coach at Asbury Park on arbitrary grounds because it simultaneously allows and has allowed another teacher it employs at its other high school to coach girls' varsity soccer at another district which district plays the Wall girls' varsity soccer team on an interscholastic basis.

The Superintendent, the high school principal and the athletic director, each of whom coached high school football prior to their present positions, are of the view that interscholastic high school football is a more intense and competitive sport than girls' varsity soccer or any other sport because of the number of spectators in attendance at football games, the number of coaches required for high school football, the number of participants on a football team compared to other teams, (Tr. 76) the income produced by football from fans who pay to see the games. (Tr. 85) The administrators also contend that football team "secrets", such as injuries, are important to safeguard against being released to opposing teams and that Livingston, if allowed to coach Asbury Park while a teacher at Wall, would be privy to those secrets. (Tr. 96) The three administrators thus conclude that Livingston should not be allowed to coach football for Asbury Park, or any other high school the Wall Township football team plays, because of the asserted intensity of football compared to other sports and because Livingston, through daily contact with Wall pupils, may learn of strategy, injuries, or weaknesses of the Wall team which he could then pass on to the Asbury Park team. (Tr. 86)

The Superintendent explained that the full-time teacher from the second high school is allowed to coach girls' varsity soccer at another school which is a competitor of Wall's girls' varsity soccer team because girls' soccer is not as intense as is boys' football. (Tr. 83) The high school principal explained that though he is not the principal of the high school where the other teacher is assigned, he sees no conflict in allowing a teacher to coach a presumably low intensity sport at another high school even though that team is in competition with Wall students in that sport. (Tr. 80) The athletic director, who is in charge of all physical education, suggests that he was not asked his opinion by either the Superintendent or by the Board whether the other teacher should be allowed to coach girls' varsity soccer at a competing high school. If he were asked, his response is that a teacher from Wall should not coach a sport at a competing high school. (Tr. 102)

The Wall teacher who coaches girls' varsity soccer at the competing school testified that for the pupils involved in girls' varsity soccer, that sport to them is intense.

This concludes a recitation of the factual pattern of the controversy. The issue thus posed in the first instance is whether the Board denied Livingston its consent for him to seek employment at Asbury Park as a part-time coach for wholly arbitrary reasons.

DISCUSSION

Livingston's complaint is grounded upon the assertion the Wall Board denied its consent to him to coach at Asbury Park on purely arbitrary grounds. In the law, arbitrary means having no rational basis, a wilful and unreasoning action, without consideration and in disregard of circumstances. (See Bayshore Sewerage Company v. Department of Environmental Protection, 122 N.J. Super 184, 198, aff'd 131 N.J. Super 37 (App. Div. 1974))

Thus, the issue is whether the Board's determination to deny Livingston permission to be a part-time coach at Asbury Park is based on criteria which do not relate in any rational way to the purpose and responsibility of boards of education.

In regard to the purpose of boards of education, the New Jersey Constitution provides that each child between the ages of five and eighteen is to be provided a thorough and efficient system of free public schools by which each such child is to be afforded a thorough and efficient program of instruction. N.J. Const. Art. VIII, Sec. XV, Par. 1

To carry out that mandate, the legislature created the Department of Education as a principal department of the executive branch of the state government which department is to consist of a state board of education and a commissioner of education. N.J.S.A. 18A:4-1 The State Board of Education is charged with the general supervision and control of public education and is given authority to make and enforce rules for carrying out the school laws of the state. N.J.S.A. 18A:4-10; 18A:4-15

The legislature has also ordained that each municipality in the state shall be a separate school district and that the schools of each school district shall be conducted by and under a board of education. N.J.S.A. 18A:8-1; 18A:10-1

The legislature, the State Board of Education, the Commissioner, and each local board of education in the state is committed to the goal of free public schools set forth at N.J.S.A. 18A:7A-4 which states:

> The goal of a thorough and efficient system of free public schools shall be to provide to all children in New Jersey, regardless of socioeconomic status or geographic location, the education opportunity which will prepare them to function politically, economically and socially in a democratic society.

The educational opportunity referred to in the stated goal includes courses in physical education, N.J.S.A. 18A:35-5, under which generic heading falls competitive team sports and interscholastic competition of those team sports. (See N.J.A.C. 6:29-6.1, et seq) In fact, the State Board of Education through its statutory authority to adopt rules at N.J.S.A. 18A:4-15 did adopt N.J.A.C. 6:29-6.2 by which it recognizes interscholastic athletic events to be equivalent to legislatively required physical education as part of the public school goal. This is so for at N.J.A.C. 6:29-6.2(d) the State Board provides

> "A board of education may adopt a policy to permit pupils to receive graduation credit in physical education through interscholastic team activity ***"

Thus, the goal of each board of education along with the State Board, the Commissioner, the legislature and all who are committed to public school education is to provide each pupil the opportunity to become prepared politically, economically, and socially to function in a democratic society which goal may be accomplished through various curricular and cocurricular offerings including for those who desire the opportunity to participate in athletic competition on an interscholastic basis.

How and where does interscholastic sports fit within the spectrum of a thorough and efficient program of education? The State Board rules in regard to high school graduation, that event which signals the pupil's completion of a free public school thorough and efficient program of education, are set forth at N.J.A.C. 6:27-1.4. There, at N.J.A.C. 6:27-1.4(c) one of the requirements for graduation is

> Statutory requirements for *** health, safety and physical education shall be fulfilled by the system adopted by the local board of education.

It has been seen that the State Board acknowledges that participation in interscholastic team activity is equivalent to the physical education requirement. N.J.A.C. 6:29-6.2(d) supra Consequently, to those pupils who rely on interscholastic team participation to meet the physical education requirement for graduation at N.J.A.C. 6:27-1.4(c), and it is presumed here that the Asbury Park Board of Education allows those who participate in interscholastic sports equivalent credit for required physical education, such participation is similar to participation in any other required course for graduation. Pupils must be successful in required courses to be graduated; so too must they be successful in physical education (albeit interscholastic sports).

Thus, interscholastic activity for those who participate is an integral part of the whole of the constitutionally required thorough and efficient program of education.

In regard to the responsibilities of boards of education the legislature, recognizing that not all school districts may have the necessary accomodations to provide their pupils with a thorough and efficient program of education imposes a duty when so ordered by the State Board, upon other boards of education which have adequate accomodations to receive such pupils. N.J.S.A. 18A:38-8 A child who lives remote from the assigned schoolhouse within the district may attend a public school not remote even though that public school is without the district. N.J.S.A. 18A:38-9 Boards of education may enter sending-receiving relationships to provide affected pupils with a public school education. N.J.S.A. 18A:38-11, 12. A pupil from one district may attend in another district a high school course not offered at his/her home district. N.J.S.A. 18A:38-15 A pupil may attend evening high school in another district not offered by his/her home district. N.J.S.A. 18A:38-16

Each of these legislative enactments address the interests of the pupil to be served. Such expressions call for cooperation between and among boards of education to meet the goal of a thorough and efficient program of education for all pupils when such cooperation is necessary.

The State Board in similar fashion has recognized the need for cooperation between and among boards of education to serve the interests of pupils in regard to

interscholastic activities at N.J.A.C. 6:29-6.3. The whole of that rule accomplishes two things: one, boards of education are prohibited from employing persons to be coaches who are not trained and certificated as teachers; and two, the rule allows a board of education who cannot fill its coaching positions from within its own staff to secure a fully trained and certificated teacher to be a coach from a surrounding district with the consent of that board.

Specifically, N.J.A.C. 6:29-6.3(d) provides

> No person not certified as a teacher and not in the employ of a board of education shall be permitted to organize public school pupils during school time or during any recess in the school day for purposes of instruction; or coaching or for conducting games, events or contests in physical education or athletics.

Furthermore, N.J.A.C. 6:29-6.3(b) requires:

> Every person appointed subsequent to June 1, 1960, to coach, teach or train individual pupils or school teams for interschool athletic competition shall be a certified member of a school faculty in that same school district and shall be employed full time during the regular school day when classes are in session.***

In instances where a board of education is not successful in acquiring the services of one of its teaching staff members to coach a particular sport, N.J.A.C. 6:29-6.3(c) does allow a board, with the prior approval of the county superintendent of schools on an annual basis, to employ certified, full-time employees of constituent or sending districts, or of a vocational school within the same county. Provision is also made at N.J.A.C. 6:29-6.3(d) which allows a board, with the prior approval of the county superintendent on an annual basis, to employ certified and qualified full-time teaching staff members of other New Jersey school districts to coach. Finally, N.J.A.C. 6:29-6.3(e) allows boards of education, under certain circumstances, and with the prior approval of the county superintendent on an annual basis, to employ as a coach a person who possesses teacher certification but is not presently employed by a board.

Specifically, N.J.A.C. 6:29-6.3(d) provides:

> (d) School districts shall be permitted to employ certified and qualified, fulltime teaching staff members of other New Jersey school districts to work on a part-time basis in the co-curricular interscholastic athletic program, provided that:

1. The employing district can demonstrate annually to the county superintendent that an emergency situation exists;

2. The part-time position has been properly advertised within the district;

3. Both local boards of education are in agreement regarding such part-time employment;

4. Approval of the county superintendent shall be obtained prior to such employment by the local board of education.

Thus, the goal and responsibility of a board of education is for each board to afford its pupils a thorough and efficient program of education and to assist where possible other board of education to reach the same goal.

A board of education may adopt its own rules and regulations for the proper conduct of its own schools so long as such rules are not inconsistent with N.J.S.A.18A:1-1, et seq., Education Law or the rules and regulations of the State Board of Education. N.J.A.C. 6:1-1, et seq.

The policy of the Wall Board which governs its full-time teachers being employed by other boards of education as a part-time coach is as follows: (R-2)

ATHLETIC PERSONNEL COACHING OUTSIDE OF THE WALL DISTRICT

The Superintendent of Schools in consultation with Athletic Director, Administrators and Athletic Committee, will review and recommend to the Board of Education all teaching staff members desiring to work on a part-time basis in the interscholastic program in another district, provided that

1. The teaching staff member notify the Building Principal of his/her intent.

2. All procedures for employment of Athletic Coaches have been met under the provisions of N.J.A.C. 6:29-6.3 (D & E).

3. Each request be evaluated according to its individual merit.

4. The Board of Education may approve or disapprove permission requested for such employment.

Here, Asbury Park could not fill its coaching position for its high school football team for either the 1979 or the 1980 season. It sought candidates, presumably in the spirit of cooperation, from surrounding school districts. Livingston, from Wall, applied. The Wall Board and its adminstrators would not consent to Livingston coaching at Asbury Park grounded on their perception that football is an intense sport and Wall did not want to provide an edge to its competitor. The Wall Board to the contrary deems it permissible for another of its teachers to coach girls' varsity soccer at a competing high school because girls' varsity soccer is not intense.

To affirm the reasoning of the Wall Board and its administrators in this matter would be equivalent to ruling that interscholastic football is an end in itself, separate and apart from the whole of the constitutional mandate that all pupils are to be afforded a thorough and efficient program of education. There is nothing in the statutes nor in the State Board rules and regulations which establishes interscholastic football as the paragon of athletic competition to the exclusion of other team or individual sports in which pupils may engage as an integral part of their total public school education.

The asserted "intensity" of a given sport is an elusive modifier. Interscholastic football is an intense sport I hear from three administrators, each of whom are former football coaches. Interscholastic girls' varsity soccer is an intense sport to those who participate according to the perception of the Wall teacher who coaches girls' varsity soccer at a competing high school. And, it may be officially noticed here, that there is interscholatic competition in wrestling, basketball, baseball, gymnastics, soccer, field hockey, swimming, and other team sports. Are not the participants in these sports as intense in their desire as those participants in football? It appears to me that the asserted intensity of a given sport, played on an interscholastic level, is best determined by the individual pupils who participate.

I find nothing herein upon which to conclude that the Wall Board's basis of its denial of consent to Livingston to coach at Asbury Park is reasonably related to its goal of providing pupils a thorough and efficient program of education, nor is that basis

reasonably related to its responsibility to assist other board of education, when possible, to accomplish the same goal. The Wall Board was not nor is not in need of Livingston's services as a football coach; Asbury Park was in need of his services and it still may be.

Nonetheless, Livingston's asserted "right" to employment as a part-time coach by a board of education has no foundation in law. The term "right" as used here must be seen in connection with a claim by Livingston that Asbury Park has a correlative duty to employ him as an assistant football coach or, in the alternative, that the Wall Board owes him a duty to be employed by Asbury Park as an assistant coach. Neither the Wall Board nor Asbury Park has such a duty in regard to a person seeking employment. Zimmerman v. Bd. of Ed. of Newark, 38 N.J. 65 (1972) Livingston may of course be offered employment as a part-time coach by Asbury Park pursuant to N.J.A.C. 6:29-6.3 and absent a valid reason by Wall why its consent to such offer may not be made. Should a valid offer be made by Asbury Park and Livingston accept, his asserted "rights" to that employment would then be found within the four corners of that agreement.

It is recognized that Wall asserts it "offered" Livingston a position of assistant coach for its football team. The evidence of record simply does not support that assertion. At best, the Wall administrators entered preliminary talks with Livingston for the 1979 and 1980 seasons but those preliminary talks do not an offer make.

Nor may it be said that Asbury Park made an offer of employment to Livingston to be an assistant football coach for the 1979 or 1980 season. This is so for without the Wall Board's required consent, Asbury Park could not make a valid offer to him. Thus, Livingston's requested relief to be compensated by the Wall Board for the 1979 and 1980 football seasons may not be granted.

I FIND the action of the Board in its denial of Robert Livingston to coach part time at Asbury Park for the 1979 and 1980 football seasons to be unrelated to the total goal of public school education. **I CONCLUDE** that that action is totally arbitrary.

The Wall Board is hereby directed to refrain from arbitrarily denying Robert Livingston its consent for him to coach part time at Asbury Park or at any school district grounded on reasons wholly unrelated to the goal of public school education.

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

October 16, 1980
DATE

Daniel B. McKeown
DANIEL B. MCKEOWN, ALJ

ROBERT LIVINGSTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent's exceptions contend that petitioner was offered the position of assistant football coach in Wall High School. (R-1) Petitioner's reply exceptions deny that such an offer was made stating that the offer was for discussion purposes only. The Commissioner agrees. The principal of the high school has no authority to hire coaches which can only be done by the Board. (Tr. 76-77) Respondent's reliance on In the Matter of the Closing of Jamesburg High School, School District of the Borough of Jamesburg, Middlesex County, 83 N.J. 540 (1980) is inapposite to the present matter; the Commissioner finds no merit to the argument therein.

The Commissioner cannot agree with petitioner's argument of his right to retroactive salary he would have received had he been an assistant football coach in Asbury Park. No contractual relationship ever existed between petitioner and the Board of Education of Asbury Park nor is petitioner eligible for any recompense for coaching duties not performed.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Wall Board is directed not to arbitrarily deny petitioner or any other professionally certified employee so situated the opportunity to coach part time as set down in and determined by N.J.A.C. 6:29-6.3 (d and e).

COMMISSIONER OF EDUCATION

December 1, 1980

LAURENCE A. BOYNTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WOODSTOWN-PILESGROVE REGIONAL SCHOOL DISTRICT, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

For the Respondent, Zehner & Zehner (Daniel A. Zehner, Esq., of Counsel)

Petitioner, a teacher with a tenure status employed by the Board of Education of the Woodstown-Pilesgrove Regional School District, hereinafter "Board," since September 1960, contests the determination of the Board to withhold his salary increment/adjustment increment for the 1977-78 academic year. He alleges that the Board's action in this regard was arbitrary, capricious, unreasonable, in violation of N.J.S.A. 18A:29-14 and violative of his constitutional right to procedural due process. The Board denies the allegations and asserts that it had a reasonable basis for its action which was lawful and authorized pursuant to N.J.S.A. 18A:29-14.

A hearing in the matter was conducted on October 4 and 6, 1977, January 11, 12, March 20, 21 and April 25, 1978 at the office of the Salem County Superintendent of Schools, Woodstown, by a hearing examiner appointed by the Commissioner of Education. Briefs of counsel were filed subsequent to the hearing.

On October 4, 1977, the first day of hearing, counsel for petitioner stated on the record an objection to moving forward with the hearing grounded on his representation that he had been afforded inadequate time to prepare for the hearing. He stated that he had telephoned the hearing examiner the previous week to request an adjournment in the instant matter and that the hearing examiner had denied his request. Subsequent to that, counsel for petitioner filed a Notice of Motion on September 30, 1977 to request a continuance of the hearing in the instant matter before the Honorable Michael Patrick King, J.A.D., Superior Court of New Jersey, Appellate Division. Petitioner's motion was denied by Judge King, wherefore counsel represented to the hearing examiner that he reserved the right to appeal that decision. On October 19, 1977 counsel for petitioner filed a

Notice of Motion to Appeal before Judge King which was denied by Order, Docket No. AM-66-67, dated October 28, 1977. The report of the hearing examiner follows:

On April 26, 1977 the Superintendent informed petitioner by letter that the Board had acted on April 18, 1977 to withhold his salary increase, adjustment, or increment for the 1977-78 school year along with its reasons to do so as follows:

> "***This decision was based upon classroom observations, administrator - teacher conferences, teacher and school records for the following reasons, as required under New Jersey Statutes Annotated, Title 18A:29-14:
>
> 1. Failure to implement satisfactory teacher methods.
> 2. Failure to implement satisfactory communication with youth.
> 3. Failure to implement satisfactory teacher presentations.
> 4. Failure to make effective and efficient use of time.
> 5. Failure to satisfactorily improve and comply with administrative guidelines regarding interim reports.
> 6. Failure to maintain adequate discipline.
> 7. Failure to provide fair and equal treatment of students.
> 8. Failure to comply with administrative guidelines regarding disciplinary referrals to the office.
> 9. Failure to maintain adequate records for student evaluation and failure to comply with administrative regulations on marking policy, report cards and reporting to parents.
> 10. Failure to demonstrate consistent patterns of student evaluation and grading.***" (P-12)

The salary policy of the Board with respect to the withholding of increments is stated in the Agreement between the Board and the Woodstown-Pilesgrove Regional Education Association, ARTICLE VI, as follows:

> "***Salary increments shall be by action of the Board of Education and shall be based upon approved service. Any increments or

> adjustments may be withheld in accordance with New Jersey Law Title 18A:29-14. A member of the bargaining unit whose increment or adjustment is withheld may use the appeal procedure in New Jersey School Law Title 18A:29-14 or may grieve the action in accordance with the Grievance Procedure in this Agreement. Except for any increments or adjustments withheld in accordance with the provisions of this paragraph, all employees covered by this guide will be placed on their proper step for the school year in which Schedules A and B are applicable.***"
>
> (R-7)

Subsequent to petitioner filing his Petition of Appeal before the Commissioner, the principal prepared a detailed summary of allegations in support of the Board's ten reasons to withhold his salary adjustment/increment as set forth in the Board's letter to petitioner dated April 18, 1977. (P-12) These documents were introduced into evidence by petitioner and were marked P-2 through P-11. (Tr. I-43-45, 49, 52-74)

The pertinent events which occasioned the instant Petition are recited as follows:

On December 9, 1976 petitioner was summoned to the principal's office for a conference in regard to petitioner's alleged exclusion of a pupil from his classroom for failure to complete a homework assignment. (R-6) On December 14, 1976 the principal forwarded a memorandum to petitioner wherein the discussion of the conference was summarized and the principal concluded by stating:

> "***Continuance of the problems identified and failure to act affirmatively on the suggestions offered, may have serious ramifications as we prepare for the 1977-78 school year." (R-2)

Petitioner testified that he recalled that the principal had discussed the matter of increment withholding during the course of the conference held on December 9, 1976. (Tr. I-77)

On February 14, 1977 the principal observed petitioner's Algebra II classroom and filed a Visitation and Assistance Report which was signed by both petitioner and the principal. (P-1) In the report the principal commended petitioner for his knowledge of subject matter and listed ten areas in which improvement was suggested under the appropriate heading as follows:

"I. Techniques

Motivation
Presentation
Pupil Response and Participation

II. Pupil-Teacher Relationships

Understanding of Youth
Ability to communicate with youth.

III. Planning and Records

Promptness: Records and Reports

IV. The Teacher

Good Judgment
Tact
Compliance with rules

V. Classroom Management

Meaningful Routines Established" (P-1)

The report also included five paragraphs of explanations and recommendations and an invitation for petitioner to arrange a conference with the principal to discuss the observation. (P-1)

On February 15, 1977, the principal held a lengthy conference with petitioner to discuss the February 14 observation and other problems that had come to the principal's attention with regard to petitioner. (P-16) In addition to discussing his observation the principal's conference notes reflect that the discussion also included petitioner's excessive use of pupil disciplinary referrals, pupil grade reductions for the second marking period, complaints about pupil grades, i.e. only three marks per pupil in the second marking period when a minimum of six pupil marks was required. The principal's notes contain, inter alia, the following comments:

***

"68 disciplinary referrals from September to December, 1976, higher than any other faculty member.

"***No evidence of intermediate steps taken in disciplinary matters.

"Grade reductions during 2nd marking period - 61% of students grades went down - higher than any other faculty member.

***

"Complaints about grades

"***[D]id tell him that Mr. Walsh called, Administrative Principal from Alloway, plus students and parents.***" (P-16)

With regard to this last item, the Board introduced into evidence a letter dated March 22, 1977 from the Administrative Principal of the Alloway Township Schools addressed to the principal which states as follows:

"On February 8, 1977 I contacted you relative your math teacher, Larry Boynton. I have received numerous complaints from several individuals of our board of education and a number of concerned parents. The problem allegedly centers on Mr. Boynton's grading system, his refusal to aid pupils who fall short of his educational expectations and his general attitude towards low achievers.***" (R-10)

On March 7, 1977 petitioner filed with the principal a two page response to the February 14 evaluation. Therein, petitioner took exception to the principal's "negative" comments and defended his selection of less able pupils to do chalkboard work at the time of the principal's observation, the absence of pupil response, the lack of pupil enthusiasm and motivation and his inability to communicate with pupils, as alleged by the principal. Petitioner alleged that the principal's evaluation of the classroom observation lacked "a just appraisal" of his work and was "at odds" with previous evaluations. (P-18)

petitioner in rebuttal to petitioner's response of March 7. The principal addressed each of petitioner's responses, his defenses thereto and summarized petitioner's remarks by stating:

"***Nevertheless, you do not dispute the findings of this observation but simply offering (sic) rationale which does not change what was observed.***" (P-21)

The memorandum also alleged that petitioner lacked the ability to communicate with pupils as follows:

"***In summation, we have spent a great deal of time in conference and discussion regarding your ability to communicate with students. I will identify specifically those items we have discussed as evidence of inefficiency and failure to communicate effectively with students:

1. Failure to keep students constantly aware of grades* as evidenced by student and parent complaints - (Period 1 - The return of second marking period graded tests and assignments only after the second marking was over. Students did not know what their grades were nor were they told by Mr. Boynton prior to the distribution of report cards.)

   *Violation of teacher handbook (page 19, second paragraph). Confirmed by Mr. Boynton in conference of February 15.

2. Failure to send out interim reports for F and D students* as evidence (sic) by complaints and lack of records to indicate such action was taken.

   *Violation of teacher handbook (page 21, item #1 under Interim Reports). Confirmed by Mr. Boynton in conference of February 15.

3. Failure to send out interim reports for students whose grades dropped* as evidence (sic) by complaints and lack of records to indicate such action was taken.

   *Violation of teacher handbook (page 21, item #1 under interim reports). Confirmed by Mr. Boynton in conference of February 15.***" (P-21)

The principal's memorandum continued to recapitulate those allegations with regard to petitioner's inability to communicate with pupils as set forth in his February 15 conference notes.

On March 18, 1977 the assistant principal observed petitioner's fourth period calculus classroom and filed a Visitation and Assistance Report. (P-17) On April 5 a conference was held with regard to that observation and petitioner signed the report. The assistant principal commended petitioner with regard to his knowledge of the subject matter and indicated four items in which improvement was suggested, i.e. methodology, presentation, ability to communicate with pupils, and effective and efficient use of time and materials. He commented in writing with respect to each as follows:

"IA - In reviewing plan book, I noticed that the primary method of instruction was lecture and board work. An overhead projector was mentioned in several lessons. I suggest that a variety of methods be employed in order to maintain student interest. Game, group work, puzzles are some examples of alternative methods of instruction.

"IC - Student board work was on a volunteer basis for review of previously assigned problems - The teacher sat at the desk for the majority of the period with the observer. Suggest that teacher move throughout the class and not remain stationary. This demonstrates to the students a feeling of interest on the part of the teacher. A small class such as this (8 students) provides an opportunity for a great deal of contact between student and teacher, however the teacher, through movement in the class, must take the initiative.

"IIE - Several negative comments were made by the teacher to the students concerning their work. Try to avoid phrasing criticism in a negative sense. By using a positive approach, the student still receives the message but does not feel 'put down.'

"IIIA - The end of the class was very confusing. Two students were working at the board on the same problem. Some members of the class were following one student and some were following the other with neither student completing the problem. This distraction prevented any student from asking questions concerning the problem or the assignment for the next class.

"Suggestion: Plan for ample time to complete work and allow students to work through assignment even if the longer method is chosen. If time is short, stop work on problem before end of class and allow students to ask questions on work up to that point." (P-17)

By letter dated April 5, 1977 the principal confirmed a conversation held on Friday, April 1, which informed petitioner that his salary increment for the 1977-78 school year would be withheld "***should [petitioner] fail to demonstrate satisfactory improvement on deficiencies identified to date***." (Petition of Appeal, at p. 2; Petitioner's Brief, at p. 1)

On April 6, 1977 the Superintendent observed petitioner's first period class in academic mathematics and filed a Visitation and Assistance Report wherein he commended petitioner on class control, well organized lesson plans, knowledge of subject matter, attendance and punctuality, punctuality of teacher and pupils, and good housekeeping. The Superintendent indicated that petitioner needed improvement with respect to teaching methodology, recognition of and provision for individual differences, pupil progress and attractiveness of the classroom. (P-20)

On April 21, 1977 the principal held a conference with petitioner and the mathematics department chairperson and his notes indicate that items for discussion included petitioner's plan book, record book, interim reports and fair and equal treatment of students. The principal's meeting notes also indicate that he would again observe petitioner in a classroom situation as follows:

> "***4. Offered to go in and observe at a time and date he [petitioner] might select. (next week) Would make observation part of a final report to Board.***" (P-13)

Petitioner testified that he believed that the subject of his increment withholding was discussed at the April 21 conference. (Tr. I-77-78)

On April 26, 1977 petitioner was in receipt of the Board's letter of April 18, 1977 which informed him that it had taken action to withhold his increment for the 1977-78 school year and its reasons therefor. (P-12) The letter was hand-delivered to petitioner by the principal.

Subsequently, on April 29, 1977 petitioner filed a response and exception (P-19) to the assistant principal's observation report of March 18, 1977 (P-17), a response (R-5) to the Superintendent's Visitation Report (P-20,) and a memorandum (P-15) with regard to the April 21 conference, which was signed by petitioner and the mathematics department chairperson. (P-13) In this memorandum to the principal, petitioner acknowledged the items that were discussed pursuant to the principal's meeting notes (P-13) and reminded the principal that he had offered to observe petitioner during the week of April 25, 1977 before the principal made his final evaluation to the Board. Petitioner also acknowledged that the principal had requested that petitioner select the time and date for the observation and responded as follows:

> "***I did not respond to your request of my selection of class for your observation. I felt it would be more fair to you and myself if I did not know when you were coming."
> (P-15)

On May 2, 1977 the principal responded to petitioner's April 29 memorandum (P-15) and stated, inter alia, as follows:

> "***It should also be noted that we did meet again on April 26 in my office and subsequently in [the assistant principal's] office. The meeting began with my comments and a verbal explanation of a letter handed to you by me at that time. [P-12] I did verbally explain to you that based on school records, observations, your records and administrative-teacher conferences that it was recommended you not receive an increment for 1977-78. I further advised you that this was the information in writing that had been promised during our April 21 meeting. I also explained that it was necessary for me to hand deliver this notice in order to provide you an opportunity to ask any questions. There were no questions but you informed me that you would notify your representatives.***" (P-14)

On May 9, 1977 the assistant principal filed a three page rebuttal (P-48) to petitioner's response and exceptions (P-19).

Petitioner asserted that the Board's reasons to withhold his salary increment adjustment, as set forth in P-12, ante, were not the real reasons for its action. He testified that, although he had no evidence to support his allegation, he believed that the Board's action was motivated by and in retaliation of petitioner filing a grievance against the principal and other criticisms that he voiced concerning the school's administrative procedures. Petitioner testified that the principal assumed his new position as high school principal commencing with the 1976-77 school year and that prior to the beginning of the 1976-77 school year the principal changed petitioner's teaching assignment. Petitioner and the mathematics department chairperson challenged the principal's decision and in so doing petitioner alleged that someone had prompted the principal to change his teaching assignment. Petitioner testified that the principal denied the allegation and asserted that the decision was his own. Thereafter, petitioner filed a grievance against the principal with regard to the schedule change which was subsquently denied by the Superintendent pursuant to the Board's grievance procedure policy. (Tr. IV-9, 12-14, 48-50, 110)

Petitioner testified that in November and December 1976 he questioned certain administrative practices with regard to school attendance and tardy pupil policies, the use of his assigned classroom for after-school detention during which he alleged a theft had occurred, and the noise made by pupils in the corridor adjacent to his classroom during the fourth period

luncheon recess. (Tr. IV-52-56, 73, 91; P-38, 43; R-1) Petitioner testified that on December 9, 1976 he was summoned to a meeting with the principal to discuss the reason or reasons petitioner excluded a senior class pupil from his first period academic mathematics class on December 7, 1976. He testified that the reason he was summoned by the principal involved an incident which occurred when the senior class had returned from its annual class trip to Florida and he entered his classroom to observe a boy dancing around the classroom wearing a Mickey Mouse hat. He testified that he instructed the boy to remove the hat and then inquired as to whether or not the pupil had completed his homework assignment. When informed by the pupil that the homework assignment had not been completed, petitioner signed a Disciplinary Referral form, sent the pupil from his classroom and directed him to the office of the assistant principal. (Tr. II-98, 102; IV-66-70; P-32; R-6)

The hearing examiner notes for the record that petitioner testified that the date "10/7" as it appeared on the Disciplinary Referral form (P-32, R-6) was incorrect and should have read "12/7." Similarly, the date of the incident read "10/6 & 7" and was corrected on the record to read "12/6 & 7." (Tr. II-99)

Petitioner testified that the discussion with the principal concerned his actions with respect to the pupil's behavior. He testified that it was on this occasion that it was first indicated to him that the school administrators were not satisfied with his performance as a teacher and that the principal informed him that his salary increment might be withheld. (Tr. III-87, 89; IV-95-96)

forwarded a two page memorandum with regard to his discussion with petitioner on December 9, 1976. Therein, the principal stated, inter alia, that petitioner's exclusion of a pupil from his classroom for failure to do assigned homework was unacceptable and appeared to be unfair and unequal treatment when other pupils were not excluded from the class when they failed to produce homework, and that petitioner violated the law and his professional responsibility when he made remarks to certain pupils about his action to exclude the pupil from his classroom. (R-2) The memorandum made no reference to the pupil dancing around the classroom while wearing a Mickey Mouse hat.

Three of the Board's reasons to withhold petitioner's increment were concerned with his failure to maintain adequate discipline (Reason No. 6), failure to provide fair and equal treatment of pupils (Reason No. 7), and failure to comply with administrative guidelines regarding disciplinary referrals to the office (Reason No. 8). (R-2) The Board alleged that petitioner failed to follow its policy when he did not indicate what, if any, intermediate action he took when he excluded the pupil from his classroom. (P-32, R-6) The Board's policy as found in its "Handbook for Teachers" is as follows:

"***DISCIPLINE PROCEDURES

"Teachers are expected to handle their own minor discipline problems. Only when the teacher feels that all means at his disposal have been exhausted should the student be referred to the office with a written explanation. It will cause an unnecessary delay if the student is sent to the office with no explanation of the offense.

"Before sending a student to the office, some intermediate steps should be followed:

1. Conference with student
2. Personal detention
3. Telephone conference with parent(s)
4. Conference with both parent(s) and student
5. Conference with Guidance Counselor
6. Conference with administrator

"When filling out Disciplinary form - please indicate the actions that the teacher has taken.***

"***Board Policy #5114.2***" (Emphasis in text.) (R-1; P-31)

The Disciplinary Referral form in use by the high school at the time of the incident of petitioner's alleged exclusion of a pupil from his classroom contained a series of three checklists to be completed by the teacher as follows: reason(s) for referral, action taken prior to referral and, present action and recommendation(s). (P-28; R-6) Petitioner testified that with regard to intermediate steps that were to be taken by a teacher before he referred a pupil to the administration he was told to handle minor matters and to discuss the problem with the pupil. In the event that that procedure failed and the problem continued, he testified that the individual pupil should then be referred to the office. He testified that it was his understanding that it was the teacher's option as to whether or not the checklist under "action taken prior to referral" was to be checked before the pupil was referred to the school administration. (Tr. II-72, III-8, 10) Petitioner testified that he chose to ignore the Board's policy with regard to intermediate action when he referred pupils for disciplinary purposes. (Tr. IV-34-35)

The record shows that petitioner filed 106 Disciplinary Referral forms from September 1976 to April 20, 1977 but had not checked any item as provided on the form to indicate "action taken prior to referral." (R-6)

Subsequent to the December 9, 1976 meeting with the principal, petitioner was observed in his classroom teaching activities on three separate occasions. On February 14, 1977 the principal observed petitioner's Algebra II class and filed a Visitation and Assistance Report. (P-1) On March 18, 1977 the assistant principal observed petitioner's calculus class and filed a Visitation and Assistance Report (P-17) and the Superintendent filed a Visitation and Assistance Report subsequent to his observation of petitioner's academic mathematics class on April 6, 1977. (P-20)

On February 15, 1977, subsequent to his visitation and observation of petitioner on February 14, the principal held a post-observation conference with petitioner. The principal's "Meeting Notes" of the past observation conference indicated that the principal was critical of petitioner's teaching techniques and methodology in the observed lesson of February 14, 1977. Specifically, the principal criticized petitioner for his use of the teacher-lecture method, calling upon the least able in the classroom to complete problems on the chalkboard and the lack of enthusiasm and pupil participation in the observed lesson. The principal's meeting notes also reflect that he discussed with petitioner items other than the classroom observation. Those items, which resulted in the Board's reasons to withhold his increment included, inter alia, petitioner's disciplinary referrals and the lack of evidence that he had taken intermediate action pursuant to the Board's policy, ante; the reduction in pupils' grades for the second marking period; complaints received by the school administration with regard to petitioner's grading; the lack of the required six grades per pupil for the second marking period; and his failure to return pupil test papers and grades before the end of a marking period. (P-16)

Petitioner acknowledged that approximately fifty per cent of his pupils' grades declined from the first to the second marking period. He attributed such a decline in grades by stating that the material covered in the first marking period was a review of that which the pupils had had in previous courses while the material covered in the second marking period was new and therefore more difficult. He testified that it was his experience that pupil grades declined from the first to the second marking period. He testified further that in his judgment it was not important to keep pupils advised and apprised of their grades and status during the second marking period. (Tr.-III-44-45, 47-48, 109-110, 118-119)

Petitioner acknowledged that the principal informed him of his failure to send interim reports to parents when the pupils grades declined in the second marking period. (Tr. I-129; II-55; III-43-44; IV-15) The Board's "Handbook for Teachers - 1976-1977" with regard to report cards and reporting to parents states, inter alia, as follows:

> "***Interim reports to parents regarding failing work and below-potential work on the part of students are available for teachers use in the Guidance Office. The reports are to be sent at each mid-marking period and at any other time as determined by the subject matter teacher. A report is to be handed to the individual student in each class. The report should then be signed by the parent or guardian and returned to the individual teacher. A copy of the interim report should also be given to the Guidance Department. If there is evidence of pending failure, a conference may be held or a phone call by the teacher may be made. A record is to be kept by the subject teacher whenever a contact is made with parent in this regard. No interim report is to be sent home without comment regarding how to correct deficiency.
>
> "Interim Reports:
>
> 1. Must be sent for all students for 'D' or 'F' grades and for all students whose grade will drop from previous marking period.
>
> 2. Must be sent for all students who are in danger of failing a course (quarter, semester, or year)." (Emphasis in text.)
>
> (R-1, at p. 21)

Petitioner testified that he understood the directive as set forth in the Handbook with regard to interim reports. (R-1) He testified that he could not recall whether or not he had sent any interim reports for the first marking period. With regard to the decline of approximately fifty percent of his pupil grades for the second marking period, petitioner testified, "I failed to send out these [interim report] forms the second marking period." He testified that he had send such reports for the third marking period. (Tr. I-134-135, II-44, 52; P-27 A)

The Board's Handbook, Part III - Grading, Determining Grades states, inter alia, as follows:

> "***Teachers should have a minimum of six marks for each report period.***"
>
> (R-1 at p.19)

Petitioner testified as to his understanding of the number of grades he was to have in class grade book for each pupil during a marking period. He testified that:

> "The handbook indicated that teachers should have at least six grades in their roll books; it did not require six grades. It was just a helpful hint." (Tr. III-29)

Petitioner testified that he was responsible for five teaching classes for the 1976-77 school year. He testified that for the second marking period his record book indicated the number of grades for each pupil as follows:

> Course Number 444 - Academic Math
> six grades for every pupil
>
> Course Number 424 - Algebra II
> four grades for every pupil
>
> Course Number 443 - Calculus
> four grades for every pupil
>
> Course Number 444 - Academic Math
> six grades for every pupil
>
> Course Number 423 - Algebra II
> three grades for every pupil
> (Tr. III-31-32; P-36)

Petitioner testified with regard to the "minimum of six marks for each report period" that it was his interpretation that the statement was "***an option. It would be nice to have six marks but it was not required.***" (Tr. III-40)

Finally, at the post-observation conference on February 15, 1977, the principal criticized petitioner for his alleged failure to return pupil test papers and grades before the end of the second marking period. Petitioner acknowledged that he was in error when he failed to return the pupil tests after the second marking period was completed. (Tr. I-131, III-24, 115; P-21) The Board's Handbook, Part III - Grading, Determining Grades states, inter alia, as follows:

> as possible. Try to have a number of short tests as well as unit tests and make certain that they are promptly marked and recorded. Be certain that the student is kept constantly aware of his grades.***" (Emphasis supplied.) (R-1, at 19)

Petitioner testified that he did not return test grades in two of his classes until after the marking period was over. He testified that a number of pupils were absent at the time of marking period test and that he attempted to provide those pupils an opportunity to make-up the test before he returned the test papers of those pupils who had taken the test. Petitioner

testified that on another occasion, subsequent to the testing, he had placed the test papers in his desk drawer and "***forgot to return that particular group of students' tests." (Tr. I-131-132, III-21-24; P-21)

Petitioner testified as to his procedure with regard to pupil grades and stated that he did not review individual grades with pupils at the end of a marking period. He testified that he usually returned the pupil tests and that although he did not discuss individual grades with individual pupils they had some idea of their standing in the class or they learned of their grades when the report cards were issued. (Tr. III-41-42)

Petitioner acknowledged that the principal was dissatisfied with his performance as a teacher on February 15, 1977. He asserted, however, that subsequent to the February 15 conference with the principal and prior to the Board's action to withhold his increment he had corrected those deficiencies set forth by the principal. Petitioner maintained that the real reasons for the Board's action were not those expressed to him in its letter of April 26, 1977 (P-12) but, rather, its action was in retaliation to petitioner's having filed a grievance against the principal and his criticism of certain practices of the high school administration. Petitioner testified that "***I was the chosen teacher to check on very closely to build a case against for the very purpose of withholding increment as an example to my fellow teachers." (Tr. IV-13-14) (See also Tr. I-133, 135; II-44-47, 52, 103; III-45, 106-107, 119-120, 131-135; IV-9-11, 12-13 41-42.)

The hearing examiner notes for the record that there was testimony offered on petitioner's behalf by the Mathematics Department Chairperson, a fellow teacher and a former student of petitioner's. (Tr. V-32-105)

Finally, petitioner asserts that the Board's action to withhold his 1977-78 salary increment was violative of N.J.S.A. 18A:29-14 and his rights to procedural due process of law when he was not afforded notice or the opportunity to be heard by the Board.

The principal testified as to the chronology of events set forth, ante. He testified that he had expressed his dissatisfaction with petitioner's performance, both orally and in writing, and further, had also informed petitioner that he would recommend the withholding of his increment for the 1977-78 school year. (Tr. V-135, 159-160, 162; VI-9, 10-12, 35; P-16, 21)

The principal testified that he first informed petitioner on December 9, 1976 that he would recommend the withholding of his increment. On April 1, 1977, the principal testified, he again informed petitioner orally that he would recommend the increment withholding. He testified that his

decision was based upon petitioner's deficiencies which had been identified throughout the course of the 1976-77 school year. He testified that prior to submitting his recommendation to the Superintendent, he devoted a period of three to four weeks analyzing petitioner's file of deficiencies, classroom observations and lack of response to those items the principal specifically directed him to correct. The principal testified that he made his recommendation to withhold petitioner's increment on or about April 10-12, 1977 and subsequently met with Board's Teachers' Committee with regard to petitioner's performance during the 1976-77 school year. (Tr. V-135; VI-35-37, 40-41)

The principal testified that subsequent to his meeting with petitioner on April 1, 1977, he directed a letter to him informing him that it was his recommendation that his increment be withheld for the 1977-78 school year. The hearing examiner observes that the letter of April 5, 1977 was not produced at the hearing. He observes further that petitioner acknowledged receipt of same by reference to paragraph #5 in the verified Petition of Appeal.

The hearing examiner notes for the record that the Board presented the testimony of the assistant principal and Superintendent on its behalf. (Tr. VI-140-230; VII-4-68)

The hearing examiner has carefully reviewed such testimony and documentary evidence in the context of petitioner's allegations and applicable law with respect to the withholding of his salary increment. The primary question for decision is whether or not such testimony and evidence refutes or supports a judgment that the Board acted reasonably and with justification when it acted in 1977 to withhold petitioner's salary increment for the 1977-78 school year.

In summary, the hearing examiner finds the following to be true in fact:

1. Petitioner failed to observe the Board's policy with regard to its "Discipline Procedure" when he failed to indicate on the Disciplinary Referral form what intermediate action, if any, he had taken prior to sending pupils to the assistant principal's office for discipline. (R-1; P-31)

2. Petitioner testified that approximately fifty percent of the pupils assigned to his classes had a decline in grades from the first to the second marking period and further testified that he failed to send "Interim Reports" to parents as prescribed by the Board's policy. (R-1)

3. Petitioner failed to maintain a minimum of six grades for each pupil in his classes for the second marking period as prescribed by the Board's policy. (R-1)

4. On two occasions, petitioner failed to return pupils' tests and grades promptly and in accordance with Board policy. (R-1)

With regard to petitioner's assertion that the Board violated his procedural due process rights when it failed to provide him the opportunity to be heard, the hearing examiner observes the Commissioner's decision in the matter of Charles Martin v. Board of Education of the Borough of Keyport, 1977 S.L.D. 1244 wherein he stated:

> "***The Commissioner has reviewed N.J.S.A. 18A:29-14 as well as Westwood [Education Association v. Board of Education of the Westwood Regional School District, Docket No. A-261-73 New Jersey Superior Court, Appellate Division, June 21, 1974 (1974 S.L.D. 1436] and Clifton [Teachers v. Clifton Board of Education, 136 N.J. Super. 336 (App. Div. 1975)] and finds that there is no authority or mandate expressly provided therein for the Board to grant petitioner or his representative an opportunity to appear and be heard in such proceedings.***" (at 1249)

The Commissioner was concerned with the withholding of a salary increment in the matter of William Myers v. Board of Education of the Borough of Glassboro, 1966 S.L.D. 66 wherein he stated:

> "***The evaluation of a teacher's performance is often a matter of total impression, based upon both objective evidence and subjective judgment. No generalization concerning the amount and type of classroom observation required for a valid evaluation is possible; frequently, as in the present case, the responsiveness of the teacher to suggestions for improvement of his teaching becomes more significant than the number of classroom visits made by the evaluator. See Haspel v. Board of Education of Metuchen, 1963 S.L.D. 78, affirmed State Board of Education, October 9, 1964, affirmed Superior Court, Appellate Division, June 10, 1965; Charen v. Board of Education of Elizabeth, decided by the Commissioner October 27, 1965. Similarly, justification for withholding a salary increment for unsatisfactory performance may be found in a single, serious infraction of the rules of the school, or in many incidents. In the context of dismissal, but with equal force here, it was said in Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943), affirmed 131 N.J.L. 326 (E. & A. 1944):

> '***Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.***'
>
> "The quantum of proof required to sustain a decision to withhold a salary increment is less than that required to establish cause for dismissal of a teacher under tenure.***"
>
> (at 68)

In such a context the hearing examiner finds no reason to hold that the Board acted herein in an arbitrary, unreasonable, or capricious manner or in contravention of any of the rights of petitioner. The total conduct of petitioner during the 1976-77 school year was scrutinized by the Board with respect to salary increment entitlement. Such scrutiny of a series of incidents was not inappropriate. Redcay, supra Petitioner, a veteran teaching staff member with seventeen years' experience in the Board's employ, chose to either ignore or violate the school's policies with regard to the pupils under his charge and control. Under such circumstances he knew, or should have known, that he placed his professional position in jeopardy. Petitioner's actions can hardly be held to contribute to improvement of the educational process but, rather, can be held to be deleterious to it.

Accordingly, the hearing examiner recommends that the Petition be dismissed.

* * * *

The Commissioner has reviewed the entire record in the controverted matter including the testimony before the hearing examiner, the Briefs of counsel, the conclusions of the hearing examiner and the exceptions to the report filed by petitioner.

Petitioner's main exception reiterates a point made in his original Brief that he believes the reasons given by the Board were not the true reasons his increment was withheld. He perceives the Board's action to be malevolently motivated "***wholly or partially by his filing of a grievance against [his principal] and by his having initiated a discussion with the Superintendent of Schools in which he effectively complained about discipline***." (Exceptions, at p. 1) He believes that the increment withholding was solely for retaliatory purposes.

The Commissioner does not agree that the allegation that petitioner's rights under the First and Fourteenth Amendments were abridged is either the primary or paramount issue here. An appeal of the withholding of an increment rises to the Commissioner under N.J.S.A. 18A:29-14. The scope of his review under the statute has been held by the courts to be "*** to determine whether a reasonable basis existed for the evaluation ***" which resulted in the determination. (Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960)

The hearing examiner determined that the Board did indeed have just cause for the disciplinary action it took. More than sufficient proof was offered that petitioner violated Board policy, administrative procedures and even acceptable teaching techniques to justify loss of a future increment. Thus a reasonable basis existed for the Board's decision, however painful it may be for petitioner to accept.

"***The decision to withhold an increment is therefore a matter of essential managerial prerogative which has been delegated by the Legislature to the Board.***" Board of Education of Bernards Township v. Bernards Township Education Association et al., 79 N.J. 311, 321 (1979) Under this dictum the Commissioner cannot and "*** will not substitute his judgment for that of a local board when it acts within the parameters of its authority.***" (See Sally Klig v. Board of Education of the Borough of Palisades Park, 1975 S.L.D. 168, 174; John Kane v. Board of Education of the City of Hoboken, 1975 S.L.D. 12, 16; and Jacqueline Nasuti et al. v. West Amwell Board of Education, 1979 S.L.D. _____ (decided January 9, 1979).)

The determination of the hearing examiner is affirmed. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

December 4, 1980

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5466-79
AGENCY DKT. NO. 370-79A

IN THE MATTER OF:

ROBERT GOLLOB,
Petitioner,
v.
ENGLEWOOD BOARD OF EDUCATION,
Respondent.

Record Closed: September 3, 1980
Received by Agency: 10/20/80

Decided: October 20, 198
Mailed to Parties: 10/22/80

APPEARANCES:

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

Allan S. Gutfleish, Esq., for respondent

OAL DKT. NO. EDU 5466-79

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

This matter concerns whether a board of education improperly withheld a teacher's salary increase for the 1979-80 school year. On September 20, 1979 petitioner, Robert Gollob ("Gollob"), filed a verified petition with the Commissioner of Education alleging that the Englewood Board of Education ("Board") had failed to follow its own binding policies, as reflected in its collective agreement with the majority representative of the Board's teaching employees, when it voted to deny Gollob's 1979-80 salary increments. Thereafter, on November 15, 1979 the Board filed an answer insisting that it had substantially complied with its own policies and disputing that the statutory standards governing the withholding of increments, N.J.S.A. 18A:29-14, could be altered by agreement between the Board and the majority representative.

The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. At a hearing held on June 2, 1980, the parties waived the right to present testimony and instead stipulated all the relevant facts. Documents received in evidence and considered in rendering this decision are listed in the appendix. Briefs were submitted by both parties on July 2, 1980. Further oral argument at the Board's request was heard on September 3, 1980, and the record closed as of that date.

None of the essential facts are in dispute. They may be summarized as follows:

1. Robert Gollob is a tenured teaching staff member employed by the Board.

2. By resolution dated July 2, 1979, the Board determined to withhold Gollob's "employment step increment" and "guide adjustment" for the 1979-80 school year because of his "failure to sufficiently improve his performance" as set forth in various evaluations, memoranda and documents. These supporting documents were attached to a written recommendation of the principal, made on May 30, 1979, that Gollob's increment be denied.

3. Attached to the principal's written recommendation were two formal evaluation reports, dated February 13, 1979 and May 4, 1979, along with a series of memoranda and other documents sent to Gollob by his supervisors between September 15, 1978 and May 4, 1979. Primarily these papers dealt with Gollob's excessive lateness and failure to prepare adequate lessons plans, although other aspects of classroom performance were also criticized.

4. Gollob acknowledged that he received each item of correspondence from his supervisors on approximately the date that each document bore.

5. There also were instances in which Gollob's supervisors verbally discussed with him the information contained in these documents.

6. A statement of criteria for evaluating effective teacher performance, entitled "Report of the Teacher-Administration Liaison Subcommittee on Teacher Evaluation Amended December 17, 1971" ("Subcommittee Report") was incorporated into the collective agreement in effect between the Board and the majority representative of the teachers.

7. During 1973 through 1978-79, the supervisory reports for all teachers in the Englewood school system, including Gollob, commonly did not cover all of the criteria listed in the Subcommittee Report.

8. For the 1978-79 school year, Gollob was on the maximum step of the salary guide adopted by the Board. At oral argument, the Board acknowledged that Gollob was placed at step 15 for teachers with a master's degree plus 30 additional courses, which called for an annual salary of $24,000.

9. For the 1979-80 school year, Gollob received the same amount of salary which he had received in 1978-79. According to the revised salary guide for that year, teachers with a master's degree plus 30 credits would receive $25,440, or a difference of $1,440.

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

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned.***

Petitioner does not challenge the accuracy of the reasons given by the Board for its decision. Nor does he contend that the vote taken by the Board or the notification of its action to him were procedurally defective. Rather, his attack is limited to the contention that the Board failed to follow the provisions contained in its collective agreement with its teachers. Specifically Gollob asserts that Articles IX(B) and XXX of the agreement mandate that the Board adhere to the criteria and procedures outlined in the Subcommittee Report which, it is further alleged, was not done in this instance. Additionally, Gollob argues that Article IX(B)(2)(d) defines employment increment in such manner that the Board is prohibited from withholding a negotiated salary increase for a given step on the guide, as distinguished from an increase resulting from advancement to a higher step on the guide. Since Gollob was already at the highest step permissible for persons with his educational qualifications, he maintains that the Board is powerless to deprive him of the scheduled increase. Finally, he contends that Article XXXII(A) declares all provisions of the agreement to be official policy which the Board is bound to follow until that policy is expressly changed.

Before discussing the issues on their merits, an important procedural point must be addressed. When the real controversy involves whether the subject matter of a particular dispute is within the scope of collective negotiations, the Public Employment Relations Commission ("PERC") has primary jurisdiction to decide the question. Ridgefield Park Educational Association v. Ridgefield Park Board of Education, 78 N.J. 144, 154 (1978); see also Bernards Township Board of Education v. Bernards Township Educational Association, 79 N.J. 311 (1979). Neither party to this proceeding has moved to transfer this case to PERC in order to resolve any disagreement about scope-of-negotiations. Indeed, in his brief, petitioner appeared to assume that the provisions were contractually unenforceable, and argued that even so they must be upheld because they represent the stated policy of the Board apart from any contractual obligation. In the course of oral argument, however, petitioner tried to disavow any concession as to the invalidity of the contract provisions. Nonetheless, the present action was initiated by Gollob before the Commissioner of Education under the jurisdiction conferred by N.J.S.A.

18A:29-14 in order to vindicate his individual right to a salary increment. Unlike a scope proceeding before PERC, the majority representative who conducted collective negotiations on behalf of all teachers is not even a party to the case. Clearly the main thrust of petitioner's position is that the Board violated its own policies, regardless of the apparent illegality of the contract provisions themselves. Moreover, the New Jersey courts have already authoritatively settled the law on scope of negotiations in this area, so that the special expertise of PERC is not as important as it otherwise would be in a case of first impression. Under these circumstances, the Department of Education is an appropriate forum to decide the issues actually raised by the parties.

Turning now to the merits, Articles IX(B) and XXX of the collective agreement adopt the evaluative criteria and procedures from the Subcommittee Report as the standard to be applied by the Board when withholding salary increments. Several requirements for the evaluation of teacher performance, however, were not strictly followed in Gollob's case. Thus, the Subcommittee Report contemplated that a tenured teacher will receive two formal supervisory reports each year, the first by January 1 and the second by May 1. In 1978-79, Gollob's first formal evaluation was not served on him until February 13 and the second not until May 4. It was conceded by Gollob that the three-day delay in communicating to him the results of the May evaluation was insignificant. His objection is solely to the delay of more than one month with respect to the report due at the beginning of January.

Another requirement of the Subcommittee Report was that evaluations include comments on various categories of teacher performance. Gollob complained that the two formal reports missed certain aspects of his classroom performance and omitted entirely any reference to his school and parent-community performance. Of course, the Board's decision rested exclusively on the contents of the reports and did not rely on possible deficiencies in other areas which had not been brought to Gollob's attention.

The Subcommittee Report also required that if any problems exist, the teacher be given "frequent or monthly" reports informing him about the nature of the problem and how it can be cured. Gollob claimed that he did not receive any reports whatsoever in satisfaction of this requirement. But the record amply demonstrates that, starting shortly after the opening of school and continuing through May 1979, Gollob received repeated written warnings from his supervisors that his performance was less than satisfactory. Even after receipt of numerous warnings Gollob continued to be cited regularly for the same basic problems.

Pointing to the language of Article XXXII(A) that the provisions of the agreement constitute Board policy, Gollob argues that technical violations of the Subcommittee Report procedure are enough to invalidate the Board's determination. Such a narrow approach would elevate form over substance. Based on the stipulated facts, the exhibits and the applicable law, I CONCLUDE that the Board substantially complied with its own policies when it withheld Gollob's salary increase. To the extent that it may not have, those policies are invalid anyway because they contravene the controlling statutory standard.

The underlying purpose behind the evaluation procedure is to insure that a teacher receives adequate notice of any unsatisfactory performance and of ways of improving future performance. Here this fundamental purpose was fully satisfied. Gollob was properly apprised of his deficiencies and afforded sufficient opportunity to remedy the situation. Fitzpatrick v. Board of Education, Montvale, 1969 S.L.D. 4. As the Board aptly remarked, the actions required to cure the administrator's criticisms were not those which take much time or effort on Gollob's part. All Gollob had to do was get to school on time and prepare more detailed lesson plans. In view of the fact that Gollob's deficiencies continued throughout the evaluation period, it is difficult to understand how the result would have been significantly different if he had received the initial evaluation a month sooner or if the evaluation had included comments on other areas. Accordingly, the Board has shown substantial compliance with the meaningful requirements of its evaluation policy.

In any event, the Board could not have validly agreed to alter the standard established by N.J.S.A. 18A:29-14 for judging the propriety of withholding increments. Bernards Township Board of Education v. Bernards Township Education Association, supra, 79 N.J. at 323. Any attempt to dictate standards more protective of teachers' interests is an illegitimate interference with the Board's rightful authority to evaluate teacher competency. To accept petitioner's contention would destroy the inherent right of the board to exercise its preeminent function to pass upon the quality of teacher performance. Clifton Teachers Association, Inc., v. Clifton Board of Education, 136 N.J. Super. 336 (App. Div. 1975). Evaluation criteria may not legally be subject to negotiation. In re Teaneck Board of Education, 161 N.J. Super. 75 (App. Div. 1978). Commenting upon the statutory authorization for a local board to withhold an increment only for "inefficiency or other good cause," the New Jersey Supreme Court in Bernards Township stated:

> The purpose of the statute is thus to reward only those who have contributed to the educational process thereby encouraging high standards of performance. In determining whether to withhold a salary increment, a local board is therefore making a judgment concerning the quality of the educational system. It is reasonable to assume that an adversely affected teacher will strive to eliminate the causes or bases of "inefficiency". The decision to withhold an increment is therefore a matter of essential managerial prerogative which has been delegated by the Legislature to the Board. It cannot be bargained away. (Citations omitted) 79 N.J. at 321.

While evaluation procedures as opposed to evaluation criteria may be an appropriate subject for negotiation, see State v. State Supervisory Employees Association, 78 N.J. 54, 90-91 and Fair Lawn Board of Education v. Fair Lawn Educational Association, unpublished Appellate Division opinion, Docket No. A-3993-78 (decided June 2, 1980), the criteria under review go beyond mere procedure and impinge upon the Board's ultimate power to regulate the quality of educational services in the district.

What the Board cannot give away directly, it surely cannot give away indirectly. If - by the simple expedient of adding a clause declaring every term to be public policy - the Board may be obligated to carry out otherwise unenforceable provisions, then managerial prerogative would be totally subverted. Local boards have a public responsibility to their students and the community to ensure that teachers are qualified, competent and efficient. It would be equally wrong for the Board to abrogate that responsibility by policy declaration as it would be to bargain that responsibility away by contractual provision. Consequently, Gollob's ingenious argument that the Board can accomplish by binding policy declaration what it is forbidden to accomplish by contractual agreement must necessarily fail.

Likewise, the Board cannot free itself from the statutory definition of "employment increment" simply by writing its own definition guaranteeing immunity from any risk of increment withholding to all teachers at the highest salary step. By virtue of N.J.S.A. 18A:29-6, "employment increment" means an annual increase of $250 granted to a member for one year of employment. Under the statutory scheme, N.J.S.A. 18A:29-7 prescribes a salary scale of 14 steps with annual increases of $250 corresponding to the number of years of employment. It is nonetheless clear that these increments establish minimum salaries which the board may not go below but may go above. N.J.S.A. 18A:29-12. Engelwood Board of Education v. Englewood Teachers Association, 64 N.J. 1, 7 (1973).

In one sense, all salary increases are "automatic" since a teacher on good behavior can routinely expect to receive an annual increment. Indiscriminate withholding of teachers' salary increments as a tactic during contract negotiations has been recognized to be an unfair labor practice. Galloway Township Board of Education v. Galloway Township Educational Association, 73 N.J. 25 (1978). Although Galloway acknowledges that generally all teachers are entitled to payment of a scheduled salary increase, its ruling was expressly made subject to the board's inviolate "right under N.J.S.A. 18A:29-14 to refuse to do so in individual cases." 78 N.J. at 52. See also, Kopera v. West Orange Board of Education, 80 N.J. Super. 288, 294 (App. Div. 1960), holding that a board of education might require favorable supervisory reports as a prerequisite to the granting of "all increases in salary". And see, Ackerman v. Kinnelon Board of Education, 1978 S.L.D. __ (Aug. 24, 1978), aff'd State Board of Education, 1979 S.L.D. ___ (Feb. 7, 1979), where the withholding of a so-called negotiated salary increase was approved by the Commissioner of Education.

From the logic of these cases, once a teacher has reached the top of the salary scale, it is appropriate for a board to grant additional annual increments conditioned upon satisfactory performance. But it violates the intent of N.J.S.A. 18A:29-14 for a board, either by agreement or policy, to make a blanket promise to grant such increases automatically, regardless of the quality of service rendered by the recipient. Surrendering the statutory right to make individual judgments about a teacher's worthiness to receive an increment based on performance would seriously undermine the public accountability of teachers for their professional conduct. Gollob's suggestion that inadequate teachers could still be disciplined by the drastic remedy of instituting tenure charges for a reduction in salary presents a completely impractical solution.

Significantly, Article IX(A) of the collective agreement emphasizes that, "It shall be clearly understood by both parties that the salary schedules *** do not guarantee an automatic salary increase." Hence, it is extremely doubtful that the Board ever really intended, without explicitly saying, that persons reaching the top of the salary scale would be rewarded until retirement with automatic salary increases. Even if the Board did intend to do so, such provision would be void as against public policy and contrary to the meaning of the governing statutes.

For the foregoing reasons, the relief requested by petitioner, Robert Gollob, is **DENIED.**

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

October 20, 1980
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

ROBERT GOLLOB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

December 4, 1980

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0864-80
AGENCY DKT. NO. 470-12/79A

IN THE MATTER OF
THE TENURE HEARING OF:

ELIZABETH MERKOOLOFF,
v.
SCHOOL DISTRICT OF
WASHINGTON TOWNSHIP,
WARREN COUNTY

Record Closed: September 25, 1980
Received by Agency: 10/20/80

Decided: October 17, 1980
Mailed to Parties: 10/21/80

APPEARANCES:

For the Complainant Board, **Henry W. Eckel, Jr.**, Esq.

For the Respondent, **Stephen E. Klausner**, Esq. (Ronald Levitt, Esq., of Counsel)

BEFORE **AUGUST E. THOMAS**, ALJ:

The Board of Education of Washington Township (Board) filed a single charge of incompetency against Elizabeth Merkooloff, respondent, a tenured teacher. The charge encompasses the 1978-79 and the 1979-80 school years, and its specifics are set forth in great detail in five typewritten pages.

These charges were filed with the Commissioner of Education and thereafter transferred to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Hearings were held on June 10, 11, and 12, 1980, in the Washington Boro Municipal Court, Washington. Four documents were admitted in evidence and Briefs were filed subsequent to the final hearing. Respondent's physician's report of her health, also in evidence, was filed subsequent to the hearing as agreed.

When tenure charges are filed, boards of education have the burden of persuasion to show that the charges are true in fact by a preponderence of the credible evidence. (In re Fulcomer, 93 N.J. Super. 440 App. Div. 1967) In the matter here considered the Board has adequately met its burden. However, the incompetency charge, though true in fact, cannot be examined in a vacuum. The entire circumstances of the charge are relevant and significant. They are set forth below in a summarized fashion.

Respondent, although denying that she is incompetent, concedes that she had a trying and difficult period wherein she suffered severe personal physical changes and was treated for personality dysfunctions. During the same time frame she experienced traumatic personal and family problems. Her unrefuted testimony in that regard follows:

Respondent was approximately 24 years of age when initially employed in January 1972 to replace a first grade teacher taking a maternity leave of absence. She met with parents to discuss their children's progress and she had a fine relationship with her fellow first grade teacher. She testified that she had no difficulties during this time and was re-employed to teach first grade in the 1972-73 school year beginning in September.

In September 1972 respondent began her first full year of employment and was married on October 7, 1972. She had a severe automobile accident in November and was out of school from November 1972 to March 1973. She testified that she fell asleep while driving and hit a tractor trailer, suffering multiple injuries. Splinters from her skull severed an optic nerve leaving her blind in one eye; her jaw, broken on both sides, was wired and her teeth were wired together; she underwent five plastic surgery operations; had a splenectomy and appendectomy; suffered six broken ribs, a punctured lung and contracted pneumonia. Respondent testified further that she required 21 blood

transfusions from which she contracted hepatitis; that she remained in the hospital's intensive care unit for 21 days and was hospitalized for three months being discharged on March 1, 1973. Her weight dropped to 90 pounds; nevertheless, she returned to work from April to June when she needed "more time to get well," because her husband wanted the money.

Respondent was run down physically and suffered severe headaches for the remainder of the year. She returned in September 1973 and taught through June 1974. She started the 1974-75 year but asked for a leave of absence for medical reasons in January 1975. Her headaches had continued and her leave was granted. Respondent returned to teach a first grade class in September 1975 and remained for the school year. She was granted another leave of absence for the 1976-77 school year. Respondent returned in September 1977 and taught until January 1978, when she was granted another leave of absence. She returned in September 1978 and taught second grade through June 1979.

Respondent returned in September 1979 and was denied a requested leave of absence, and at the same time the Board filed its tenure charges. All of Respondent's requested leaves were for reasons related to her health. Respondent suffered continuing headaches and other infirmities and was treated by several doctors, including psychiatrists. Her doctors included a lung specialist, an opthomologist, a neurologist, and a general practitioner. During her treatment and recovery, Respondent was hospitalized at least four times for mental dysfunctions at the Carrier Clinic. Her visits there included stays from three to eleven weeks.

During respondent's lengthy recovery a variety of medications were prescribed including sedatives, insulin shots, muscle relaxants, and pain killer drugs. These drugs left her dizzy and disoriented according to her own testimony which corroborated that of Board witnesses. She testified also that she became addicted to these drugs and that they had made her a different person. Respondent testified that the drugs caused her to be drowsy; to have slurred speech; to lose her coordination: that she could hardly walk and that she wanted to sleep all the time. She testified further that she walked into things; she could not remember and that her perception was off so that she nearly cut off a finger in school with a paper cutter.

As if these physical problems were not enough for her to bear, during this period of her medical difficulties, respondent's husband asked for a divorce, which was later granted; her mother had an accident in which her leg was caught in a dog's chain and required 21 stitches. It was feared she might suffer its amputation. Her father nearly died of blood poisoning. Against this background she tried to teach and the Board quite easily met its burden of persuasion as to the truth of its charges.

The Superintendent testified about continuing trouble getting respondent's lesson plans. Her attendance cards were inaccurate; parents complained about the lack of homework, no homework, or improperly corrected school work; her desk remained cluttered; she was absent without calling in ill so the Board could arrange for a substitute; she misplaced a pupil in a resource room; her car was left blocking a school bus; she left the school without permission; and letter complaints were received by parents asking that their children be transferred.

The administrative assistant to the Superintendent corroborrated this testimony as did three teachers, and the mothers of six pupils testified about their personal problems with respondent and their observations of her as a nervous, disoriented, and child-like teacher at one of the back-to-school night visits.

Indeed, respondent does not refute this testimony; however, she testified that she has improved significantly so that she is nearly fully recovered. Her last visit to the Carrier Clinic was one wherein she was cured of her (prescription) drug addiction. She takes only one prescribed drug called lithium to control a chemical imbalance in her body brought on by the accident. Her tension, and aches and pains are successfully combatted by exercises taught by her physicians and she continues her out-patient treatment by her doctors as needed. Respondent testified finally that she feels "great. I feel wonderful when I wake up, I feel so ambitious."

From my observations of respondent during the three days of hearing I noticed no outstanding or unusual peculiarities. Respondent is an attractive middle aged woman, admittedly lacking the verve and vigor one might expect of a new college graduate: however, she appeared to be in total control of herself and she answered all questions directly and with clear understanding. Her attitude is positive and her testimony is

accepted on its face that the problems she encountered have been practically eliminated by her relief from her drug dependency. (Psychiatrist's letter, R-1)

Based on the foregoing discussion of the facts I FIND that:

1. The Board's charges of Respondent's incompetency during the 1978-79 and the 1979-80 years are true in fact.

2. Respondent has overcome the causes of her incompetency.

It is certainly understandable how respondent could suffer a complete breakdown in her abilities to function as a teacher, given all of her unfortunate circumstances as reported here. Although the statutes permit the dismissal of a tenured teacher for incompetency or just cause, such a result is not ordered in this instance. (N.J.S.A. 18A:6-10)

No case on point with similar factual circumstances leading to the reinstatement of a teacher has been cited; nor has any been found during the research of this matter. Nevertheless, I CONCLUDE that dismissal of respondent is an inappropriate remedy under the circumstances; therefore it is ORDERED that respondent be reinstated immediately to her teaching duties with all back pay, emoluments and privileges withheld from her less mitigation of any monies earned by her during her suspension.

It is further ORDERED that the Board may re-certify these same tenure charges utilizing these same findings of facts and all the evidence leading thereto, if it discovers that respondent is unable to resume her teaching responsibilities regularly and competently.

The tenure charge(s) are dismissed without prejudice.

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

17 October 80
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

IN THE MATTER OF THE TENURE	:	
HEARING OF ELIZABETH	:	COMMISSIONER OF EDUCATION
MERKOOLOFF, SCHOOL DISTRICT	:	DECISION
OF THE TOWNSHIP OF	:	
WASHINGTON, WARREN COUNTY.	:	
_____	:	

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

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The petitioning Board excepts to the initial decision by August E. Thomas, ALJ, wherein he finds that respondent was incompetent as a teacher during school years 1978-79 and 1979-80 but determines that dismissal is not an appropriate remedy because respondent has overcome the causes of her incompetency. The Board questions the Court's findings that respondent's testimony be accepted on its face that her problems have been practically eliminated. Respondent's reply exceptions contend that a reviewing agency head cannot set aside such findings and that consequently the conclusions of the Court on that point must be accepted. The Commissioner finds no merit in such contention. It is true that when conflicting evidence is offered on any issue and there is sufficient evidence contained in the record to reasonably support the findings made, the Commissioner will defer to the judgment of the Court. Herein the Commissioner notes respondent's reliance on her doctor's letter of July 25, 1980, the closing two paragraphs of which are set down in full:

> "At our last session, today, I discontinued the use of Lithium Carbonate and the Tofranil, so that as of now she is taking no drugs of any kind. However, should any features of depression return, I have asked that she take 50mg of Tofranil at bed time.
>
> "How her health will hold up over the next few weeks, now that all medication has been discontinued, I cannot tell. She is about to go on a short vacation and I will see her again early August." (R-1)

The Commissioner does not find this to be the positive, affirmatory prognosis of her future competence which respondent claims.

Respondent's record of absences is unrefuted. She has been twice absent for a year's leave of absence for health reasons and has been absent over two hundred and forty sick days. She contends that such absences were for legitimate health reasons and that any action taken against her by the Board constitutes discrimination against a handicapped person. The Commissioner finds no merit in such argument, nor have the Courts. In Edith E. Trautwein v. Board of Education of the Borough of Bound Brook, Somerset County, Superior Court of New Jersey, Appellate Division, A-2773-78, decided April 8, 1980 it was found that despite the legitimacy of Mrs. Trautwein's absences because of illness they were so numerous as to justify the withholding of her increment.

Nor can the Commissioner give credence to respondent's reliance on 29 USC Section 706(7)(A) and (B). Paragraph B therein specifically excludes those whose use of drugs prevents such individual from performing the duties of the job in question. Respondent has been found to be incompetent as a teacher and her prospective competence in the judgment of the Commissioner is purely speculative.

The Commissioner views with regret the personal problems and health difficulties that respondent has endured; they have truly been unfortunate. The Commissioner notes that her requested leaves were for reasons relating to her health and observes that these health problems were compounded by her own family problems which impacted severely on her function as a first or second grade teacher. The Commissioner believes that these young pupils in their formative years surely deserve the best education possible with as complete continuity as can be accorded them, recognizing that excessive teacher absenteeism has a deleterious effect on their education. Trautwein, supra; In the Matter of the Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, 1977 S.L.D. 403

The Commissioner, while sensitive to the problems of teachers, must stress again that which he previously said in Clinton F. Smith et al. v. Board of Education of the Borough of Paramus, 1968 S.L.D. 62:

> "***The principle enunciated by the Court in Bates v. Board of Education, 72 P.907 (Calif. Sup. Ct. 1903), and quoted with approval in McGrath v. Burkhard, 280 P.2d 864 (Calif. App. 1955), bears repeating here:
>
> 'The public schools were not created, nor are they supported, for the benefit of the teachers therein, *** but for the benefit of the pupils and the resulting benefit to their parents and the Community at large.'***"
>
> (at 67)

For the foregoing reasons the Commissioner sets aside the orders of the Court herein and directs the Board of Education of the School District of Washington Township, Warren County to dismiss respondent as of the date of her suspension.

The Commissioner notes respondent's Notice of Motion for an Order Compelling Compliance with N.J.S.A. 18A:6-14. It is ordered on this _____ day of December 1980 in compliance with the aforesaid statute that the Board reimburse respondent her salary mitigated by any substitute employment. Respondent's request for interest on the monies therein is denied. Fred Bartlett, Jr. v. Board of Education of the Township of Wall, 1971 S.L.D. 163, 165-166

COMMISSIONER OF EDUCATION

December 4, 1980

Pending State Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL. DKT. NO. —
AGENCY DKT. NO. 259-7/78

IN THE MATTER OF:
LILLY FEIT,
petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,
respondent.

APPEARANCES:

Gerald M. Goldberg, Esq., for petitioner (Goldberg & Simon, attorneys)

Allen P. Dzwilewski, Esq., for respondent (Green & Dzwilewski, attorneys)

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

In a matter submitted for summary judgment, petitioner (Feit) seeks an order directing the Roselle Board of Educattion (Board) to reinstate her, within the scope of her certifications, with back pay to September 1, 1978. Her petition is based on a claim that her tenure and seniority rights were violated when the Board failed to employ her for the 1978-79 school year. The Board avers it has fully conformed to its obligations with regard to petitioner's employment and states petitioner is a non-tenured elementary teacher. It demands the petition be dismissed with prejudice and costs.

The following facts are stipulated:

1. Feit was an art teacher in the Board's schools from September 1, 1969 through June 30, 1975 under a valid Teacher of Art Certificate issued by the State Board of Examiners.

2. Feit acquired tenure status.

3. Feit was not employed by respondent for the 1975-76 school year because of the abolishment of her position pursuant to N.J.S.A. 18A:28-9.

4. Feit acquired Associate Educational Media Specialist certification in April 1976 and Elementary Teacher certification in July 1976.

5. Feit served as an elementary classroom teacher in the Board's schools in the 1976-77 and 1977-78 school years.

6. Feit was not employed by the Board for the 1978-79 school year.

In addition to the facts stipulated, I FIND from a review of the whole record the following:

1. The position held by Feit in 1976-77 and 1977-78 was not abolished.

2. At the time of Feit's nonrenewal of employment, the Board employed nontenured teachers in elementary teacher positions.

3. The Board informed Feit, by letter of April 18, 1978, "that the Board of Education at its' (sic) regular meeting held on April 17, 1978, adopted a resolution not to offer you a contract of employment for the 1978-1979 School Year."

Feit was a tenured teacher in the Roselle School District when her position was lawfully abolished. Holding no certification other than teacher of art, she enjoyed no bumping rights as to less senior or nontenured teachers when the art position was abolished. When she returned to the Board's employ, she had acquired two additional certificates, viz., Associate Educational Media Specialist and Elementary Teacher. She was employed as and served as an elementary teacher under a valid certificate for two school years, 1976-77 and 1977-78. She was not employed for 1978-79.

The Board argues she was not tenured as an elementary teacher and was, therefore, dismissable. In support of this argument, the Board cites N.J.S.A. 18A:28-5 which states, in pertinent part, that tenure during good behavior and efficiency shall be enjoyed "after employment...for...(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or (c) the equivalent of more than three academic years within a period of any four consecutive academic years;..."

This Feit did. She gained tenure status as a teacher in the district upon her first day of service in the 1973-74 school year. The reduction in force did not in any way affect that status. When she resumed teaching as an elementary teacher, it was no different than it would have been had she taught art for the entire 1975-76 school year and then, in 1976-77, had begun service as an elementary teacher under a valid certificate. That she acquired the elementary teacher certificate during the hiatus in her active service is inmaterial.

N.J.S.A. 18A:28-12 clearly states:

> If any teaching staff member shall be dismissed as a result of such reduction [in force], such person shall be and remain upon a preferred eligible list in the order of seniority for remployment whenever a vacancy occurs in a position for which such person shall be qualified... (Emphasis supplied.)

It is obvious that the statute does not demand that a person whose position is abolished be returned only to the precise position. Whenever there is a vacancy in a position for which he is qualified he shall be reemployed. Such is the case here.

At the conclusion of the 1977-78 school year, Feit was a tenured teacher with eight years' service in the district. Nonrenewal of employment, absent any action pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:60-10 et seq. or a legitimate reduction in force pursuant to N.J.S.A. 18A:28-9 et seq. was, therefore, an act ultra vires.

In consideration of the above facts and analysis, **I CONCLUDE** the nonrenewal of Feit's employment noticed on April 18, 1978, was ultra vires and, therefore, a nullity.

Accordingly, the Roselle Board of Education shall immediately reinstate Lilly Feit within the scope of her certifications and with back pay to September 1, 1978, mitigated by any earnings she has received from employment during the period September 1, 1978 to date of reinstatement. **IT IS SO ORDERED.**

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

Ag.#259-7/78

I HEREBY FILE my Initial Decision with FRED G. BURKE for consideration.

21 OCTOBER 1980
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

LILLY FEIT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

In the instant matter petitioner properly acquired tenure as a teacher of art within the scope of the only certificate then held by her. At the close of the 1974-75 school year her position was abolished by the Board pursuant to N.J.S.A. 18A:28-9 and she was released with six years' seniority. The propriety of the Board's action in abolishing her position is not in question. Petitioner was not in the employ of the Board for the entire 1975-76 school year and she acquired further certification in April 1976 as a media specialist and in July 1976 that of an elementary teacher. She was subsequently employed by the Board and served as an elementary teacher for two school years, 1976-77 and 1977-78. Her contract was not renewed for the 1978-79 school year.

Judge Bruce R. Campbell, ALJ, found in the initial decision that:

> "When she resumed teaching as an elementary teacher, it was no different than it would have been had she taught art for the entire 1975-76 school year and then, in 1976-77, had begun service as an elementary teacher***."
> (at p. 3)

Judge Campbell went on to clothe her with tenure at the end of the 1977-78 school year and eight years' service in the district with reinstatement within the scope of her certifications and back pay to September 1978.

The Commissioner finds that Judge Campbell erred in his decision. Petitioner's claim to tenure status and seniority protection in any subject field other than that which she held as

a teacher of art when she was employed and when her position was abolished, must fail. Petitioner can only claim tenure status and seniority protection within the scope of the subject field for which she was eligible and held at the time the Board abolished her position. The propriety of that abolishment is not in question; petitioner's service with the Board was properly terminated. Elizabeth K. Morer v. Board of Education of the Township of Teaneck, 1976 S.L.D. 963.

Accordingly, the decision of the Court is herewith set aside. The action of the Roselle Board of Education in not renewing petitioner's contract for the 1978-79 school year is affirmed as a proper action. The Petition of Appeal is therefore dismissed.

COMMISSIONER OF EDUCATION

December 8, 1980

Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4830-80

AGENCY DKT. NO. 317-7/80A

IN THE MATTER OF:

V.R. on behalf of A.R.,
Petitioner
v.
Board of Education of the
Borough of Hamburg, Sussex County,
Respondent

Record Closed: September 22, 1980
Received by Agency: 10/21/80

Decided: Oct 17, 1980
Mailed to Parties: 10/22/80

APPEARANCES:

Nancy L. Heath, Esq., for Petitioner
Joseph M. Hoffman, Esq., for Respondent

BEFORE **STEVEN L. LEFELT,** ALJ:

Under N.J.S.A. 18A:38-1, Petitioner, a New York resident, seeks an order compelling the Borough of Hamburg's Board of Education (Board) to provide a free education for his minor handicapped daughter A.R., whose all-year-around continuous dwelling place has been in Hamburg since 1975. The Board contends that A.R. and her father are New York domiciliaries and therefore not entitled to a free education provided by the taxpayers of Hamburg, New Jersey.

This dispute was transmitted to the Office of Administrative Law (OAL) by the Commissioner of Education for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

I. THE FACTS

The parties stipulated that V.R. is the father of A.R. a nine year old girl and that, while V.R. is domiciled in New York, he has never submitted an application to enroll A.R. in any New York school. For the past four years, A.R. has neither attended nor been enrolled in any educational program. She has lived since 1975 with an unrelated resident of the rural, Sussex County community of Hamburg (population under 3,000). This Hamburg resident is paid by V.R. for looking after A.R. and therefore is unable to affirm a willingness to support A.R. gratis as is required to qualify A.R. for a free education under N.J.S.A. 18A:38-1(b).

While the parties did not stipulate to A.R.'s specific physical and mental condition, the uncontroverted testimony of V.R. indicated that A.R. suffers from Down's Syndrome and therefore compels my **FINDING** that A.R. is handicapped at least to the extent that would require an evaluation by the district's child-study team, if she were admitted to the Hamburg School District. N.J.S.A. 18A:46-6 and 8. The Board does not seriously contest this finding and urges by letter brief that A.R. is "profoundly retarded."

Petitioner, a New York lawyer, testified concerning why A.R. was brought to New Jersey. He explained that he and his wife were physically unable to care for A.R. and that they were concerned about the possible strain such a difficult burden would place on their family, which included an older son. Thus, in 1971, about two months after A.R.'s birth, V.R. brought A.R. to New Jersey where she has lived ever since. V.R. had searched for a suitable home without regard to geography or state lines, and according to V.R., no thought was given to educational facilities either at the time New Jersey was selected or at the time A.R. began residing in Hamburg, a fact corroborated by the stipulation indicating that A.R. has not received any education for the last four years. I, therefore, **FIND** that A.R. was not brought into New Jersey to obtain a free education, but rather for personal and family reasons. The Board presented no testimony contesting this finding and did not indicate any special Hamburg educational programs or facilities that might have attracted V.R. to this small Sussex County town. Its position has been that the reason A.R. entered New Jersey is irrelevant.

II. PROCEDURAL BACKGROUND

After transmission of this controversy to OAL, petitioner pressed a motion for interim relief seeking A.R.'s enrollment in the district's public schools; a comprehensive

evaluation by a child-study team to classify A.R.'s handicap; and the provision of suitable programs and facilities for A.R. See N.J.A.C. 6:28-1.6 and N.J.S.A. 18A:46-6 to 18.1. At oral argument on the motion for interim relief, both parties agreed that resolution of the legal question whether A.R. was entitled to a free education under N.J.S.A. 18A:38-1 was the crux of the case. They further recognized that an expedited resolution of that question was possible, if there were no genuine issues as to any material facts. See: N.J.A.C. 1:1-13.2.

After reviewing the stipulated facts, my additional findings of fact, the parties positions as contained in the initial papers (N.J.A.C. 1:1-5.3) and briefs, and the applicable law, **I RULE** procedurally (N.J.A.C. 1:1-9.7(e) that there are no genuine issues over any material fact and that therefore I shall consider this matter as if both parties have made cross-motions for summary decision under N.J.A.C. 1:1-13.1 et seq. seeking determination of the legal question whether A.R. is entitled to a free education under N.J.S.A. 18A:38-1.

III. A.R.'S DOMICILE UNDER N.J.S.A. 18A:38-1(a)

The applicable statute, N.J.S.A. 18A:38-1, in pertinent part reads:

"Public schools shall be free to the following persons over 5 and under 20 years of age:

(a) Any person who is domiciled within the school district;

(b) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child...(the remainder of this subsection requires the filing of a sworn statement affirming the arrangement and establishes a mechanism to test the validity of the sworn statement);

(c) Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-around dwelling place within the district for 1 year or longer shall be

deemed to be domiciled within the district for the purposes of this section;

(d) ...(this subsection deals with persons placed in the district by the bureau of children's services)."

Petitioner argues that A.R. should be considered domiciled in Hamburg and thus entitled to a free education under N.J.S.A. 18A:38-1(a). The normal domicile rule is that an unemancipated infant cannot acquire a new domicile other than its father's which it obtains at birth. Restatement, Conflict of Laws Sec. 14 (1934); In the Matter of the Adoption of Susan-an Infant, 22 N.J. Misc. 181 (Bergen County Ct. 1944); and Russels Case, 64 N.J. Eq. 313 (1902). A domicile is a person's permanent home to which whenever absent he or she intends to return. Kurilla v. Roth, 132 N.J.L. 213 (Sup. Ct. 1944). Therefore, the normal rule results in a New York domicile for A.R. since her father's permanent home is New York, but petitioner urges that "changing times" require a different result since application of the normal rule is mechanistic and unreasonable.

The law establishing an infant's domicile seems based on the rationale that an unemancipated person receives his or her custody, support and maintenance from the father, regardless of the child's physical location. E.g., Commonwealth ex. rel. Human v. Hyman, 164 Pa. Super 64 (1949); Commonwealth ex. rel. Welsh v. Welsh, 96 Pa. Super 426 (1929); Pieretti v. Pieretti, 13 N.J. Misc. 98 (Ch. Div. 1935). Changing times should, therefore, affect the domicile law only when the factual situation presented undercuts this rationale. For example the rising recognition of women's independence is reflected in the Conflict of Law Restatement, Second Sec. 21 (1971) where a wife, under special circumstances, may have a different domicile from her husband, even if she is living with him. Thus, in cases where a child lives with either parent who is separated from a spouse, the rationale that custody, support and maintenance rests with the father in all cases may be undercut by the facts. Walton v. Board of Education of the City of Brigantine, 51 S.L.D. 39 (1950-51). The present case involves neither a husband and wife who have separated nor a minor living with either a mother or father. Similarly, the unemancipated child domicile rationale is questioned when emancipated college students who are frequently extremely independent of their parents seek to vote in their college town and not in the town where their parents live. See Worden, et. al, v. Mercer Cty. Bd. of Elections, 61 N.J. 325, 345-346 (1972).

These situations, however, are extremely different from the present case: we deal with a handicapped child of tender years who needs the care of another person for an indefinite period, not necessarily limited by the child's chronological age; a child who would be returned to her parents, however temporarily, if her present caretaker suddenly and unexpectedly became unable to provide the day-to-day care; and a child dependent upon her parents, who pay for her board and supervision and who select a suitable home. The fact that a third person provides the day-to-day care and control of A.R. at the request of A.R.'s parents seems insufficient to overturn normal domicile principles. Thus, in the absence of a legal termination of parental responsibility, a finding that A.R.'s domicile is in New York would not be mechanical, but rather would be a reasonable application of the general rule. Wherever A.R. is placed by her parents, until emancipation, her domicile must remain in New York, as long as her parents live there. Control, in a legal sense, over A.R.'s life clearly rests with her parents. Mansfield Twp. and C. v. State Bd. of Education, 101 N.J.L. 474, 480 (Sup. Ct. 1925).

In short, I do not believe that the domicile law has progressed, nor in my opinion should it progress, to the position petitioner argues. The cases cited by petitioner from other jurisdictions all permit free education for children "residing in the state," but turn on particular regulatory language or policy. See Drayton v. Baron, 276 N.Y.S. 2d 924 (1967); Fangman v. Moyers, 90 Colo. 308, 8 P.2d 762 (1932); Cline v. Knight, 111 Colo. 8, 137 P.2d 680 (1943); and Spriggs v. Altheimer, 385 F.2d 254 (8th Cir. 1967). As we have seen, however, New Jersey requires a local domicile and since **I CONCLUDE** that A.R. is domiciled in New York, she is not entitled to a free education under N.J.S.A. 18A:38-1(a).

IV. CONSTRUCTION OF N.J.S.A. 18A:38-1(c)

Petitioner also contends that under N.J.S.A. 18A:38-1(c), A.R. is entitled to a free education since A.R. is a "person" between 5 and 20 years old and has her "all-year-around dwelling place within the district for 1 year or longer" and therefore should "be deemed to be domicile within the district..." pursuant to the second clause in N.J.S.A. 18A:38-1(c).

While N.J.S.A. 18A:38-1(c) has never before been construed, the Board argues that Mansfield Twp., and C. v. State Board, 101 N.J.L. 474 (Sup. Ct. 1925) is exactly on point and controlling. Mansfield is close on its facts to the present matter: it involved a minor living all-year-around for the past two years at a private boarding school in

Mansfield Township. The minor's father, a New York resident, sought a High School education paid for by the Township because of his child's residence in the district. Mansfield applied domicile principles to prohibit the minor's free education and stated that it "does not seem consistent with sound public policy to open our public schools to the admission of pupils from other states and whose parents reside there to be educated here at the expense of the taxpayers." Mansfield Twp. and C. v. State Bd. Education, 101 N.J.L. 474, 480 (Sup. Ct. 1925). Mansfield however, unlike the present case, involved a parent who sent his child to New Jersey for an education. 101 N.J.L. 474 at 478. Furthermore, Mansfield did not construe the statutory provisions that govern the present case. A review of the 1925 statute indicates that clauses (b) and (c) were not part of the 1925 law. L. 1912 c. 183. In fact, much of Mansfield's reasoning was required by the 1925 statutory references to "resident" and "non-resident" instead of domiciliaries. Thus, Mansfield construed a statute substantially different from the one petitioner relies upon. The holding in Mansfield is reflected in N.J.S.A. 18A:38-1(a) where children domiciled in New Jersey are entitled to a free education.

The legislature subsequent to Mansfield has enlarged the categories of persons eligible for a free education beyond those legally domiciled in the district. For whatever the specific meaning of clauses (b) and (c) have, it is clear that they broaden Mansfield beyond domicile. For example, a child under clause (b) would be entitled to a free education in New Jersey even if domiciled in New York, provided the child lived with a relative or friend, domiciled in New Jersey, who is supporting the child. N.J.S.A. 18A:38-1(b). Thus, this tribunal must determine whether the legislature intended by the second clause in N.J.S.A. 18A:38-1(c), to require free education for children who have had or shall have their "all-year-around dwelling place within (this state) for 1 year or longer," even though their parents are supporting them and domiciled in another state.

The problem with ascribing such intent to the legislature is that it ignores the first clause of subsection (c) which provides free education to a child "whose parent or guardian, even though not domiciled within the district, is residing temporarily therein...."

General statutory construction principles require a consideration of the whole instrument. Each part or section should be construed in connection with every other part or section to produce a harmonious whole. State v. Madewell, 117 N.J. Super 392 (App. Div. 1971). Thus, it is improper to confine interpretation to a portion of one subsection.

Delaware Township v. Neeld, 52 N.J. Super 63 (App. Div. 1958). An attempt should, therefore, be made to reconcile the two portions of the pertinent subsection, N.J.S.A. 18A:38-1(c).

The board urges that reconciliation can be achieved simply by holding that under N.J.S.A. 18A:38-1(c) the "person" who must have an all-year-around dwelling place in New Jersey should be a "parent or guardian." In this manner, both clauses of N.J.S.A. 18A:38-1(c) would relate to parents or guardians residing in New Jersey and A.R. would be precluded from recovery. It seems relatively clear, however, that the term "person" appearing in the second clause must refer to a child between the ages of five or twenty. Any other construction would be inconsistent with usage appearing throughout N.J.S.A. 18A:38-1. To hold that "person" means "parent or guardian" would require a finding that the legislature ascribed different meanings to the same word in the first and second clauses, usages separated by only seventeen words.

An alternative approach would in essence read the second clause as if the word "such" preceded "persons." Thus, the second clause would apply only to those persons who have an all-year-around dwelling place and whose parents are temporarily residing in the district. Petitioner asks why should children who are entitled under the first clause of subsection (c) to a free education because their parents are temporarily residing within the district, also be entitled to a free education if they stay for a year, thereby becoming "domiciled" by operation of the second clause of subsection (c)? Petitioner argues therefore that such a construction renders the second clause of (c) meaningless and, thus, should be rejected. However, to read the clause as petitioner argues (establishing in effect, a separate category of children entitled to free education - those living all-year-around in the district) would render meaningless the entire subsection (b) in N.J.S.A. 18A:38-1.

Subsection (b) was amended in 1977 to permit boards of education to test the validity of the sworn statement affirming that the domiciliary, whether friend or relative, intends to support the child in question gratuitously. The problem addressed by the amendment was described as follows:

> "Parents sometimes attempt to send their children to schools in districts other than their own without actually changing their residences. It is a very simple matter for a parent to request a

> relative or friend who resides within the district to provide the child with an official address within the district for purposes of school attendance. Further, if the friend or relative agrees to sign an affidavit, the school district must accept the child as a student within the system..." Senate No. 1464-L. 1977, c. 373.

Thus, the 1977 amendment to subsection (b) empowered boards of education to contest the validity of any sworn statement submitted pursuant to this subsection.

Should the statute be construed as petitioner requests, the clear legislative purpose of the 1977 amendment would be destroyed. Parents could simply send their children into any district in this state regardless of where the parents were residing, domiciled and paying taxes. The determinative factor according to petitioner is solely that the child live within the district "all-year-around" for "1 year or longer." Thus, no affidavit would be required and the parent's continued support of the child would be irrelevant. Subsection (b) would be rendered nugatory - a result that is unreasonable and therefore should be avoided. David v. Heil, 132 N.J. Super 283 (App. Div. 1975).

The key to construing subsection (c) in accordance with the legislative intent can be found in the subsection's legislative history. In 1942, the statute, in pertinent part read that:

> "Public schools shall be free to all persons over five and under twenty years of age, and to such persons over the age of twenty years as the board of education of any school district may deem it wise to offer instruction who are residents of the school district. Nonresidents of a school district, if otherwise competent, may be admitted to the schools of a district with the consent of the board of education..." L. 1942 C. 211.

This statute was essentially the language construed by Mansfield Twp. and C. v. State Bd. Education 101 N.J.L. 474 (Sup. Ct. 1925).

In 1947, however, the predecesor of subsection (c) was adopted and read as follows:

> "Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein but no person who has had or shall have his all-year-around dwelling place within the district for 1 year or longer shall be deemed temporarily resident therein..." L. 1947, C. 138.

The first revelation gleaned from this subsection is that the second clause beginning with "but no person" must relate to the first since the terms "temporarily resident" in the second clause refer to "residing temporarily therein" in the first clause. The introductory statement to this law declares its purpose as follows:

> "Children whose parents were engaged in farm labor in this state for the war period were entitled to free public education under the provision of chapter 91, P.L. 1943. This privilege expires at the official close of the war. The present bill continues to provide educational opportunity to the children of migrant farm laborers and for other children residing temporarily in the state with their parents or guardians."

Thus, the 1947 legislative history leads to the conclusion that the second clause of subsection (c) is related to the first and that the law's purpose was to provide a free New Jersey education to the children of migrant laborers working and temporarily living in the district.

Nevertheless, even in the 1947 law the effect of the second clause is somewhat uncertain. Presumably, if the migrant worker and child remained in New Jersey for a year or longer, subsection (c) would not apply because the worker could no longer be deemed temporarily resident. The children of migrant workers would be domiciled outside New Jersey and not entitled to a free education, assuming that the migrant worker intended to return to his or her permanent home. See: Kurilla v. Roth, 132 N.J.L. 213 (Sup. Ct. 1944) and In the Matter of the Adoption of Susan - an Infant, 22 N.J. Misc. 181 (Bergen County Ct. 1944). Parents who had been living temporarily in the district with their children would have to satisfy the school board that they were domiciled there in order for their children to continue to receive a free education. To avoid this result might very well have been the reason the law was amended in 1967 to its present form. L. 1967 Ch. 271. While no legislative history is available to clarify the purpose for the 1967

amendment, under the 1967 provision a child having an all-year-around dwelling place within the State for one year or longer was not denied temporary resident status, but rather was "deemed domiciled." Thus, the amendment eliminates the need for disputes with school boards over the status of such children. They were now "deemed domiciled." Presumably, as long as the parents resided temporarily within the district, their children could remain enrolled in the local schools. Another possible construction is for "deemed" to establish a rebuttable rather than a conclusive presumption. E.g. Zimmerman v. Zimmerman 175 Or. 585, 155 P.2d 293 (1945); Brimm v. Coche, et.al. Banking Co., 2 Utah 2d 93, 269 P.2d 859 (1954). But see Black's Law Dictionary, Rev. 4th Ed. (1968) citing only a single case where "deemed" was determined to establish a disputable presumption. If "deemed" establishes only a rebuttable presumption, then the only practical difference between the 1947 and 1967 laws may be to shift the burden of producing domicile evidence from the parent to the school board. See: Lilly, An Introduction to the Law of Evidence, Sec. 16, p.49 (1978). Because of the conclusion I reach, however, it is unnecessary to decide whether "deemed domiciled" establishes a conclusive or rebuttable presumption.

Thus, I believe that the second clause of N.J.S.A. 18A:38-1(c) must be restricted by the first and should be read as if the word "such" preceded "person" to require that a child have a parent or guardian temporarily residing in New Jersey before (c) becomes operative. Under this construction, A.R. would not be entitled to a free education since her parents are not temporarily living with her in Hamburg. Only this construction seems consistent with the 1977 Amendment to N.J.S.A. 18A:38-1(b) and with the previous legislative history to N.J.S.A. 18A:38-1(c). See: L. 1947 Ch. 138. In addition, Mansfield Twp. and C. v. State Bd. Education, 101 N.J.L. 474, 480 (1925) and the legislature in N.J.S.A. 18A:38-1(b) have established that our public policy protects local taxpayers from public school expense caused by the admission of excessive numbers of pupils whose parents are non-residents of New Jersey. The construction of (c) that I adopt limits its effect to children of parents temporarily residing in New Jersey, and thus fosters the public policy of this State. Vlandis v. Kline, 412 U.S. 441 (1973). Petitioner's construction of subsection (c) would, in effect, open our public schools to any child living in New Jersey no matter where the parent or legal guardian resides and therefore must be rejected as violative of this State's public policy. Roberts v. All American Engineering, Co., 104 N.J. Super. 1 (App. Div. 1968).

V. CONCLUSION

Before stating my specific conclusion, I wish to clarify what has been decided. A.R. has been deprived of an education to be paid for by New Jersey citizens. She has not been totally deprived of a New Jersey education. If she wishes and her parents are financially able, appropriate economic arrangements are not precluded by this opinion. See e.g., N.J.S.A. 18A:38-3.

Furthermore, the construction of N.J.S.A. 18A:38-1(c) that I adopt renders unnecessary a determination that could not be made on this record of whether A.R. is so profoundly retarded as to be outside the requirements of New Jersey's free public education clause, N.J. Const. Act 8, Sec. 4, para. 1. See Levine v. Institutions and Agencies, Dept. of N.J., 84 N.J. 234 (1980).

I therefore **CONCLUDE** that A.R. is not entitled to a free education under N.J.S.A. 18A:38-1 at the expense of Hamburg taxpayers since she is domiciled in New York and her parents do not live in New Jersey. I deny petitioner's motion for summary decision, grant summary decision in favor of the respondent Board, and **ORDER** that the petition be **DISMISSED**. No costs are awarded respondent. N.J.S.A. 18A:6-9. Deciding the case on this ground, moots petitioner's request for an interim order, declaratory judgment and other requested relief.

While the intent of this decision is clearly to protect New Jersey citizens from excessive tax levies, I must also recognize that A.R. lives in New Jersey and that her parents were not attempting to manipulate our public education system to obtain a free education for A.R. when she was sent to New Jersey. Her residence is bona fide. Nevertheless, I believe that even though N.J.S.A. 18A:38-1 is not completely clear, it prevents A.R.'s recovery. New Jersey's statute is unlike New York's which specifically provides for children who are "mentally retarded" and "children cared for in family homes at board." N.Y. Educ. Law Sec. 3202. Thus, it is my opinion that any relief for A.R. permitting a free education in New Jersey must come from the legislature.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, FRED G. BURKE,** who by law is empowered to make a final decision in this matter. However, if **Fred G. Burke** does not

so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

Oct. 17, 1980
DATE

STEVEN L. LEFELT, ALJ

V.R., on behalf of A.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAMBURG, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed in a timely fashion by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner argues that, because A.R. resided year-round with a nonparent for over one year, she is therefore entitled to attend respondent's schools pursuant to N.J.S.A. 18A:38-1(c). Petitioner contends that subsection (b) applies only to those living apart from the family for less than one year. The Commissioner finds no merit in such argument rendering as it would the requirement of an affidavit for such pupils an act of supererogation.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

December 5, 1980

Pending State Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. —
AGENCY DKT. NO. 268-6/78

IN THE MATTER OF:
OLGA TCHIR AND
BONNY CARIDAD,
petitioners,
v.
BOARD OF EDUCATION OF
THE TOWN OF BLOOMFIELD,
ESSEX COUNTY,
respondent.

APPEARANCES:

Sheldon H. Pincus, Esq., for petitioners (Goldberg & Simon, attorneys)

John A. Errico, Esq., for respondent.

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

Petitioners, tenured teaching staff members in the employ of the Bloomfield Board of Education (Board), claim the Board acted improperly in requiring them to commence maternity leaves at times other than requested by them, such requests having been made after consultation with their attending physicians. Petitioners claim further that the Board improperly denied their requests that sick leave entitlements accrued by

them be applied to their maternity leaves. They seek an order (a) restraining the Board from requiring teachers to begin maternity leaves of absence at times contrary to the requests of those teachers and/or the judgments of their physicians; (b) declaring the actions of the Board as to them were in violation of the statutes governing leave of school employees, N.J.S.A. 18A:30-1 et seq. and of Castellano v. Linden Bd. of Educ. 79 N.J. 407; (c) ordering the Board to cease and desist from refusing to allow accumulated sick leave days to be applied to maternity leaves of absence and (d) such other relief as may be deemed appropriate in the circumstances. The Board denies all claims and requests the petition of appeal to be dismissed.

The matter was filed before the Commissioner of Education on July 26, 1978, and heard on March 13 and 14, 1979. Post-hearing submissions were timely filed. The matter was transferred to the Office of Administrative Law on July 2, 1979, as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

The claim of each petitioner is the same except as to dates. Each avers she applied for maternity leave, specifying the date she desired the leave to begin. At some time subsequent to the request, each was told the leave would commence on a date earlier than the one requested. Each petitioner also avers she requested unused and accumulated sick leave be applied to the initial dates of requested maternity leave and the requests were denied.

As a result of these actions, Tchir alleges she lost one week's salary and the salary she would have received for the number of accumulated sick leave days she was not allowed to apply to the maternity leave. Caridad claims she lost two weeks' salary and the salary she would have received for the number of accumulated sick leave days she was not allowed to apply to the maternity leave.

The Board contends Tchir discussed the pending leave with the principal of her school, including the beginning date of May 1, 1978, and agreed orally and in writing to commence leave on April 24, 1978. It is not controverted that she agreed reluctantly. In a letter to the superintendent of schools dated March 30, 1978 (P-4,) she stated she would abide by the decision, but did not agree with the decision and would prefer to begin the leave, as per her request, on May 1.

As to Caridad, the Board contends she submitted a request for maternity leave to commence on December 1, 1977, and the request was granted. She later submitted a medical certificate indicating the expected date of birth to be November 9, 1977 but the medical certificate was not received by the superintendent until after November 9. The superintendent conferred with Caridad and suggested she commence her leave on November 16. She, too, agreed to abide by the suggestion but did so reluctantly and let it be known she would prefer to begin the leave, as per her request, on December 1.

From a review of the documents in evidence and the testimony adduced at hearing, **I FIND** the following to be true in fact:

1. Tchir, on February 9, 1978, requested a maternity leave to begin on May 2 and continue through June 30. (P-1)

2. Her attending physician, Dr. Margaret Brisco, on December 8, 1977, prepared a memorandum stating Tchir to be physically capable of teaching until the birth of her child and that the birth was expected to occur on April 30, 1978. This memorandum is attached to P-1.

3. On March 1, the superintendent of schools wrote to Tchir expressing concern for the continuity of the educational program of Tchir's pupils. He said it was usual for teachers to begin maternity leaves two to four weeks prior to expected date of confinement and "it would seem that since there is a vacation week during April, your leave could begin on April 24 the day classes resumed following the vacation. Your last day in the classroom, however, would be April 14...." (P-2)

4. On March 7, Tchir wrote to the superintendent and affirmed her desire to begin her leave on May 1. She stated her educational program plans for the month of April were complete. (P-3)

5. On March 27, Tchir and the superintendent discussed the matter. The superintendent insisted the leave begin on April 24.

6. In the course of the March 27 conversation, Tchir requested any accumulated sick leave days to be applied to the maternity leave. The request was denied.

7. Tchir, on March 30, wrote to the superintendent and agreed she would abide by the decision that her leave commence on April 24 although she did not agree with it. She also stated she was informing "the appropriate legal, institutional and educational parties" of the situation and expressed hope that the matter be fairly resolved. (P-4)

8. The official Board action setting the commencement of Tchir's leave at April 24 was taken on March 27. (P-5)

9. On April 12, a representative of the New Jersey Education Association wrote to the superintendent enclosing a copy of the Appellate Division decision in Castellano, above, stating the decision indicates the commencement of maternity leave is up to the employee, accumulated sick leave is allowable for maternity leave purposes and stating that litigation would ensue if the Board did not comply with Castellano as to "Mrs. Tchir and any other similarly affected employees...." (P-6)

10. No change was made in either of the above determinations.

11. Caridad, on September 22, 1977, requested a maternity leave to begin on December 1, 1977, and continue through August 31, 1978. (P-7)

12. On September 22, the superintendent wrote to Caridad requesting a medical statement of her condition, estimated length of her ability to remain on duty and estimated date of birth of her child. (P-8)

13. The Board, on September 26, approved Caridad's maternity leave as requested by her. (P-9)

14. On September 26, Caridad forwarded to the superintendent a memorandum prepared by her physician, Dr. Robert T. Miller, on September 13 stating Caridad to be able to work until termination of her pregnancy. (P-11) The physician's memorandum was received after the Board's action approving Caridad's leave request.

15. On November 2, Caridad forwarded to the superintendent a second memorandum prepared by Dr. Miller and dated November 2 giving Caridad's expected date of delivery on November 9. (P-12)

16. Caridad was informed on November 14 by her building principal that the superintendent, on the basis of Dr. Miller's estimation of a November 9 delivery date, wanted her to begin her leave on November 16.

17. Caridad and the superintendent had a discussion on November 15 in which Caridad expressed her desire to keep working and to apply accumulated sick leave days to her maternity leave. Both requests were denied.

18. The Board, on November 28, took official action setting the commencement of Caridad's leave at November 16.

As agreed at the prehearing conference, there are two issues to be determined in this matter. First, may a Board require teachers to begin maternity leaves at times other than the times requested by the teachers themselves, presumably determined in consultation with their physicians and second, may teachers, of right, apply accumulated sick leave entitlements to unpaid maternity leaves of absence.

Concerning the first issue, I am convinced from the evidence the Board believed its actions as to commencement dates proper, in the best interests of the educational program and, indeed, in the best interests of the teachers. Its belief, however, is not sufficient to a determination of the issue. It is also observed that the Board's concern for continuity of the educational program is a valid one. However, in the words of Mr. Justice Sullivan in Castellano, above, at 412, the concept cannot be adhered to blindly at the expense of the civil rights of teachers.

Both petitioners offered medical evidence that they were able to work up to the expected date of birth. If the Board harbored any doubt of their ability to do so, it could have invoked N.J.S.A. 18A:16-2 and required physical examinations by the school medical inspector, a physician or institution of the Board's choosing or a physician or institution mutually agreeable to the parties. No such examinations having been required and no challenge to the physician's statements having been made, I must give credence to the physician's statements.

It is immediately noticed that Tchir's requested date of leave virtually coincided with her physician's estimate of her date of delivery. Caridad's on the other hand, was a full three weeks after her estimated due date. I can see no compromise of a teacher's civil rights in requiring good faith on the part of one applying for a maternity leave of absence. It is not alleged and I cannot presume that Caridad did not know her estimated date of delivery.

Assuming the correctness of the proposition that a teacher may, of right, select the date upon which to begin a maternity leave, which I do, the proper rule in such cases should be that the requested leave commencement date be no later than the date upon which the attending physician estimates birth will take place. To allow designation of a leave commencement date after the estimated due date would place an unnecessary burden of uncertainty as to its staffing requirements and, hence, continuity of program on the public employer and seems contrary to the common understanding of fair play.

In summary, **I FIND AND CONCLUDE** a teacher has the right to designate the commencement date of a maternity leave of absence provided the teacher has the attending physician's certificate of her ability to work until that date and further provided the designated commencement date is not later than the date upon which the attending physician expects birth to occur.

I FURTHER FIND AND CONCLUDE that the question of whether teachers may, of right, apply unused sick leave entitlements to maternity leaves was determined in the affirmative by the Supreme Court of New Jersey in Castellano, above, at 412-13.

In this matter, Tchir gave birth two days before the beginning of her leave but while school was in recess. She had submitted a statement of her attending physician

attesting to her ability to work until giving birth. Therefore, there is no question of application of sick leave days prior to birth. Her accumulated sick leave as of April 22 is properly creditable to her maternity leave commencing April 24, 1978.

Caridad gave birth on November 23, 1977. This was 14 days after her expected date of delivery, November 9, which was also the date until which her physician certified that she was able to work. Her leave actually began on November 16. Thus, there were five school days prior to the birth on which Caridad did not work and which were not covered by a medical statement of ability to work. Five of her sick leave days accumulated as of November 16 are properly creditable to this period; the balance is properly creditable to the part of the maternity leave remaining.

The Bloomfield Board of Education shall calculate the number of days of accumulated sick leave creditable to Olga Tchir on April 22, 1978, and to Bonny Caridad on November 16, 1977, and shall apply the accumulations to their respective maternity leaves, reimbursing them accordingly, minus legally required deducations, as set forth above. **IT IS SO ORDERED.**

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

Ag.#268-6/78

I HEREBY FILE my Initial Decision with FRED G. BURKE for consideration.

23 OCTOBER 1980
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

OLGA TCHIR AND BONNY CARIDAD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the entire record of the instant matter including the initial decision rendered by Bruce R. Campbell, ALJ.

The Commissioner observes that timely exceptions and reply exceptions were filed by the Board and petitioners respectively, pursuant to the provisions of N.J.A.C. 1:1-16.4a, b, and c.

The Board in its exceptions maintains that Judge Campbell, in relying on Castellano, supra, has given that case a much broader interpretation than is warranted by the facts of the instant matter. Moreover, the Board contends that such interpretation of Castellano has in fact been misapplied by Judge Campbell herein.

More specifically, the Board asserts that petitioners' requests for maternity leaves of absence were not accompanied by a request for the use of sick leave days and, even if such requests were made, they could not have been granted to petitioners in light of the ruling of the State Board of Education in Adrinne Logandro v. Board of Education of the Township of Cinnaminson, Burlington County, 1979 S.L.D. ____ (decided August 6, 1979), reversed in part State Board of Education June 11, 1980.

The language of the State Board in Logandro relied upon by the Board reads in pertinent part:

> "***The key issue in this controversy is whether the Board may refuse to pay sick leave for every kind of disability arising during an extended unpaid leave of absence. We believe the Board has this right. We find no statute or judicial decision to the contrary.***"
>
> (Slip Opinion, at p.3)

The Board further relies on Linda Farley v. Ocean Township Board of Education, Docket A-48-49 N.J. Superior Court, Appellate Division, decided June 16, 1980, in distinguishing between sick leave disability due to childbirth and entitlement to maternity leave for the purpose of child rearing. The specific language upon which the Board relies in Farley reads in pertinent part:

> "***The period of disability resulting from childbirth is separate and a pregnant teacher should be entitled to both accumulated sick leave for the time in which she is actually disabled, followed by maternity leave for the purpose of raising the child.***"
> (Slip Opinion, at p. 4)

The Board avers that there can be no question that it had approved petitioners' requests for unpaid maternity leaves of absence and therefore since it did in fact pay both Petitioners Caridad and Tchir up to the time their maternity leaves without pay commenced on November 16, 1977 and April 24, 1978 respectively, they were not entitled to claim their accumulated sick leave with pay during such periods thereafter.

Consequently, the Board takes further exception to Judge Campbell's determination that it is required to allow Petitioner Caridad to claim disability sick leave with pay for the period extending from the commencement of her unpaid maternity leave of absence on November 16, 1977 until the birth of her child on November 23, 1977.

Similarly, the Board takes exception to the determination of Judge Campbell which holds that Petitioner Tchir is to be allowed to claim accumulated disability sick leave with pay from the date she gave birth to her child on April 22, 1978 to April 24, 1978 when her unpaid maternity leave of absence commenced. In this regard the Board points out that Petitioner Tchir had received her regular salary until April 24, 1978, the time when her unpaid maternity leave of absence commenced.

It is observed that petitioners, in their reply to the Board's exceptions, admit that while it was true in fact, that they were capable of performing their teaching duties up to the time of birth, nevertheless they did request of the Board to be allowed to utilize their accumulated disability sick leave for reasons of pregnancy, to be followed by unpaid maternity leaves of absence. Petitioners further contend that they were never given options by the Board in this respect. Instead, petitioners claim, the Board denied their requests to be allowed to take paid disability sick leaves due to pregnancy followed by unpaid maternity leaves of absence by virtue of what it considered insufficient medical proof of their disabilities related to pregnancy. Petitioners argue by way of their reply exceptions that the Board further refused their requests to be allowed to

work up until the termination of their pregnancies by causing them to commence unpaid maternity leaves of absences on November 16, 1977 (Petitioner Caridad) and April 24, 1978 (Petitioner Tchir), rather than on the dates of December 1, 1977 and May 2, 1978, respectively, as requested.

Moreover, petitioners claim that the Board refused to accept those medical certificates provided by them from their physicians attesting to their ability to work until the dates they gave birth and to their disabilities thereof.

Petitioners maintain that the Board does not, in fact, have a policy which refuses to permit the use of accumulated sick days during an unpaid maternity leave of absence. Instead they assert that the only reason given by the Board for refusing them the use of accumulated disability sick leave with pay resulting from pregnancy was that they had not provided sufficient medical proof of such disability.

Petitioners assert that such actions by the Board as described above were totally arbitrary and capricious. In support of these assertions petitioners rely on Lillian Hynes v. Board of Education of the Township of Bloomfield, 1980 S.L.D. _____ (decided April 28, 1980, aff'd State Board of Education December 3, 1980 and Susan Headley v. Board of Education of the Township of Jefferson, 1980 S.L.D. _____ (decided June 27, 1980), appeal pending State Board of Education.

The Commissioner has carefully reviewed and considered the exceptions of the parties pertaining to the matter herein controverted. He is constrained to observe that the Board in its exceptions specifically rejects the finding and conclusion of Judge Campbell which reads in pertinent part:

> "***that the question of whether teachers may, of right, apply unused sick leave entitlements to maternity leaves was determined in the affirmative by the Supreme Court of New Jersey in Castellano, above, at 412-13.***" (at p. 6)

The Commissioner agrees with the exception taken by the Board insofar as it tends to convey a lack of distinction between an unpaid maternity leave for child rearing purposes and a leave of absence for physical disability including, but not limited to, pregnancy and childbirth whereby employees may apply accumulated sick leave days prior to the commencement of extended Board approved unpaid leaves of absences. In the Commissioner's judgment it is clear that the New Jersey Supreme Court in Castellano made such distinction when it held in part:

> "***The policy of a mandatory one-year maternity leave may have been well intentioned. In purpose and effect, though, it discriminates against teachers because of their sex. It is therefore illegal and void.
>
> "The nonallowance of the use of accumulated sick leave during complainant's absence due to childbirth suffers from the same fault. A woman giving birth to a child becomes physically disabled and unable to attend her teaching duties for that reason. It is discriminatory not to allow her to use her accumulated sick leave during that period of temporary disability, when it can be used for any other period of absence due to physical disability.***" (Emphasis supplied.)
>
> (79 N.J. at 412-413)

Moreover, the New Jersey Superior Court, Appellate Division, relied on Castellano in part when it rendered its ruling in Farley. The Court's decision in Farley distinguishes between allowable accumulated disability sick leave and maternity leave for child rearing purposes as follows:

> "***Thus, the 'birth of the baby' is not the purpose of maternity leave; rather, the purpose of the extended unpaid leave of absence [maternity leave] following childbirth is to rear the child. The period of disability resulting from the childbirth is separate and a pregnant teacher should be entitled to both accumulated sick leave for the time in which she is actually disabled, followed by maternity leave for the purpose of raising the child.***"
>
> (Slip Opinion at p. 4)

The Commissioner in relying on Farley herein acknowledges the fact that the use of accumulated sick leave for disability due to childbirth followed by unpaid maternity leaves of absence for child rearing purposes applies only in instances where local boards of education have adopted a policy for unpaid maternity leaves of absence for child rearing purposes. Absent such policy or negotiated agreement, however, there exists no right as a matter of law to an unpaid maternity leave for child rearing purposes.

Finally, the Commissioner is constrained to observe, however, that once a Board-approved unpaid leave of absence is granted for any reason that teacher or employee is not entitled to use accumulated sick leave days after the commencement of said leave of absence. Logandro, supra

Upon review of the Board's negotiated agreement with the local Education Association covering the 1977-78 and 1978-79 school years (J-2), the Commissioner observes that the Board does in fact have a policy covering maternity leaves of absence (section E, p. 22) under the category of "Extended Leaves of Absence" (J-2, p. 21). The section (E) governing maternity leaves of absence, however, does not specify whether such leaves will be granted with or without pay. In any event the Board did, in fact, grant unpaid maternity leaves of absence. The Commissioner in relying on the language of the courts in Castellano, supra, and Farley, supra, as well as the negotiated agreement (J-2) between the Board and the Bloomfield Education Association must construe such maternity leaves of absence to be for child rearing purposes. The Commissioner so holds.

In reaching a fair and equitable determination of the matter controverted herein, the Commissioner cannot ignore the language of the courts in those cases cited above. It is clear that both petitioners, Caridad and Tchir, requested extended unpaid maternity leaves of absence for child rearing purposes to commence on December 1, 1977 and May 2, 1978 respectively. It is also evident that once the Board was provided with medical information from each petitioner with respect to her estimated date of delivery, it rescinded its approval to grant Petitioner Caridad an unpaid maternity leave from December 1, 1977 and moved such date of approval forward to November 16, 1977. In regard to Petitioner Tchir's request for an unpaid maternity leave of absence, the Board determined to grant approval for such leave of absence as of April 24, 1978. Consequently, Petitioner Caridad gave birth to her child on November 23, 1977 when she was on an unpaid maternity leave of absence by virtue of the Board imposed date of such leave on November 16, 1977. Similarly, Petitioner Tchir gave birth to her child on April 22, 1978 which was prior to the time of the Board imposed maternity leave of absence of April 24, 1978 and also the time of her requested leave of absence of May 2, 1978. It is evident that petitioners were paid up until the time of the commencement of their unpaid maternity leaves of absence as determined by the Board.

In the Commissioner's judgment it cannot be argued that petitioners' originally requested dates for commencement of unpaid extended maternity leaves of absence for child rearing purposes were unreasonable. Conversely, it also cannot be argued that the Board acted in an arbitrary or capricious manner in arriving at its determination regarding when petitioners' leaves of absence should commence in view of its desire to provide continuity to the educational program. In this regard the Board also took into consideration the medical information it received from petitioners' attending physicians' estimates of the dates upon which they were expected to be disabled because of the birth of their infants.

Without question, however, the Board's actions precluded petitioners' right to continued employment prior to the time when they originally requested maternity leaves for child rearing purposes to commence.

The Board could have remedied the inequity caused to petitioners by its actions merely by granting their original reasonable request for unpaid maternity leaves for child rearing purposes and by using its authority pursuant to the provisions of N.J.S.A. 18A:30-1 et seq. to grant them paid leaves of absence on November 16, 1977 (Caridad) and April 24, 1978 (Tchir) so as to enable it to provide the continuity of educational program it so desired until petitioners' unpaid maternity leaves of absence for child rearing purposes commenced. If as was the case with both petitioners they became physically disabled due to childbirth prior to the times of commencement of their requested unpaid maternity leaves of absence the Board could have and should have in the instant matter allowed them to use their accumulated sick leave days for disability until December 1, 1977 (Caridad) and May 2, 1978 (Tchir) respectively. The Commissioner so finds and determines that such relief as herein before set forth be granted to petitioner herein. This determination is based upon the factual circumstances herein that petitioners provided adequate medical information to the Board indicating that they were in fact capable of continuing their teaching duties up until the time each of them gave birth which then rendered them physically disabled to continue thereafter until the commencement of their unpaid maternity leaves of absence.

Accordingly, for the reasons set forth herein the Board is directed to allow Petitioner Caridad the use of her accumulated sick leave entitlement for those working days from November 16, 1977 up to but not including December 1, 1977.

In Petitioner Tchir's case, the Board is directed to allow her to claim her accumulated sick leave entitlement for disability purposes for each working day commencing with April 24, 1978 up to but not including May 2, 1978.

The initial decision in this matter is hereby set aside for the reasons set forth in the Commissioner's determination herein.

COMMISSIONER OF EDUCATION

December 8, 1980

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON
MOTION FOR SUMMARY JUDGMENT
OAL DKT. NO. EDU 3147-80
AGENCY DKT. NO. 224-5/80A

IN THE MATTER OF:

BERGENFIELD EDUCATION ASSOCIATION
v.
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY

Record Closed:
Received by Agency: 10/31/80

Decided: 10/29/80
Mailed to Parties: 11/5/80

APPEARANCES:

Cassel R. Ruhlman Jr., Esq., for Petitioner, Bergenfield Education Association (Ruhlman & Butrym, attorneys),
Stephen G. Weiss, Esq., on the Brief,
Robert H. Greenwood, Esq., substituted counsel, for Respondent, Board of Education of the Borough of Bergenfield

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

This matter was brought before the Court as the result of a petition filed pursuant to N.J.S.A. 18A:6-9, which vests the Commissioner of Education with jurisdiction to hear and determine all controversies and disputes arising under the school laws. The case was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on July 18, 1980. A Prehearing Order was issued, which delineated the legal issues to be determined as follows:

1. Whether or not the Board of Education has acted properly, and in compliance with the law, when it offers behind-the-wheel driver education training only in the adult evening school, for a monetary fee, taught by persons not certified by the State of New Jersey, while the classroom portion of the driver education course is offered, free of charge, as part of the regular school program?

2. Whether or not the petition should be dismissed as out of time, pursuant to N.J.A.C. 6:24-1.2?

3. Laches.

4. Whether or not the petitioner, Bergenfield Education Association (Association), is the proper party to bring this matter, and whether or not said Association has a justiciable interest in this controversy, in response to which effective relief can be given?

The respondent, Bergenfield Board of Education (Board), filed a Motion to Dismiss the Complaint, based on three issues: that the petitioner had exceeded the 90-day statute of limitations contained within N.J.A.C. 6:24-1.2, that laches existed, and that the Association had no standing to pursue this matter. Petitioner, Bergenfield Education Association, filed a Cross-Motion for Summary Judgment, based on the theory that the Association was entitled, as a matter of law, to summary judgment on all the assertions contained within the petition. Briefs in support of the Motion to Dismiss and the Cross-Motion for Summary Judgment, and in opposition thereto, were filed with the Court on the appropriate dates. No oral argument was heard.

The movant-respondent, Bergenfield Board of Education, urges this Court to adhere strictly to the limitations set forth in N.J.A.C. 6:24-1.2, which provide that:

> To initiate a proceeding before the Commissioner to determine a controversy or dispute arising under the school laws, a petitioner shall file with the Commissioner the original copy of the petition, together with proof of service or a copy thereof on the respondent or respondents. Such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested.

The Board's attorney argues that the determination not to offer behind-the-wheel driver education in its regular school program was made and implemented by the Board in 1976. The instant petition was filed on May 16, 1980. He also argues that petitioner has presented no explanation whatsoever as to why this action was not timely filed, since the Association had received notice and been aware, since 1976, that the behind-the-wheel portion was available only in the adult evening school. Counsel relies on Riely v. Hunterdon Central High School Board of Education, 173 N.J. Super. 109 (App. Div. 1980), as well as various Commissioner's decisions.

Counsel for the Board also argues that the unexplained delay in filing is the equivalent of laches, a further basis for dismissal.

The Board of Education also urges the petition be dismissed because the Association has no justiciable interest in the case, is not the proper party, and is without standing to pursue this matter. He argues that there is no viable connection between the petitioner and the substantive issue raised, that no relief for the Association has been requested, nor can any be granted, and that no specific teacher has been injured. The attorney for the Board distinguishes the cases of Camp v. Board of Education of Glen Rock, 1977 S.L.D. 706 and Winston v. Board of Education of South Plainfield, 64 N.J. 582 (1974), which give teachers' associations standing, by pointing out that in each matter there were challenges by individual teachers. The Board asserts that, absent an individual teacher's claim that he or she has been deprived of some right guaranteed under the school law of this State, there is no reason to allow the Association to be the sole petitioner.

Petitioner responded to the Motion to Dismiss by arguing that the 90-day rule should not apply, because there has been a continuing violation of the school laws, the gravamen of which is centered on the current method of providng behind-the-wheel training. He cites Terry v. Mercer County Freeholders Board, 173 N.J. Super. 249 (App. Div. 1980), and Decker v. Board of Education of the City of Elizabeth, 153 N.J. Super. 470 (App. Div. 1977) aff'd 75 N.J. 612 (1978), cases dealing with violations of the Law Against Discrimination. The Association's counsel also points out that laches is not applicable here because the Board has not shown that they have been prejudiced at all by the delay.

Counsel for the Association argues vehemently that the Association, as the majority representative of all the teachers in the employ of the Board, has the requisite standing to pursue this matter and relies on Camp v. Board of Education of Glen Rock, 1977 S.L.D. 706, where the Association was granted separate standing in a joint suit with certified teachers of driver education. He also cites Wyckoff Education Association v. Board of Education of Wyckoff, 1980 S.L.D. ___ (decided March 1980), Schnedeker v. Hightstown Education Association v. Board of Education of East Windsor, 1978 S.L.D. ___ (decided June 6, 1978) and Hutchins et al. v. Board of Education of Lumberton, 1980 S.L.D. ___ (decided May , 1980), for the proposition that the Commissioner of Education has recognized the standing of education associations to pursue issues concerning the use of uncertified personnel. He urges this Judge to follow the liberal New Jersey policies in regard to the granting of standing. See Urban League of Essex County v. Township of Mahwah, 147 N.J. Super. 29 (App. Div. 1977), as well as Dome Realty v. Paterson 150 N.J. Super. 448 (App. Div. 1977), and Urban League of New Brunswick v. Mayor and Council of Carteret, 170 N.J. Super. 461 (App. Div. 1979).

The Association, in its Cross-Motion for Summary Judgment asserts that, as a matter of law, certified teachers must be used to teach the behind-the-wheel portion of driver education, see N.J.A.C. 6:11-7.18, that fees cannot be charged for behind-the-wheel instruction, see Willet v. Board of Education of Colts Neck, 1966 S.L.D. 202, aff'd State Board of Education, 1968, that behind-the-wheel instruction should not be provided for public school students only in the adult evening school, see N.J.A.C. 6:27-6.1, and that driver education is part of a thorough and efficient education as required in the Public School Education Act of 1975. The Board responds by arguing that there is no legal requirement that the behind-the-wheel portion of driver education must be offered, free of charge, as part of the regular school program by certified teachers, and relies on

letters from the Attorney General and the Department of Education, as well as Camp v. Board of Education of Glen Rock, 1977 S.L.D. 706.

Both counsel stipulated to the following facts, which the Court adopts as uncontroverted and true:

1. Driver Education, including both classroom instruction and behind-the-wheel instruction, was previously taught in respondent's schools as a part of its regular school program, available to all of its students of appropriate age without charge. The behind-the-wheel portion was deleted from the regular school program at the end of the 1975-76 school year. It was first offered in the evening adult school in 1977-78.

2. Respondent now offers only the classroom instruction portion of Driver Education as a part of its regular school program.

3. Respondent now offers the behind-the-wheel portion of Driver Education for pupils in its schools only in the evening adult school, operated by respondent, for which a fee is charged in the amount of $105.

4. Behind-the-wheel Driver Education is taught in the respondent's adult evening school to the respondent's pupils by persons who do not hold certificates issued by the State Board of Examiners. All instructors in the evening adult school are licensed by the Division of Motor Vehicles, State of New Jersey, to teach behind-the-wheel driver training to students.

The Court also finds the following to be fact:

5. The instant petition was filed on May 16, 1980, four years after the decision of the Bergenfield Board of Education to delete the behind-the-wheel portion of driver education from the regular school program.

The Court will first decide petitioner's Cross-Motion for Summary Judgment, wherein the Association asks for an Order directing the Board of Education to provide behind-the-wheel driver education in its regular public schools, free of charge, to its students, to be taught only by persons holding appropriate certificates issued by the State Board of Examiners. The law is clear that a motion for summary judgment may only be granted if there are no genuine issues as to material fact. Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). See also N.J.A.C. 1:1-13.4(a). The dispositive issue in this motion is whether or not the behind-the-wheel portion of driver education is a necessary component of a thorough and efficient education. The Association says yea; the Board says nay. There is clearly an issue here as to the material fact, and evidence would have to be heard on the components of a thorough and efficient education before this Court could arrive at a decision. Therefore, the Assocation's Motion for Summary Judgment and for an Order directing the Board to include behind-the-wheel driver education, free of charge, in the regular school day, is HEREBY DENIED.

In reviewing respondent's Motion to Dismiss, the Court must determine whether or not the instant petition was filed more than 90 days after the event giving rise to the claim, and therefore is in violation of N.J.A.C. 6:24-1.2. In order to decide that the Court must determine if there has been a continuing violation of the School Laws of this State, as well as of the New Jersey Constitution, Article 8, Section 4, Para. 1, because of the Board's actions in regard to behind-the-wheel driver education. Even if there has not been a continuing violation, the Court has to decide whether or not to relax the 90-day requirement by exercising the discretion given to the Commissioner of Education in N.J.A.C. 6:24-1.19. Before deciding whether or not a continuing violation of the School Laws has occurred, the Court carefully reviewed the cases cited by petitioner, which arose out of violations of the Law Against Discrimination. Both Decker v. Board of Education of the City of Elizabeth, 153 N.J. Super. 470 and Terry v. Mercer County Freeholders Board, 173 N.J. Super. 249 point out that payment of unequal wages, discriminatory refusal to promote and additional duties for female employees are continuing violations for the purpose of determining whether the female plaintiffs' claims were barred under the 180 statute of limitations set forth in the Law Against Discrimination, even if the violations occurred beyond the 180 days before the Complaint was filed. Both Decker and Terry were centered on individual petitioners whose rights were violated right up to the very date of the filing of the verified

complaint, and even beyond. Those cases are inapposite to the instant matter, where the specific action which gives rise to this petition took place in the Spring of 1976, was finally implemented in the 1976-77 school year, and where there had never been any allegation that the rights of any individual teacher were violated. Counsel's argument that petitioner is only complaining of the violation occurring at the present time does not hold water, because New Jersey courts have established that the accrual of a cause of action commences on the date on "which the right to institute and maintain a suit" first arose; that is to say the knowledge of injury or, pertinent to this specific circumstance, that time when the Association received notice that the Board was going to discontinue the behind-the-wheel portion of driver education in the daytime school. See Rosenau v. City of New Brunswick and Gammon Meter Co., 51 N.J. 130, 137 (1968); Burd v. New Jersey Telephone Company, 149 N.J. Super. 20, 30 (App. Div. 1977), aff'd 76 N.J. 284, (1978). Certainly the accrual of this cause of action could have arisen no later than the 1977-78 school year, when the Association knew that the behind-the-wheel portion of driver education was offered at the fee of $105 in the adult evening school. For the aforementioned reasons, this Court finds that the petition was filed more than 90 days after the accrual of the cause of action, the last possible day the Association received notice of the action of the Board of Education.

Both the Commissioner of Education and the courts have been taking a firm position in regard to petitioners' failures to comply with N.J.A.C. 6:24-1.2. The New Jersey Supreme Court has ruled that a teacher must file a petition within 90 days of his receipt of notice of a Board's decision which affects him, (such as withholding of an increment), and that a teacher who proceeds to advisory arbitration is not relieved from compliance with this 90-day filing requirement. Board of Education Bernards Township v. Bernards Township Education Association, 79 N.J. 311 (1979), at 326-327, N.4. In accord, Riely v. Hunterdon Central High Board of Education, 173 N.J. Super. 109 (App. Div. 1980), wherein Riely's petition of appeal was out of time because she had utilized arbitration machinery and waited more than a year from the date of the Board's action before filing her petition with the Commissioner. See also Miller v. Morris School District, 1980 S.L.D. (decided February 25, 1980), where the Commissioner held that the petition would be dismissed as untimely, because that petitioner failed to file her petition until nine months after being notified she would not be reemployed as a non-tenured teacher.

However, before dismissing the petition out of hand, the Court must consider whether the provisions of N.J.A.C. 6:24-1.19 should be applied, because strict adherence to the 90-day rule in this case might be inappropriate, unnecessary or might result in injustice. The Commissioner has determined in recent decisions, that the relaxation rule is to be applied sparingly. See Kallimanis v. Board of Education Carlstadt-East Rutherford Regional High School District, 1980 S.L.D. _____ (decided September 26, 1980). See also Stolte v. Board of Education of the Township of Willingboro, 1980 S.L.D. _____ (decided March 17, 1980). In accord Baley v. Board of Education of the Township of Mansfield, 1980 S.L.D. ___ (decided June 20, 1980). It is interesting to note that, in Baley, the Commissioner concluded that the reasons given by petitioner's counsel, which included, among others, the fact that he had been sick with mononucleosis, were of insufficient merit to justify a relaxation of the regulation, N.J.A.C. 6:24-1.19.

This Judge finds that the action of the Board in putting behind-the-wheel driver education in the adult school took place in the Spring of 1976, and was implemented in the 1976-77 school year. The Association was not suprised by the implementation as it understood what was happening, accepted the action and continued to work as usual until May 1980, when the instant petition was filed. The petition of the Association posits no excuse or explanation whatsoever as to why it did not file its claim for relief with the Commissioner of Education at the time the Board passed the resolution, or at the time the Board implemented its decision. There is no allegation of injury in fact to any individual member of the Association. Therefore, because no reasonable explanation has been given to this Court as to why petitioner did not file suit within the appropriate time, but waited nearly four years to attempt to redress the alleged wrong and to enforce the statutory and constitutional rights it alleges have been violated, this Court concludes that the discretion to relax the 90-day rule prescribed by N.J.A.C. 6:24-1.2 will not be exercised. The Court further **CONCLUDES** that the petition was filed out of time, far in excess of the 90 days after the event which triggered the Statute of Limitations. It will order that the Board's Motion to Dismiss the instant petition be granted on the grounds that the petition was filed out of time, and was not in compliance with N.J.A.C. 6:24-1.2

Notwithstanding its determination on the Motion, the Court finds it appropriate to comment briefly on the other issues raised in the Motion to Dismiss, in order to obviate possible further argument and determination.

Respondent also urged laches as a bar to the instant petition. That equitable theory rests on inexcusable delay and prejudice to the opposing party. See Allstate v. Howard Savings Institution, 127 N.J. Super. 479 (Ch. Div. 1974). The Board of Education has not shown that prejudice inured as a result of the passage of time. The Court has already commented on the lack of good reason for the delay in filing. Laches is not the appropriate avenue to travel in this matter.

Respondent also urged the Court to find that the Association lacks standing to pursue the instant matter. The New Jersey courts have taken a liberal view in regard to the questions of standing in law suits. See Crescent Park Tenants Association v. Realty Equity Corp. of New York, 58 N.J. 98 (1971), the seminal case, as well as Common Cause v. New Jersey Election Law Enforcement Commission, 74 N.J. 231 (1977), Urban League of New Brunswick v. Mayor and Council of Carteret, 170 N.J. Super. 461 (App. Div. 1979); Homebuilders League of South Jersey v. Township of Berlin, 81 N.J. 127, 179 and Urban League of Essex County v. Township of Mahwah, 147 N.J. Super. 28 (App. Div. 1977) certif. denied 74 N.J. 278 (1977). In each of the aforementioned cases, the plaintiffs were granted standing because the challenged action caused them "injury in fact, economic or otherwise" and because the party seeking relief alleged such a personal stake in the outcome of the controversy that concrete adverseness was assured. Crescent Park v. Realty Equity Corp., 58 N.J. at 103-104. In each of the cases cited, the Court found the public interest in determining exclusionary zoning regulations minimized the personal stake which had to be proven by the plaintiff, although it should be noted that each case had a plaintiff who alleged some specific harm, which had or might occur. In Urban League v. Mahwah, the Appellate Divison did not comment on the standing of the Association, but found only that the two of the named plaintiffs, who worked in Mahwah, had a sufficient stake and injury-in-fact which would allow the case to proceed to decision.

The instant matter does not fall within the rubric of the exclusionary zoning cases because there has been no showing whatsoever by the plaintiff Association that any of its members were injured by the action of the Board. Nor has there been a showing by petitioner that it is the appropriate vehicle to represent the public interest in a determination of the appropriate components of a thorough and efficient education. The case of Winston v. Board of Education of South Plainfield 125 N.J. Super. 131 (App. Div. 1973) aff'd 64 N.J. 582 (1974), wherein the Supreme Court permitted the teachers

association, as the exclusive representative of the public employees, to participate, is inapposite to the case at bar, because Winston dealt with a specific grievance filed on behalf of a particular party. In accord, Camp and Glen Rock Education Association v. Board of Education of the Borough of Glen Rock, 1977 S.L.D. at 709, where the Commissioner found that, "...the Association is the representative for non-supervisory teaching staff employees who may feel threatened by the Board's action of contracting with persons not covered by the usual teacher contracts, for certain instruction to be completed during nonschool hours, which instruction was previously performed during the regular school day. This fact alone is sufficient to embrace the Association as an interested party to the dispute." (Emphasis added.) Since no specific teacher has indicated he or she may feel threatened by the Board's action, and since the Commissioner emphasized that the determination in Camp applied only to those facts, this Court is unable to see where this Association has a sufficient stake in the outcome of the litigation to give it standing, despite a recognition of the aforementioned liberality in New Jersey. Such liberal treatment is also inapplicable to the instant matter because the petitioner seeks no relief for itself in the petition. See Kochman and Keansburg Teachers Association v. Board of Education of the Borough of Keansburg, 1976 S.L.D. 748, 750. This Court thus concludes that the Association does not possess the requisite adversity and personal stake in the outcome of the proceedings, and has not suffered an injury in fact, economic or otherwise, which would give it the appropriate standing and justiciable interest to bring this matter.

For all the aforementioned reasons, it is **HEREBY ORDERED** that the Board's Motion to Dismiss the instant petition is **HEREBY GRANTED**; and

it is further **ORDERED** that the instant Petition of Appeal is hereby **DISMISSED**.

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

OAL DKT. NO. EDU 3147-80

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

Oct. 29, 1980
DATE

SYBIL R. MOSES, ALJ

BERGENFIELD EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that exceptions were filed in a timely fashion by petitioner pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner has carefully examined the record herein, and the exceptions filed to the initial decision rendered by Sybil R. Moses, ALJ. The Commissioner notes that the Court considered whether the provisions of N.J.A.C. 6:24-1.19 should be strictly applied or if such application would be inappropriate, unnecessary or might result in injustice. The Court found, properly, that the Commissioner has determined in recent decisions that the relaxation rule is to be applied sparingly. (at p. 8) The Court erred, however, in not extending such relaxation to include the present matter.

The Commissioner deems it important that the stipulation of facts, agreed to by counsel and determined by the Court to be uncontroverted and true, be set down in its entirety:

> "1. Driver Education, including both classroom instruction and behind-the-wheel instruction, was previously taught in respondent's schools as a part of its regular school program, available to all of its students of appropriate age without charge. The behind-the-wheel portion was deleted from the regular school program at the end of the 1975-76 school year. It was first offered in the evening adult school in 1977-78.
>
> "2. Respondent now offers only the classroom instruction portion of Driver Education as a part of its regular school program.

"3. Respondent now offers the behind-the-wheel portion of Driver Education for pupils in its schools only in the evening adult school, operated by respondent, for which a fee is charged in the amount of $105.

"4. Behind-the-wheel Driver Education is taught in the respondent's adult evening school to the respondent's pupils by persons who do not hold certificates issued by the State Board of Examiners. All instructors in the evening adult school are licensed by the Division of Motor Vehicles, State of New Jersey, to teach behind-the-wheel driver training to students." (at p. 5)

The Commissioner finds the present record insufficient for certain determinations relevant to the present matter. The record does not show whether or not the behind-the-wheel portion of Driver Education offered to pupils in the evening adult school forms part of that pupil's permanent high school record. Alternatively, does the record of participation in behind-the-wheel training rest only within the records of the evening adult school? Is it required that a high school pupil desirous of behind-the-wheel training take, as a prerequisite, the classroom instruction portion of Driver Education offered within the regular school program? Alternatively, may a pupil take only behind-the-wheel training? What provision, if any, is made for pupils who cannot pay the $105 fee required for behind-the-wheel training?

The Commissioner cannot agree with the Court's determination that the Association has no standing in the present matter. Camp et al., supra Nor can the Commissioner agree that there was no justification to relax the 90 day requirement of N.J.A.C. 6:24-1.2. The Commissioner finds it important that the record in the present matter be amplified and embellished with facts necessary to answer the foregoing questions. Accordingly, on this _____ day of December 1980 this matter is remanded to the Office of Administrative Law for an expeditious resolution therein.

It is so directed.

COMMISSIONER OF EDUCATION

December 15, 1980
Pending State Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NO. EDU 2721-79
AGENCY DKT. NO. 224-6/79

IN THE MATTER OF:

PAUL FURLONG
v.
BOARD OF EDUCATION OF KEARNY AND ITS MEMBERS, HUDSON COUNTY

Record Closed: October 28, 1980 Decided: October 29, 1980

Received by Agency: 10/31/80 Mailed to Parties: 11/5/80

APPEARANCES:

J. Sheldon Cohen, Esq., for Petitioner
(Schneider, Cohen and Solomon, attorneys)

Frederick R. Dunne, Jr., Esq., for Respondent

BEFORE **JACK BERMAN**, ALJ:

On June 1, 1979, a Petition was filed with the Division of Controversies and Disputes claiming that the action by respondent, the Board of Education of Kearny, in not reemploying petitioner to a coaching position, was arbitrary, capricious or unreasonable and in violation of The Open Public Meetings Act.

Jurisdiction with the Commissioner of Education to hear and determine controversies is contained in N.J.S.A. 18A:6-9.

This matter was transferred to the Office of Administrative Law as a contested case on August 6, 1979.

On January 9, 1980, a prehearing conference was held wherein the following were determined to be the issues:

A. Whether the action of respondent in failing to renew petitioner as basketball coach was arbitrary, capricious or unreasonable.

B. Did respondent violate the Open Public Meetings Act, N.J.S.A.10:4-6, et seq.?

On May 12, 1980, June 12, 1980 and October 1, 1979, a hearing was held pursuant to N.J.S.A.52:14F-1, et seq.

At the hearing certain exhibits were received in evidence and appear in the appendix attached.

The court also heard the testimony of nine witnesses.

Petitioner is a tenured physical education and driver's education teacher. He had served for six years (1972-1977) as respondent's varsity basketball coach on a year to year basis. He was terminated by respondent as its basketball coach in 1978 and his services as such were not renewed.

The events leading to petitioner's termination as basketball coach evolved in 1977 when the Board considered terminating its football coach. Petitioner signed petitions supporting the retention of the football coach and also obtained help from members of his basketball team to conduct demonstrations on behalf of its football coach. It is this support that petitioner infers motivated certain members of respondent Board to terminate petitioner's coaching position. Petitioner also asserts that the Superintendent of Schools failed to resubmit his name to the Board to be rehired as basketball coach because of threats certain Board members made upon the Superintendent.

Petitioner was notified that his name would be discussed under personnel at the Board's meeting of May 15, 1978. Petitioner sent a letter to the Board requesting that any discussion concerning him be heard in public. This request was complied with.

During the first week of July, petitioner was interviewed by the school's Athletic Committee consisting of various Board members, the Superintendent, the Principal of Kearny High School, the Assistant Superintendent and the Athletic Director.

A week later petitioner was informed that he did not get the position and his application had been withdrawn. He was shocked and dismayed as he had been led to believe, through the Superintendent, that he would be favorably considered.

A week later petitioner received a letter from the Kearny Board of Education Athletic Committee inviting him to appear at a closed meeting. Petitioner wrote to them that he wanted any discussion pertaining to him to occur at an open public meeting. No communication in response thereto was received by petitioner.

Petitioner, although receiving no notice, decided to appear at the regular Board meeting held in June. At that meeting the Board's attorney counseled the Board members that the Board was under no obligation to set forth their reasons for not hiring a coach since it was a non-tenured position. Petitioner spoke to the Board members and stated his opinion that the Board's action was in retaliation to his support to reinstate the school's football coach. The Board voted to readvertise the coaching position.

On August 21, 1978 the Board, pursuant to proper notice, at its regular meeting, agreed to retain the services of someone other than petitioner, as its basketball coach.

Having reviewed the testimony and other evidence offered in this matter (see Appendix of Exhibits attached hereto), and having given fair weight thereto; and having observed the demeanor of the witnesses and assessed their credibility, this Court **FINDS** and **CONCLUDES:**

1. Petitioner is a tenured physical education and driver's education teacher.

2. Petitioner served for six years (1972-1977) as respondent's varsity basketball coach on a year to year basis.

3. Petitioner was terminated by respondent as its basketball coach in 1978.

4. Respondent did not renew petitioner as basketball coach.

5. Respondent's failure to renew petitioner as basketball coach was not arbitrary, capricious or unreasonable.

6. Respondent did not violate the Open Public Meetings Act, N.J.S.A.10:4-6 et seq.

   a) Petitioner was notified of the May 15, 1978 regular Board meeting.

   b) Petitioner sent a letter requesting that any discussion concerning him be heard in public at the May 15, 1978 meeting. This request was complied with as per N.J.S.A. 10:4-12(b)(8) and discussions were held in public.

   c) The subsequent meeting of the Athletic Committee was not a meeting of the full Board as defined by N.J.S.A. 10:4-8(b)(1).

   d) The June 18, 1978 regular Board meeting was properly advertised as per N.J.S.A. 10:4-6 et seq. Since only the position of basketball coach in general was discussed, and not petitioner specifically, petitioner need not have been given any individual notice.

   e) The August 21, 1978 meeting was properly advertised.

Tenure status does not accrue to extra-curricular assignments which in and of themselves do not require a certificate. Dallolio v. Board of Education of the City of Vineland, Cumberland County, 1965 S.L.D. 18. In Diggnan v. Board of Education of the Rumson Fair Haven Regional High School, Monmouth County, 1971 S.L.D. 336 at page 343, it was decided:

> Absent a requirement for a certificate other than that of a teacher, no tenure status accrues to such assignments, and they are renewed or discontinued at the discretion of the Board. In the judgment of the Commissioner, this issue of whether a tenure status accrues for such extra-curricular assignments is res judicata.

The reason for this is well articulated in Dallolio supra at p. 21:

> ...if tenure accrues to an assignment as football coach it must also attach to such other positions as senior class advisor, coach of the junior play, supervisor of safety patrols, sponsor of the chess club or other similar jobs. Such a circumstance would seriously interfere with sound school administration and would place obstacles in the way of the development of a good educational program.

Petitioner claims that respondent acted in an arbitrary, capricious or unreasonable manner in not renewing him as basketball coach. The basis of this allegation

appears to be (1) petitioner's active support in 1977 of having petitions signed to retain the school's football coach; and 2) that various members of the respondent Board threatened the Superintendent of Schools with some kind of adverse action if he formally recommended petitioner for the position of basketball coach.

Both of these contentions are not supported by the facts presented to me in this matter. In fact the Superintendent denied that he had been threatened by Board members.

The Board is under no legal obligation to renew petitioner as coach. When a Board of Education acts within its authority, its decision is "entitled to a presumption of correctiveness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Quinlan v. Board of Education of North Bergen, 73 N.J. Super 40 (App. Div. 1962). The petitioner has failed to affirmatively show that the Board's decision was arbitrary, capricious, or unreasonable.

Petitioner's reliance N.J.A.C.6:29-6.3(a),(b) as explained in Point Pleasant Beach Teacher's Association v. Board of Education, 1974 S.L.D. 241 is misplaced. In that case, the Board retained the services of a non-certified teacher from a sending district to serve as its baseball coach. The Commissioner held at page 245:

> The Administrative Code, N.J.A.C.6:29-6.3, clearly states that coaches employed from sending districts must be "certified" as teachers and employed by the sending district on a "full-time" basis. The intent of this rule is, in part, to avoid the evil of hiring professional athletes and other uniquely qualified persons as minimal part-time employees, as a guise for acquiring their coaching talents. A further intent of the rule is to insure that boys and girls will be coached by teachers who have been trained to develop the mind, body and character of their pupils.

Clearly, in the matter before me, no facts or allegations have been presented that a non-certified person from a sending district was hired as respondent's basketball coach.

It is therefore **CONCLUDED** that respondent did not act arbitrarily, capriciously or unreasonably in failing to renew petitioner as basketball coach and did not violate the Open Public Meetings Act.

It is hereby **ORDERED** that respondent's action of not renewing petitioner as basketball coach is hereby **AFFIRMED** and it is further **ORDERED** that the petition be and is hereby **DISMISSED.**

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

October 29, 1980
DATE

Jack Berman
JACK BERMAN, ALJ

PAUL FURLONG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed in a timely fashion by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

December 15, 1980

Pending State Board of Education

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0861-80
AGENCY DKT. NO.

IN THE MATTER OF:

WILLINGBORO ADMINISTRATORS ASSOCIATION,
Petitioner
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO AND THE WILLINGBORO EDUCATION ASSOCIATION, BURLINGTON COUNTY,
Respondent.

Record Closed: July 28, 1980
Received by Agency: 10/31/80

Decided: October 31, 1980
Mailed to Parties: 11/5/80

APPEARANCES:

For the Petitioner: **Robert M. Schwartz,** Esq.

For the Respondent Education Association: **John E. Collins,** Esq. (Selikoff & Cohen)

For the Respondent Board of Education: **John T. Barbour,** Esq. (Barbour & Costa)

BEFORE **ERIC G. ERRICKSON,** ALJ:

ISSUE AND PROCEDURAL HISTORY:

The Willingboro Administrators Association petitions the Commissioner of Education for a declaratory judgment on the question of whether an agreement entered

into by the Board and the Willingboro Education Association (WEA) requiring that evaluations of tenured teaching staff members be completed no later than January 15 is in compliance with N.J.A.C. 6:3-1.21.

The matter was referred as a contested case to the Office of Administrative Law, pursuant to N.J.S.A. 52:14F-1, et seq. Thereafter, an Oral Argument was conducted at Trenton on April 16, 1980 on a Motion to Dismiss brought by the Willingboro Education Association, alleging that petitioner lacked standing and that the Commissioner lacked jurisdiction. A Decision on Motion dated April 29, 1980, issued by the undersigned and incorporated herein by reference, denied the Motion to Dismiss. The Commissioner, in an opinion dated June 6, 1980, denied an appeal by WEA of that Decision on Motion. Thereafter, Briefs and Memoranda of Law were filed completing the record.

FACTUAL RECITATION

The relevent facts which are undisputed are as follows:

The Board and the Willingboro Education Association negotiated an agreement effective from July 1, 1977 through June 30, 1980, one provision of which, in Article XVIII - Evaluation, provided that:

> "Evaluation reports will be presented to the teacher by the principal periodically in accordance with the following procedure:
>
> (1) Such reports will be issued in the name of the building principal based upon a compilation of reports, of observations, and of discussions with any or all supervisory personnel who come into contact with the teacher in their supervisory capacity.
>
> (2) Such reports will be addressed to the teacher, with carbon copies being forwarded to the Superintendent of Schools and kept by the building principal.
>
> (3) Such reports will be written in narrative form and will include:
>
> a. Strengths of the teacher as evidenced during the period since the previous report.
>
> b. Weaknesses of the teacher as evidenced during the period since the previous report.
>
> c. Specific suggestions as to measures which the teacher might take to improve his performance, particularly in

each of the areas wherein weaknesses have been indicated.

(4) Such supervisory evaluations are to be provided for non-tenure teachers three (3) times each year; the first not later than November 15th, the second not later than February 1st, and the third not later than April 1st.

With respect to tenure teachers, such supervisory evaluation shall be provided once each year no later than January 15, except that a tenure teacher shall be so evaluated a second time if he files a written request for the same with his building principal on or before February 1. The second evaluation, if requested, shall be completed on or before April 15." (emphasis supplied)

Subsequent to the adoption of this provision in the negotiated agreement, the State Board of Education promulgated the following rule to become effective September 1, 1979:

"6:3-1.21 Evaluation of tenured teaching staff members

(a) Every local board of education shall adopt policies and procedures requiring the annual evaluation of all tenured teaching staff members by appropriately certified personnel (N.J.S.A. 18A:1-1; N.J.A.C. 6:11-3.4).

(b) The purpose of the annual evaluation shall be to:

1. Promote professional excellence and improve the skills of teaching staff members;

2. Improve student learning and growth;

3. Provide a basis for the review of performance of tenured teaching staff members.

(c) The policies and procedures shall be developed under the direction of the district's chief school administrator in consultation with tenured teaching staff members and shall include but not be limited to:

1. Roles and responsibilities for implementation of the policies and procedures;

2. Development of job descriptions and evaluation criteria based upon local goals, program objectives and instructional priorities;

3. Methods of data collection and reporting appropriate to the job description including, but not limited to, observation of classroom instruction;

4. Observation conference(s) between the supervisor and the teaching staff member;

5. Provision for the use of additional appropriately certified personnel where it is deemed appropriate;

6. Preparation of individual professional improvement plans;

7. Preparation of an annual written performance report by the supervisor and an annual summary conference between the supervisor and the teaching staff member.

(d) These policies shall be distributed to reach tenured teaching staff member no later than October 1. Amendments to the policy shall be distributed within 10 working days after adoption.

(e) The annual summary conference between supervisors and teaching staff members shall be held before the written performance report is filed. The conference shall include but not be limited to:

1. Review of the performance of the teaching staff member based upon the job description;

2. Review of the teaching staff member's progress toward the objectives of the individual professional improvement plan developed at the previous annual conference;

3. Review of available indicators of pupil progress and growth toward the program objectives;

4. Review of the annual written performance report and the signing of said report within five working days of the review.

(f) The annual written performance report shall be prepared by a certified supervisor who has participated in the evaluation of the teaching staff member and shall include but not be limited to:

1. Performance areas of strength;

2. Performance areas needing improvement based upon the job description;

3. An individual professional improvement plan developed by the supervisor and the teaching staff member;

4. A summary of available indicators of pupil progress and growth, and a statement of how these indicators relate to the effectiveness of the overall program and the performance of the individual teaching staff member;

5. Provision for performance data which have not been included in the report prepared by the supervisor to be entered into record by the evaluatee within 10 working days after the signing of the report.

(g) Local board of education policies for the evaluation of tenured teaching staff members, based upon but not limited to the above provisions, shall be developed during the 1978-79 school year and shall become operational September 1, 1979. These provisions are the minimum requirements for the evaluation of tenured teaching staff members.

(h) For the purposes of this section:

1. Appropriately certified personnel means personnel qualified to perform duties of supervision which includes the superintendent, assistant super-intendent, principals, vice-principals, and supervisors of instruction who hold the appropriate certificate and who are designated by the board to supervise instruction.

2. Indicators of pupil progress and growth means the results of formal and informal assessment of pupils as defined in N.J.A.C. 6:8-3.4.

3. Individual professional improvement plan is a written statement of actions developed by the supervisor and the teaching staff member to correct deficiencies or to continue professional growth, timelines for their implementation, and the responsibilities of the individual teaching staff member and the district for implementing the plan;

4. Job description means a written specification of the function of the position, duties and responsibilities, the extent and limits of authority, and work relationships within and outside the school and district;

5. Observation conference means a discussion between supervisor and teaching staff member to review a written report of the performance data collected in a formal observation and its implications for the teaching staff member's annual evaluation;

6. Observation means a visitation to an assigned work station by a certified supervisor for the purpose of formally collecting data on the performance of a teaching staff member's assigned duties and responsibilites and of a duration appropriate to same;

7. Performance report means a written appraisal of the teaching staff member's performance prepared by an appropriately certified supervisor;

8. Supervisor means any appropriately certified individual assigned with the responsibility for the direction and guidance of the work of teaching staff members;

9. Teaching staff member means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him/her to hold a valid and effective standard, provisional or emergency certificate, appropriate to his/her office, position or employment, issued by the state board of examiners and includes a school nurse; excluding the district superintendent of schools or, if there is no superintendent, excluding the principal."

CONTENTIONS OF THE PARTIES:

Petitioner contends that the State Board requirement in N.J.A.C. 6:3-1.21 of an annual evaluation of each tenured teacher necessitates that supervisors be afforded a longer period of time than that between the opening of school in September and January 15. In this regard, petitioner cites the rule's requirement that the annual evaluation take into consideration job descriptions, data collection, classroom observations, cumulative pupil records, pupil performance, testing results and health data. Petitioner contends that the summary conference called for by the rule would pertain to only a few months of work by the teacher and would, for this reason, be less effective in promoting a thorough and efficient education than it would if the summary period were from September through April. Similarly, petitioner asserts that the professional improvement plan to be considered in the annual evaluation report, to be meaningful, should be based on a longer performance period that the four and one half months between September and January 15. In support of its contention that the annual evaluation was intended to be based on a school year's performance, petitioner cites the newly enacted N.J.A.C. 6:3-1.22(g) which requires that annual written performance reports for school administrators be completed by April 30.

The Respondent Board states that it believed the adoption of N.J.A.C. 6:3-1.21 would overrule and nullify the controverted January 15 deadline. It asserts that it is willing to abide by that deadline or any other reasonable deadline deemed appropriate by the Commissioner, consistent with an effective system of education. Robinson v. Cahill, 62 N.J. 473 (1973)

Respondent WEA, contending that the controverted January 15 evaluation is only one part of the total evaluation process required by N.J.A.C. 6:3-1.21, asserts that the annual summary conference, IPIP, and written performance report may properly be completed at a later date. WEA contends further that the only requirement of the policy which was negotiated prior to the effective date of N.J.A.C. 6:3-1.21 was and is to guarantee that a teacher will receive an evaluation by January 15.

DISCUSSION AND DETERMINATION:

The contested provision of the agreement negotiated effective July 1, 1977, is primarily a procedural matter which was not invalidated by the State Board's rule effective September 1979, requiring an annual evaluation of tenured teachers. There are cogent reasons why both tenured teachers and the Board may desire that at least one evaluation be completed by January 15. In the event a teacher is deemed by an evaluation to fall short of expectation, there remains time to correct such deficiencies prior to the time recommendations for salary adjustments must be made. There remains after January 15 over half of the academic year which the teacher, having been advised of the shortcomings, may improve, thus enhancing the thoroughness and efficiency of classroom performance and pupil progrsss in keeping with the goals of N.J.S.A. 18A:7A-1, et seq. Coincidentally, the teacher's own performance rating may similarly improve.

It is the responsibility of the Board to make a determination whether the January 15 evaluation deadline will in all aspects be in compliance with N.J.A.C. 6:3-1.21. If such is its determination, the period of time to be considered should be from the past January 15 to the same date one year later; thus complying with the announced intent of the State Board's rule that an annual evaluation be provided. It is apparent that no time schedule for evaluation could conveniently be filled into a neat package of one academic year unless it were to be established concurrent to the closing of school in June. Such a date, for practical reasons, may be patently unworkable. The collection of data on pupil progress and other aspects of teacher performance is no more important within one year than another for the evaluation of tenured teachers who, with satisfactory service, are employed without interruption. Accordingly, data from portions of two academic years may properly be considered in an annual evaluation during January. That such was considered an appropriate procedure by the Legislature is reflected in N.J.S.A. 18A:27-3.1 wherein it was stated that mandated evaluations of tenured teachers "***may cover that period between April 30 of one year and April 30 of the succeeding year***."

The State Board has not mandated a date by which the requirements of N.J.A.C. 6:3-1.21 must be completed. While the Board, in the instant matter, is not obligated to establish January 15 as the date by which all aspects of the rule must be completed, there appears no impediment to its doing so.

The obvious intent of the State Board, in the absence of a mandated date of completion of all requirements of the rule, was to leave to local boards the discretion to set the date or dates by which all aspects of the evaluation and professional improvement plans should be completed.

Absent convincing proof that the specific date of January 15 is either inappropriate or more appropriate than any other date, **I CONCLUDE** that the Commissioner should not interpose his discretion by ruling that this Board or any other board should or must establish a deadline in any given month for the completion of those requirements found in N.J.A.C. 6:3-1.21. The only requirement thereof regarding deadlines is that the evaluations must be completed annually and should treat the performance of a teacher for a period approximating the time worked during a twelve month period. Appropriate to this conclusion are the following statements:

> "***it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.***" Boult and Harris v. Board of Education of Passaic, 1939-49 S.L.D. 7,13, affirmed State Board of Education, 15, affirmed 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E. & A. 1947)

In consideration of the above stated conclusion, **IT IS ORDERED** that the Petition brought by Willingboro Administrator's Association seeking a declaratory judgment to the effect that a deadline of January 15 is an inappropriate deadline date for an annual evaluation of tenured teachers is **DENIED**. **IT IS FURTHER ORDERED** that the Board, exercising its managerial prerogative, establish and make known to its employees, forthwith, the deadline or deadlines by which its administrators and supervisors are to complete those numerous requirements set forth in N.J.A.C. 6:3-1.21.

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

I HEREBY FILE my Initial Decision with **FRED G. BURKE** for consideration.

October 31, 1980
DATE

Eric G. Errickson
ERIC G. ERRICKSON,A.L.J.

WILLINGBORO ADMINISTRATORS ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO AND THE WILLINGBORO EDUCATION ASSOCIATION, BURLINGTON COUNTY,	:	DECISION
RESPONDENTS.	:	

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

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the determination by Eric G. Errickson, ALJ, that the Board may with propriety decide that the annual evaluation for tenured teachers include data from portions of two academic years. Petitioner maintains that the intent of the administrative code for the evaluation of tenured teaching staff members (N.J.A.C. 6:3-1.21) was predicated on the need for continuity of a built-in factor based on the performance of the same teacher during one school year. The Board seeks affirmation of its present policies and reiterates its stance that the setting of deadlines for the evaluation of tenured employees is a managerial procedure. The Commissioner argues that the establishment of such deadlines fall within the aegis of the Board but as such is not without limitations.

Petitioner's contention that it was the intent of the writers of the code to predicate the application of N.J.A.C. 6:3-1.21 on the academic year rather than on parts of two different school years has merit. Petitioner stresses that otherwise the evaluation, the teacher's job description, the class for which the teacher is responsible, even the school itself could change, all of which would affect the continuity of the evaluative process.

The Commissioner concurs with petitioner's argument.

The Commissioner observes that by statute the following definitions are established by N.J.S.A. 18A:29-6, seriatim:

> "As used in this subarticle the following words shall have the following meaning:
>
> 'Member' shall mean a full-time teaching staff member as defined in this title except one who is the holder of an emergency certificate;
>
> 'Salary schedule' shall mean a schedule of minimum salaries fixed according to years of employment;
>
> 'Full time' shall mean the number of days of employment in each week and the period of time in each day required by the state board of education, under rules and regulations prescribed for the purposes of this article, to qualify any person as a full-time member;
>
> 'Year of employment' shall mean employment by a member for one academic year in any publicly owned and operated college, school or other institution of learning for one academic year in this or any other state or territory of the United States;
>
> 'Academic year' shall mean the period between the opening day of school in the district after the general summer vacation, or 10 days thereafter, and the next succeeding summer vacation;
>
> 'Employment increment' shall mean an annual increase of $250.00 granted to a member for one year of employment;
>
> 'Adjustment increment' shall mean, in addition to an 'employment increment' an increase of $150.00 granted annually as long as shall be necessary to bring a member, lawfully below his place on the salary schedule according to years of employment, to his place on the salary schedule according to years of employment; provided, that a fraction of an 'adjustment increment' may be granted when such amount is sufficient to bring such member to his place on the schedule according to years of employment***."

Salary schedules in this state are established for an academic year. N.J.S.A. 18A:29-7 The withholding of increments in any year is determined by N.J.S.A. 18A:29-14 herewith set down in pertinent part:

"Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education.***"

The Commissioner refers to Guidelines for the Evaluation of Tenured Teaching Staff Members, January 1979, New Jersey State Department of Education which shows clearly the intent of the Department as follows:

"IV. Recommended Schedule for Implementation
1979-80

Fall

1. Distribution of policies and procedures to all tenured teaching staff members by October 1, 1979.

Fall/Winter

2. Observations, authorized data collection, and observation conferences as required.

Spring

3. Drafting of the annual performance reports.

4. Collection of available indicators of pupil progress as required.

5. Scheduling of annual summary conferences.

6. Filing of performance reports including the summary of pupil progress data and the professional improvement plan."
(at 15-16)

In the Commissioner's opinion it is clear that the evaluations of tenured teaching staff members are intended to be for one discrete academic year. He so rules.

Accordingly, the conclusion of the Court herein is set aside. The determination of other equitable deadlines is left to the Board.

COMMISSIONER OF EDUCATION

December 15, 1980

EMMET F. MC WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

For the Petitioner, Carl J. Kerbowski, Esq.

For the Respondent, Daniel C. Soriano, Esq.

Petitioner charges that the Bridgewater-Raritan Board of Education, hereinafter "Board," failed to evaluate his performance as Superintendent of Schools as required by education law and violated his alleged tenure rights to continue to be employed as Superintendent by the Board. The Board, conversely, asserts that petitioner was not tenured as its Superintendent and that its termination of his services in that position was none other than a proper exercise of its discretionary authority.

A hearing to establish the relevant facts in dispute was conducted on December 18, 1978 at the office of the Somerset County Superintendent of Schools, Somerville, by a hearing examiner appointed by the Commissioner of Education. Post-hearing Briefs were filed by both parties. The hearing examiner report follows setting forth first those undisputed facts which reveal the contextual setting of the dispute:

Petitioner was employed by the Board as a tenured Assistant Superintendent when on February 17, 1976 the Board accepted the resignation of its then superintendent. (R-2-3) Thereafter, on March 23, the date of March 31, 1976 was established as the effective date of his resignation. (R-7) On February 19, 1976 the Board appointed petitioner to become Superintendent "***effective April 1, 1976***." (R-4) The contract signed by the Board and petitioner provided, inter alia, that petitioner would be employed "***as Superintendent of Schools of the District for the term beginning April 1, 1976 and ending March 30, 1978***." (J-1) It also specified that the Board had the right "***to dismiss the Superintendent for inefficiency, incapacity, unbecoming conduct, or other just causes.***" It further provided that either party to the contract determining not to renew the contract should give notice to the other party on or before January 1, 1978.

The Board in closed session evaluated petitioner on July 21, 1977. (Tr. 16) The Board presented a written copy of that evaluation to him on November 29, 1977. Therein, the Board commended him for his preparation of the budget and his adherence to established district and State laws and policies. In that document the Board asserted that petitioner should display more initiative, leadership and creativity in the evaluative processes, in communication with the public, in developing new policies, in informing the Board of his recommendations and in delegation of routine duties to subordinates. (J-2-3)

On December 20, 1977 the Board determined not to reemploy petitioner as Superintendent. On December 27 he was notified that his services as Superintendent would terminate on February 10, 1978 but that he would receive his salary and all other emoluments pertaining to the aforementioned contract until March 30, 1978 after which date his employment would revert to that of Assistant Superintendent. (J-5, 7)

Petitioner requested reasons for the Board's action. (J-6, 8) Reasons were given in writing on January 19, 1978 by the Board president who stated that Board members individually or collectively had criticized him, inter alia, for his performance in the areas of leadership and creativity in planning, implementation of Board directives and decisions, evaluation of staff, and keeping the Board properly informed. (J-9) Thereafter, petitioner requested and on February 28, 1978 was afforded an informal appearance before the Board. The Board on March 2, 1978 notified him that its prior decision was affirmed. (J-10-12)

Petitioner ceased performing duties as Superintendent after February 10 and did not work thereafter for the Board until April 1, 1978 when he returned to his duties as Assistant Superintendent. (J-13) On February 16, 1978 the Board appointed an Acting Superintendent to serve from that date through June 30, 1978. (R-10)

Petitioner testified that during the six week period prior to April 1, 1976 the then superintendent was seldom in the district and that he performed the duties of superintendent in his absence. (Tr. 14, 23)

Petitioner testified that on December 13, 1976 the Board, during a two and one-half hour closed session, verbally reviewed his performance as Superintendent. (Tr. 28) He testified that on July 21, 1977 the Board again met with him in closed session for three hours to discuss his performance as Superintendent. He testified that he had thereafter been shown a draft copy of the evaluation of July 21, 1977 and that a final draft thereof was provided to him on November 29, 1977. He testified that after the Board, in his absence, had met in closed session on October 11 and discussed his performance as Superintendent, he was visited and advised orally by the Board's

officers of the content of that discussion. (Tr. 30-32, R-1) Petitioner also testified that on a number of occasions individual Board members had related to him their personal assessment of his performance. (Tr. 33, 48)

A Board member testified that during October 1977 questions had been raised at a Board meeting about the advisability of renewing petitioner's contract. (Tr. 45)

The Board Secretary-Business Administrator testified that during the period from February 17 through March 31, 1976 the then superintendent, although frequently absent from the district, was on a number of occasions physically present and performing his duties as superintendent. He testified also that official communications were issued by the then superintendent during that period. (R-5-6; Tr. 61-62)

The hearing examiner, having carefully examined the Stipulation of Facts (J-13), the pleadings, Briefs of counsel, and the testimony of witnesses at the hearing sets forth, in addition to those uncontroverted facts previously reported, the following findings of fact and recommendations:

1. During the period from February 17, 1976 through March 31, 1976 petitioner, under authority of his job description as Assistant Superintendent, performed certain duties of the then superintendent when the latter was absent. He did not, however, perform all of the duties. Nor did the Board terminate the employment of the then superintendent nor appoint petitioner to that post prior to April 1, 1976. The then superintendent, during that period, did perform certain official duties. (Tr. 24; R-5-6)

2. Although he was paid in accord with the terms of his contract as Superintendent from February 10, 1978 through March 31, 1978, petitioner, at the Board's direction, performed no duties as Superintendent during that period.

3. Petitioner was frequently observed by the Board at its meetings in the performance of his duties as Superintendent. He was present and orally evaluated by the Board on December 13, 1976 and July 21, 1977. Both an interim draft and a final draft of the July 21, 1977 evaluation were provided to petitioner. In addition, when the Board met on October 11, 1977 to evaluate petitioner, its officers thereafter conveyed to him orally the expressed perceptions of Board members concerning his performance.

4. The Board complied with petitioner's December 23, 1977 request for reasons for his nonreemployment as Superintendent by furnishing reasons on January 19, 1978. Those reasons were not frivolous and are of sufficient specificity to be in accord with those found appropriate by the Commissioner in Donald

Banchik v. Board of Education of the City of New Brunswick, 1976 S.L.D. 78. Petitioner has not entered into the record evidence on which to base a finding that those reasons were not factually based or that the Board acted in bad faith in giving them.

5. The Board scheduled an informal appearance for petitioner within 30 days of his written request for reasons. This, however, was forty days from his receipt of the requested reasons. N.J.A.C. 6:3-1.20(b) provides that such appearance should be afforded within thirty days of the receipt of reasons.

Recommendation No. 1: In consideration of Findings Nos. 1 and 2, it is recommended that the Commissioner determine that petitioner's service as Superintendent which accrued toward tenure entitlement was from April 1, 1976 through February 10, 1978, a period of less than the two years necessary for him as a tenured employee in the district to acquire tenure as Superintendent pursuant to N.J.S.A. 18A:28-6.

Recommendation No. 2: The hearing examiner recommends that the Commissioner determine that the Board's three evaluations and the conferences and written reports furnished petitioner during the period from April 1, 1976 through December 1977 constitute sufficient compliance with N.J.S.A. 18A:27-3.1 to obviate the imposition of any penalty against the Board.

Recommendation No. 3: It is recommended that the Commissioner determine that the reasons provided by the Board for not reemploying petitioner as Superintendent, ante, were proper and in compliance with the directive of the Court in Mary Donaldson v. Board of Education of the City of North Wildwood, 65 N.J. 236 (1974). Banchik, supra

Recommendation No. 4: It is recommended that, in consideration of Finding No. 5, the Commissioner determine that petitioner was provided an informal appearance in accordance with the State Board of Education's intent as expressed in N.J.A.C. 6:3-1.20.

The hearing examiner also recommends that the Commissioner determine that the ten day delay in providing that informal appearance, in view of petitioner's agreement to that date is not sufficiently violative of N.J.A.C. 6:3-1.20 to warrant either financial penalty or reinstatement of petitioner to the post of Superintendent.

Recommendation No. 5: The hearing examiner recommends that the Commissioner determine that petitioner's contention that he should have been notified in advance that the Board would discuss his performance at its meetings on October 11, December 20, 1977 and a subsequent meeting in June 1978 should have been filed within the 45 day time limit before a court of competent jurisdiction pursuant to the mode of relief specified by N.J.S.A. 10:4-15.

Recommendation No. 6: In conclusion the hearing examiner recommends that the Commissioner determine that petitioner is not entitled to the relief which he seeks for the reason that the Board's decision not to reemploy petitioner as Superintendent but to return him to his tenured position as Assistant Superintendent was a legal act within its discretionary authority under education law. N.J.S.A. 18A:11-1

This concludes the hearing examiner's report.

* * * *

The Commissioner has reviewed the report of the hearing examiner as well as the entire record in the instant matter. The Commissioner notes that petitioner has filed exceptions to the hearing examiner's report in a timely manner.

Petitioner excepts to the hearing examiner's finding that the Board sufficiently complied with 18A:27-3.1 to obviate the imposition of any penalty against the Board. Petitioner contends that only one written evaluation was provided by the Board between February 17, 1976 and March 30, 1978 and furthermore alleges that the Commissioner's decisions in Gorny v. Board of Education of the City of Northfield et al., 1975 S.L.D. 669, Procopio v. Board of Education of the City of Wildwood, 1975 S.L.D. 805, aff'd State Board 1975 S.L.D. 1161 and Bendon v. Board of Education of the Borough of Keansburg, 1978 S.L.D. 720 control the instant matter. The Commissioner does not agree. Gorny and Procopio, while admonishing boards of education to comply with the then newly adopted requirements of 18A:27-3.1 and emphazing the critical nature of effective and continuing supervision and evaluation of teaching staff members, stopped short of any determination that petitioners be restored to their positions. Bendon, while restoring petitioner to her position, did so for reasons which were unique to the particular circumstances of that case; namely, failing to provide any formal written evaluation; providing petitioner with reasons which indicated "***her non-reemployment was due to factors unrelated to professional or classroom performance" (at 721); and providing reasons at her informal hearing based upon unsatisfactory performance allegedly discussed at informal evaluation conferences.

The Commissioner finds the circumstances in the instant matter to be significantly different. Although it is unrefuted that the Board did not meet the prescribed procedures of N.J.S.A. 18A:27-3.1 and N.J.A.C. 6:3-1.19, it is likewise unrefuted that petitioner was evaluated on July 21, 1977 and that a draft copy of a formal evaluation was presented to him and discussed on October 18, 1977 and a final copy was provided on November 29, 1977. While the Commissioner decries the Board's failure to fully comply with statute and regulations, petitioner herein cannot argue, as could petitioner in Bendon, supra, that he did not receive any formal notice of the Board's dissatisfaction with his performance. The Commissioner is further constrained to point out that petitioner, as Superintendent, unlike petitioner in Bendon, supra, was continually being observed by the Board in the performance of his duties and that he was afforded, as indicated by the record, several additional opportunities to be orally evaluated and to respond to the deficiencies indicated to him.

Petitioner further takes exception to the hearing examiner's conclusion that the reasons given him were proper and in compliance with the law. Petitioner argues that the law requires the reasons to be specific and based upon required and correct evaluations, relying upon Hazlet Township Teachers Association v. Hazlet Township Board of Education, Docket No. A-1583-76 N.J. Superior Court, Appellate Division, February 6, 1978. The Commissioner does not agree with petitioner's claim to the applicability herein. The Appellate Division in that case found the reasons presented in a form letter to sixteen teachers not renewed because of a reduction in force to lack specificity as to what "***strengths, skills, experiences and backgrounds would be able to make the greatest contribution to said educational program.***" (Slip opinion at p. 3) The Commissioner cannot agree that the reasons given to petitioner in the instant matter lack specificity as those cited in Hazlet.

Petitioner also takes exception to the hearing examiner's recommendation #5 wherein the hearing examiner contends that petitioner should have filed his claim of violation of N.J.S.A. 10:4-15 within the 45 day limit provided by said statute. Petitioner cites In the Matter of the Tenure Hearing of Robert Kiamie, School District of North Haledon, Passaic County, decided September 7, 1979, in support of such contention. The Commissioner does not agree with petitioner's contention. N.J.S.A. 10:4-15 states inter alia;

> "a. Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public***." (Emphasis supplied)

Petitioner having failed to seek such relief prior to the proceedings in the instant matter is statutorily prohibited from seeking such relief at this time.

Petitioner takes further exception to recommendation #4, in which the hearing examiner found that petitioner was granted a timely informal appearance, in that the date for such hearing was mutually agreed upon despite the fact that it was held some ten days after the time period required by N.J.A.C. 6:3-1.20. Petitioner argues that such action was ultra vires since a board may not violate the law for any reason. The Commissioner finds such reasoning to be without merit. Even assuming arguendo that petitioner's allegation of illegality were correct, the Commissioner finds no authority in law to grant petitioner's request for reinstatement. Margaret Pelose v. Board of Education of the Township of South Brunswick, 1977 S.L.D. 232

Petitioner takes final exception with the hearing examiner's ultimate recommendation, namely that petitioner is not entitled to the relief sought herein and that the Board's actions were within its legal authority. Petitioner contends herein that he enjoyed a tenure status as a result of his having served in excess of two years as Superintendent, having assumed such post after having served as a tenured assistant superintendent. Petitioner further contends that his services as Superintendent commenced on February 17, 1976 and continued until March 30, 1978 thus acquiring tenure by virtue of having served in excess of two years in said position (N.J.S.A. 18A:28-6). The Commissioner does not agree. The record clearly establishes that petitioner, by contract, did not commence his services as Superintendent until April 1, 1976. The record likewise establishes that the resignation of the previous superintendent did not become effective until March 31, 1976 (Tr. 24) and that said superintendent continued, by petitioner's own admission, to intermittently officially conduct his duties as superintendent.

The Commissioner must therefore conclude that petitioner, in the absence of affirmative evidence to the contrary or a Board resolution officially appointing him as acting superintendent, continued to serve in his capacity as assistant superintendent until such time as he formally became Superintendent on April 1, 1976. See Robert F. X. Van Wagner v. Board of Education of the Borough of Roselle, 1973 S.L.D. 488 and R. Thomas Jannarone, Jr. v. Board of Education of the City of Asbury Park, 1976 S.L.D. 526.

Accordingly, and for the reasons stated herein, the Commissioner affirms and adopts the determinations and recommendations of the hearing examiner and makes them his own.

COMMISSIONER OF EDUCATION

December 24, 1980

Pending State Board of Education

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3750-80

AGENCY DKT. NO. 277-6/80A

IN THE MATTER OF:

PARSIPPANY-TROY HILLS EDUCATION ASSOCIATION

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY

Record Closed: October 27, 1980

Received by Agency: 11/12/80

Decided:

Mailed to Parties: 11/14/80

APPEARANCES:

Cassel R. Ruhlman Jr., Esq., for Petitioner
(Ruhlman and Butrym, attorneys)

Myles C. Morrison III, Esq., for Respondent
(Dillon, Bitar & Luther, attorneys)

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

The Petition of Appeal was filed with the Commissioner of Education on June 4, 1980, wherein petitioner alleges that the Board acted improperly in bifurcating its driver education program by deleting behind-the-wheel instruction from its regular daily program and offering same to pupils in the adult program.

The respondent Board filed its answer with the Commissioner on June 23, 1980 wherein it denies any improprieties.

The matter was transmitted to the Office of Administrative Law on June 13, 1980 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on August 7, 1980 at which the parties agreed to submit the matter for summary decision. A jointly executed stipulation of facts was forwarded by the parties on September 8, 1980 and timely briefs were filed by each. The record in this matter was closed on October 27, 1980 with the expiration of the time scheduled for rebuttal, which was not filed, and the matter is now ripe for decision.

The relevant facts stipulated by the parties are as follows:

1. Driver education including both classroom instruction and behind-the-wheel instruction was previously taught in respondent's schools as a part of its regular school program, available to all of its students of appropriate age without charge.

2. Respondent now offers only the classroom instruction portion of driver education as a part of its regular school program.

3. Respondent now offers the behind-the-wheel portion of driver's education only in the evening adult school operated by the respondent. This behind-the-wheel training is available to pupils and other residents of Parsippany-Troy Hills Township. During the 1979-1980 school year, a fee in the amount of $105 was charged for behind-the-wheel training.

The issues to be addressed by agreement at the prehearing conference are as follows:

1. Does the Board's failure to provide behind-the-wheel instruction in driver education in the regular school curriculum constitute a denial of a thorough and efficient education?

2. Is the driver education program an integral part of the Board's curriculum?

3. May the Board's driver education program be bifurcated, with behind-the-wheel training offered in the evening adult school, for which pupils are assessed a fee?

DOES THE BOARD'S FAILURE TO PROVIDE BEHIND-THE-WHEEL INSTRUCTION IN DRIVER EDUCATION IN THE REGULAR SCHOOL CURRICULUM CONSTITUTE A DENIAL OF A THOROUGH AND EFFICIENT EDUCATION?

The petitioner cites N.J.S.A. 18A:7A-1 et seq., N.J.A.C. 6:8-2.1, N.J.A.C. 6:27-6.1 and N.J.A.C. 6:11-7.18 in support of its contention that the determination of this issue must be an affirmation, and quotes in pertinent part N.J.S.A. 18A:7A-2a(4):

> Because the sufficiency of education is a growing and evolving concept, the definition of a thorough and efficient system of education and the delineation of all the factors necessary to be included therein, depend upon the economic, historical, social and cultural context in which that education is delivered ... . (at Pb3).

At Pb3,4, petitioner cites what he perceives to be the relevant sections of "State Educational Goals" incorporated in N.J.A.C. 6:8-2.1 as follows:

> (a) The State educational goals shall be the following outcome and process goals and shall be applicable to all public school districts and schools in the State.
>
> (b) The public schools in New Jersey shall help every pupil in the State:
>
> 4. To acquire the knowledge, skills and understanding that permit him or her to play a satisfying and responsible role as both producer and consumer;
>
> 5. To acquire job entry level skills and, also to acquire knowledge necessary for further education;

> 6. To acquire the understanding of and the ability to form responsible relations with a wide range of other people, including but not limited to those with social and cultural characteristics different from his or her own; ... .

The petitioner contends that after a review of the above it must therefore be concluded that driver education is an essential part of a thorough and efficient education.

Petitioner also cites N.J.A.C. 6:27-6.1 and N.J.A.C. 6:11-7.18 as additional support of the aforementioned contention and opines that these regulations must be construed in pari materia with the previously cited statute and regulation. These regulations refer to approval of a course in driver education during the summer months and standards pertaining to college programs preparing driver education teachers, respectively. Failing to find relevance in these regulations to this issue before me, I do not find it compelling to reproduce them.

The respondent counters petitioner's contention with extensive argument and citations in its brief, which is incorporated herein by reference.

The Commissioner has addressed this issue previously in Ann Camp, et als. v. Board of Education of the Borough of Glen Rock, Bergen County, 77 S.L.D. 706, wherein he stated:

> Boards of education, while not compelled by law to offer behind the wheel driver training, have been encouraged by the State Department of Education, the law enforcement agencies and by local citizens to do so in the interests of practicality and individual and public safety. The Board in this instance has elected to relegate its behind the wheel driver training to hours other than the regular school day. This it may legally do assuming proper supervision and the use of certified teachers. (at 710, 711)

A diligent search for legislative or State Board amendments since Camp has failed to reveal any requirement that driver education must be included in curricular offerings by local Boards within the ambit of the Public School Education Act of 1975. I **FIND** that the Commissioner's decision is dispositive of this issue and **CONCLUDE** that the Board's failure to provide behind-the-wheel instruction in the regular day school curriculum is not a denial of a thorough and efficient education.

IS THE DRIVER EDUCATION PROGRAM AN INTEGRAL PART OF THE BOARD'S CURRICULUM?

It seems apparent that this issue is to be addressed for the primary purpose of establishing a foundation for petitioner's contention in the third and final issue in this dispute.

Petitioner cites at Pb7 a letter written under date of June 28, 1978 by then acting Commissioner Lataille, wherein is quoted: "Recognizing that driver education was an integral part of any school program, ... " Said letter is attached to petitioner's brief and is incorporated herein by reference, and was written to a driver education coordinator of a school district out of Morris County. The letter responded to the coordinator's "concern as to where and how driver education should be located within the State Department of Education." **I FIND** no consequence or merit to the quoted declaration to support petitioner's contention that the determination of this issue must be affirmative, as said statement must be construed to be ultra vires. The Commissioner himself has frequently stated that he will not substitute his judgment for local Boards', and I am confident he would never attempt to usurp the authority of the Legislature or State Board.

Respondent does not argue strongly on the issue but strenuously insists that the Board acted within the scope of its authority in relegating behind-the-wheel training to hours other than the regular school day.

A determination of this issue must be based on what meaning and intent is attached to use of the word integral. A search in several dictionaries reveals little dispute between authors. "Essential to completeness", "formed as a unit with another part", and "lacking nothing essential" are adopted here for application in determining this issue.

There can be little dispute that there is considerable value to be derived by pupils from classroom instruction in driver education. There can also be little dispute that the practical applications of said values in the absence of behind-the-wheel training would create a void in the attainment of the objectives of the program. **I FIND**, therefore, that behind-the-wheel training is an integral part of the driver education program.

In the instant matter the Board has not eliminated behind-the-wheel training from the driver education program, but simply relegated same to hours other than the regular school day. It has previously been determined that there is no requirement that the Board include a driver education program in its curriculum. But once it has acted to approve such a program, it is indeed deemed by the Board to be as integral a part of the total curriculum as any other program approved by them. I **CONCLUDE**, therefore, that the determination of this issue is **AFFIRMATIVE**, with the sincere hope that the infinite wisdom of the Board will continue to approve the inclusion of the driver education program in its curriculum.

MAY THE BOARD'S DRIVER EDUCATION PROGRAM BE BIFURCATED, WITH BEHIND-THE-WHEEL TRAINING OFFERED IN THE EVENING ADULT SCHOOL, FOR WHICH PUPILS ARE ASSESSED A FEE?

The bifurcation part of this issue has already been addressed. The sole issue that remains is whether the Board may assess pupils a fee for behind-the-wheel training.

The arguments and citations as put forth by the parties in their briefs are incorporated herein by reference, and will now be addressed as a matter of law without pointed reference to the parties.

This appears to be a determination of first impression due to a failure to find any statutory or case law precisely on point.

In the Matter of the Appeals of the Boards of Education of the Black Horse Pike Regional School District and the Sterling Regional School District, Camden County, 73 S.L.D. 130, State Department of Education approval of petitioner's summer school program was rescinded due to the fact that a registration fee was levied and charged to all students as a prerequisite to summer school admission. In his decision, the Commissioner said:

> Since summer schools must, if they are to retain integrity, be regarded as companion schools to those conducted during the course of the regular school year, the State Board has properly, in the Commissioner's judgment, joined both kinds of schools together in the opening sentence of the rule on the operation of summer schools. This rule (N.J.A.C. 6:273.1(a)) provides that:

> The rules for the approval of fulltime secondary schools except as otherwise provided shall apply to secondary summer sessions.***

Thus, the two kinds of schools — full-time secondary schools and secondary summer sessions — are inextricably linked together.

It follows, therefore, that the following provisions of the State Board rule (N.J.A.C. 6:27.31(a)) which states that:

> ***No summer secondary session may be approved unless it:
>
> 1. Is operated by a board of education without charge to the pupils living within the district***,

is a necessary and cogent requirement of the rule. Education in New Jersey must be thorough and efficient and "free," and insofar as the rule is applicable to regular programs of instruction, it is also applicable to companion summer sessions.

In this regard, the Commissioner holds that it makes no difference that the summer session is voluntary. If it is offered at all, it must be offered in a parallel manner to the offering of the regular school program, and any provisions which mandate a cost as a prerequisite to program admission must be rendered a nullity. (at 136, 137)

The Legislature addressed itself to summer school enrichment programs and tuition charges, and the laws which became effective May 31, 1979 are reproduced here:

> 18A:54B-1. Enrichment program defined
> For the purposes of this act "Enrichment Program" means any summer school program offered by a public school for which a student does not receive credit for graduation and is unrelated to the curriculum content of the regular school program.
>
> 18A:54B-2. Tuition; rules and regulations
> For the purpose of providing enrichment programs in public schools boards of education may charge tuition for students to attend such noncredit courses subject to rules and regulations promulgated by the State board.

The Commissioner addressed the matter of fees charged to students for participation in field trips in Melvin C. Willett v. Board of Education of the Township of Colts Neck, Monmouth County, 66 S.L.D. 202. In that decision, the Commissioner

incorporated at p. 205 the New Jersey State Constitution, Article VIII, Section IV, paragraph 1 which states: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." (emphasis supplied). He also stated that:

> The term "field trip" as used in this case is understood and is limited to mean a journey by a group of pupils away from this school premises under the supervision of a teacher for the purpose of affording a first-hand educational experience as an integral part of an approved course of study. For example, pupils may visit the post office, the firehouse, a bank, a farm, a museum, government buildings, a factory; they may take nature walks, visit a planetarium, observe examples of air and water pollution, attend a professional theatrical performance. (at 205).

and

> The Commissioner finds and determines that the regulation adopted by the Colts Neck Board of Education on December 13, 1965, with respect to field trips is inconsistent with the school laws of New Jersey to the extent that it requires that the costs of such field trips shall be borne by parents of the participating children and, therefore, such portion of regulation is improper and unenforceable. (at 206).

The position of the Commissioner in Willett was modified in Board of Education of the Borough of Fair Lawn, Bergen County, 78 S.L.D. ___ (decided September 19, 1978). In that matter the legality of charging pupils for costs of food and lodging incident to their participation in the Board's Outdoor Education Program, which consisted of a period of two and one-half days at a YMCA camp on days during which school was in session, was upheld. In that matter the Commissioner held at p.739 that "Reasonable charges may be made to those pupils who voluntarily engage in the program for costs of food and lodging ..." and also stated at that same page that the matter was "importantly differentiated from Willett since it is stipulated herein that participation is optioned in an activity conducted in part during school hours and in part during the sixteen hours of the day when school is not ordinarily in session".

In affirming the Commissioner's decision in Fair Lawn, decided June 6, 1979, the State Board added one qualification. It cited N.J.A.C. 6:4-1.5 which provides:

> (a) No student shall be denied access to or benefit from any educational program or activity solely on the basis of race,

> color, creed, religion, sex, ancestry, national origin or social or economic status.

and stated that:

> We therefore conclude that in operating the outdoor educational program the Board could properly require the payment of a $25.00 fee for meals and lodging by all pupils whose families could afford such a fee; but that in the case of any pupil whose economic status would deprive him of the opportunity to take such field trip because he could not pay the fee, the Board must provide in some other way for the participation of such impecunious student.

Since Fair Lawn, the Legislature enacted N.J.S.A. 18A:36-21 which became law effective June 26, 1980, and is reproduced here in its entirety:

> 1.
> Any board of education may authorize field trips which all or part of the costs are borne by the pupils' parents or legal guardians, with the exception of pupils in special education classes and pupils with financial hardship. In determining financial hardship the criteria shall be the same as the Statewide eligibility standards for free and reduce price meals under the State school lunch program (N.J.A.C. 6:79-1.1 et seq.).
>
> 2.
> As used in this act "field trip" means a journey by a group of pupils, away from the school premises, under the supervision of a teacher.
>
> 3.
> No student shall be prohibited from attending a field trip due to inability to pay the fee regardless of whether or not they have met the financial hardship requirements set forth in section 1 of this act.
>
> 4.
> This act shall take effect immediately. Approved and effective June 26, 1980.

The State Board of Education adopted rules relative to Adult Education and are incorporated in N.J.A.C. 6:44-3.1, which is reproduced here in relevant part:

> 6:44-3.1 Standards for reimbursement
> (a) To be eligible for reimbursement, local programs of adult education must be approved by the Commissioner of Education. To meet the approval of the Commissioner, the educational services provided by the local public schools of the State for out-of-school youth and adults must:
>
> ...

> 2. Be designed to serve persons beyond the cumpulsory school age and not regularly enrolled in a public or private secondary school; ...

A careful and thorough review of statutory and case law as well as regulations should make determinations as a matter of law abundantly clear. In this instance an additional question of whether students in attendance in the regular high school program can be enrolled in the adult program at all must be addressed, and if affirmative, may a fee be charged? Said review reveals the following in the order of authority:

1. The Constitution of the State of New Jersey guarantees a thorough and efficient system of free public schools for the instruction of all State residents between five and eighteen years of age. (emphasis added).

2. The Legislature has declared that fees may be charged for no credit enrichment programs in summer school that are unrelated to curricular content in the regular school program.

3. The Legislature has declared that charges may be assessed to students for field trips but no student who fails to pay same is to be denied participation in said trips.

4. The State Board has declared that the Commissioner may not grant approval of a summer school program if a fee is charged.

5. The State Board has determined that although food and lodging fees may be charged for field trips, no pupil is to be denied participation.

6. The State Board has declared that adult programs are to be designed to serve those beyond the compulsory school attendance age in order for the Commissioner to grant approval for educational services provided for out-of-school youth and adults. Eligibility for State reimbursement is contingent on the Commissioner's program approval.

7. The definition of field trips by the Legislature and the Commissioner are synonymous, with the Commissioner's elaboration through examples of visitations, observations and attendance of a performance.

In the instant matter it was stipulated that behind-the-wheel training in driver education for pupils in attendance in the regular high school program is available only in the evening adult school, said program being also designed for other residents of the community. During 1979-80, a fee in the amount of $105 was charged for each participant in the program.

It has already been determined here that behind-the-wheel training is an integral part of the driver education program, which has been deemed to be an integral part of the curriculum through Board approval of same. As such, I FIND that the Constitution of the State of New Jersey, in guaranteeing a free public education, requires that no fee be charged. This determination is buttressed by Commissioner's decisions and State Board declarations that no fee be charged for summer school programs that grant credit for satisfactory completion or are linked with the regular curriculum.

Respondent's attempt to construe behind-the-wheel training as a field trip is without merit. Such training requires a departure from school premises due to lack of space and conditions on the premises in order to achieve the objectives of this portion of the program. The exceptions to fees charged for field trips as declared by the Legislature, State Board, and the Commissioner are inapplicable here. I SO FIND.

Relative to the adult program, there is no evidence in the record that said program has not been designed for community residents out-of-school and beyond the compulsory school attendance age. Having been approved by the Commissioner, the school district would appear to be eligible for State aid for its program. However, no claim for State aid for the adult program may include regularly enrolled day students who participate in the behind-the-wheel training program.

A search in statutory and case law as well as State Board regulations has not revealed a prohibition of the enrollment of day students in the behind-the-wheel training program in the evening adult program as approved by the Board. I SO FIND.

Having determined that the Board may not charge its day students for behind-the-wheel training, I FIND that claims made for reimbursement of said charges made during the 1979-80 school year would be untimely, as this petition was filed on June 4, 1980, and furthermore no such claim for reimbursement was made.

However, the basic principle of fundamental fairness would seem to require that the Board give consideration to reimbursing student fees received for behind-the-wheel training received in the 1980-81 school year.

In summary, I CONCLUDE that:

1. The Board's failure to provide behind-the-wheel instruction in driver education in the regular school curriculum does not constitute a denial of a thorough and efficient education.

2. The driver education program is an integral part of the Board's curriculum.

3. The Board's driver education program may be bifurcated, with behind-the-wheel training offered in the evening adult school, but no fee may be charged for any pupil enrolled in the regular day school.

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

OAL DKT. NO. EDU 3750-80

I HEREBY FILE my Initial Decision with FRED G. BURKE for consideration.

7 November 1980
DATE

WARD R. YOUNG, ALJ

PARSIPPANY-TROY HILLS EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the reliance by the Honorable Ward R. Young, ALJ on Camp, supra, to determine that driver education was not necessary for a thorough and efficient education. Petitioner further excepts to the determination by the Court that behind-the-wheel instruction may be offered in the evening adult school to pupils enrolled in the regular day school.

The Board's exceptions affirm the above determination of Judge Young but except to his finding that the Board may not impose a fee on those pupils choosing to enroll in the adult school behind-the-wheel program. The Board argues that there is no relation between the classroom portion of the driver education program and the behind-the-wheel portion offered in the adult school. The Board contends that any such conjecture or claim could be resolved by simply placing the entire driver training program in the adult school. The Commissioner cannot agree with such a simplistic resolution.

A course in driver education customarily forms part of the curriculum in physical education in high school required for graduation credit. The record herein is not sufficiently developed to show how driver education forms a portion of the curriculum adopted by the Board for graduation credit and approved by the Commissioner and the State Board.

The Commissioner has considered similar circumstances very recently in Bergenfield Education Association v. Board of Education of the Borough of Bergenfield, Bergen County, 1980 S.L.D. (decided December 15, 1980). Therein the Commissioner said in part:

> "***The Commissioner finds the present record insufficient for certain determinations relevant to the present matter. The record does not show whether or not the behind-the-wheel portion of Driver Education offered to pupils in the evening adult school forms part of that pupil's permanent high school record. Alternatively, does the record of participation in behind-the-wheel training rest only within the records of the evening adult school? Is it required that a high school pupil desirous of behind-the-wheel training take, as a prerequisite, the classroom instruction portion of Driver Education offered within the regular school program? Alternatively, may a pupil take only behind-the-wheel training? What provision, if any, is made for pupils who cannot pay the $105 fee required for behind-the-wheel training?***" (at ___)

Here, too, the Commissioner deems it relevant to determine such facts. Accordingly, on this _____ day of December 1980 this matter is remanded to the Office of Administrative Law for an expeditious resolution therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

December 29, 1980

Notes

Notes

SUBJECT INDEX TO COMMISSIONER'S DECISIONS - 1980

GLADYS ASLANIAN,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, October 15, 1979 and January 4, 1980

For the Petitioner-Appellee, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent-Appellant, John C. McGlade, Esq.

Petitioner here held a tenured teaching position on a four-fifths of full-time basis. When the Board of Education abolished her position and terminated her employment, she asserted seniority rights over two other full-time teachers within her field of certification (art) whose employment was continued by the Board. The Commissioner upheld her claim and directed the Board "to reinstate Petitioner to her position as teaching staff member", not specifying whether to a four-fifths or a full-time position.

We are of the opinion that the Commissioner erred in so applying the seniority rules and in ordering such reinstatement.

We agree with the Commissioner's ruling set forth below that

> "***a person who acquires tenure as the result of a part time position of employment which requires a certificate issued by the State Board of Examiners has no right to a claim for a full time position in the same or different area of certification which may exist. ***Thus, a person who acquires a tenure status as the result of part time employment is protected to the extent that that part time employment and emoluments pertaining thereto may not be diminished or abolished except as provided by law. *N.J.S.A.* 18A:28-9 *et seq.****" (1979 *S.L.D.* at 577)

Seniority rights cannot give rise to greater tenure than that which the teacher has achieved under the statute. Accordingly, in this case Petitioner holding tenure in a four-fifths position could achieve seniority only over other teachers who likewise held a position with four-fifths or less of full time duties. When her part-time position was abolished and no other part-time positions were left in her category, there was nothing to which Petitioner's tenure could attach.

N.J.S.A. 18A:28-3, which directs the Commissioner to classify the fields or categories in which seniority may be obtained, makes no provision with respect to the seniority of part-time teachers. The same is true of the pertinent State Board regulations (*N.J.A.C.* 6:3-1.10).

We believe that the Legislature did not intend part-time staff members to have the same status or be in the same category with full-time personnel so as to allow the former to obtain seniority over the latter. The duties of part-time positions often differ from those of full-time faculty in a number of respects. With regard to supplemental teachers, Title I teachers and substitute teachers, it has been held that tenure does not attach at all. *Biancardi v. Waldwick Board of Education,* 138 *N.J. Super.* 175 (App. Div. 1976), affirmed 73 *N.J.* 37 (substitute teachers); *Point Pleasant Beach Teachers Association v. Callam*

and Board of Education of Point Pleasant Beach, 173 *N.J. Super.* 11 (App. Div. 1980) (Title 1 teachers); *Kuboski et al. v. Board of Education of South Plainfield,* 1978 *S.L.D.* 322 (supplemental teachers).

For purposes of tenure and seniority rights at least, full-time teaching staff members are in a different class from part-time teachers. The Legislature differentiated between the two classes in the notable one instance of eligibility for membership in the Teachers' Pension and Annuity Fund. According to *N.J.S.A.* 18A:66-2(p), a "teacher" to be eligible must be someone who is "regularly engaged in performing one or more of these [school] functions as a *full-time* occupation outside of vacation periods." The precedents have established tenure rights for part-time teachers as such. We do not think the law should be extended so as to enable a part-time teacher whose job is abolished to obtain a full-time position by "bumping" another staff member.

By directing the Board to reemploy Petitioner here, the Commissioner has in essence ordered the Board to re-establish a part-time position which it had abolished. The Commissioner thereby contravened the authority of a local board of education to organize its school system in such manner as it sees fit, so long as it violates no constitutional or statutory mandate.

The State Board reverses the Commissioner's decision and dismisses the petition herein.

Attorney Exceptions are noted
July 2, 1980
Pending N.J. Superior Court

RALPH BOGUSZEWSKI,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODCLIFF LAKE, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, November 30, 1979

For the Petitioner-Appellee, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent-Appellant, Wittman, Anzalone, Bernstein & Dunn (Walter T. Wittman, Esq., of Counsel)

The State Board affirms the Commissioner's decision directing the Board to pay full salary less mitigation for compensation received from date of dismissal to end of contract year.

May 7, 1980

DR. JOSEPH R. BOLGER,	:	
Plaintiff-Appellant,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY,	:	APPELLATE DIVISION
Defendant-Respondent.	:	

Decided by the Commissioner of Education February 1, 1979.

Decided by the State Board of Education July 11, 1979.

Submitted June 3, 1980—Decided June 13, 1980.

Before Judges Fritz and Lane.

On appeal from New Jersey State Board of Education.

Carl John Kerbowski, attorney for appellant.

Kalac, Newman & Griffin, attorneys for respondent (Peter P. Kalac, on the brief).

John J. Degnan, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of New Jersey State Board of Education (Mary Ann Burgess, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

The Commissioner of Education granted a motion for summary judgment made by respondent Board of Education (Board) in response to appellant's petition asserting that he and the Board had entered into a binding contract establishing his salary for the school years 1976-77 and 1977-78. It was the view of the Commissioner that since the purported contract had not been authorized by resolution of the Board, the absence of any genuine issue of fact warranted his dismissing the petition on the motion. The State Board of Education affirmed for the reasons expressed in the opinion of the Commissioner.

While not put in this fashion in an affidavit submitted after the argument of the motion before the hearing officer but prior to the determination of the Commissioner, the essence of appellant's principal argument is at last clear from his brief before us. Holding a written contract purportedly signed by the President and the Secretary of the Board as well as by himself, he argues that the mere existence of that should be enough to generate factual inquiry and if it is not, the resolution of the Board of December 9, 1975 is susceptible of inference of ratification of that contract and that therein lies a factual issue. With the Commissioner we are satisfied that whatever their office members of a board of education acting independently of the board, which can act only by resolution, as a matter of law cannot enter into a contract which binds the board. *Potter v. Metuchen*, 108 *N.J.L.* 447 (Sup.Ct. 1931);

cf. Monmouth Cty. Pub. Co. v. Monmouth Cty., 124 *N.J.L.* 105, 108-109 (E.&A. 1940). A public body corporate, as is a board of education, *N.J.S.A.* 18A:10-1, can act only by regular corporate conduct. 16 *McQuillin, Municipal Corporations* (3 ed. 1979), §46.09b at 665; *Busboom v. Southeast Neb. Tech. Community Col.*, 194 *Neb.* 448, ——, 232 *N.W.*2d 24, 27, (1975); *see Anderson v. Grant Cty. Bd. of Ed.*, 87 *S.D.* 83, ——, 203 *N.W.*2d 179, 181-182 (S.D. 1973). Without respect for the moment to appellant's claim of ratification by resolution, the absence of a resolution or other *corporate* action authorizing the contract imposes fatal irrelevancy upon any fact question regarding the execution of the contract.

With respect to the argument that the December 9, 1975 resolution can be read to infer ratification of the contract by the Board, we record our awareness that on motions for summary judgment all favorable inferences must be accorded the opponent to the motion and as far as the motion is concerned, to doubt is to deny. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 74-75 (1954). Nevertheless, we are satisfied that the presence of specific limiting dates in the resolution defeats any rational possibility of an intention to ratify the contract in question. From a contract standpoint, varying as it did an express term of the written contract, it was at best a counteroffer.

Appellant also argues that the failure of the hearing officer to prepare and submit a written decision is a violation of the law and causes him to suffer "fatal prejudice." (The only statutory reference provided us by counsel is to *N.J.S.A.* 52:14B-1 *et seq.*) In a statement in lieu of brief on behalf of the State Board of Education the Attorney General responds that since the hearing officer never heard evidence and the Commissioner based his decision solely upon the transcript, affidavits, exhibits and briefs, the matter is distinguishable from *Winston v. So. Plainfield Bd. of Ed.*, 64 *N.J.* 582 (1974) and *Pietrunti v. Bd. of Ed. of Brick Tp.*, 128 *N.J.Super.* 149 (App.Div. 1974), certif. den. 65 *N.J.* 573 (1974), *cert.* den. 419 *U.S.* 1057 (1974). Without condoning the practice here followed we note that we have everything before us now which appellant had available and might have offered in "an opportunity to correct any mistakes in the report of the hearing officer." We are not persuaded of any error in the agency.

Affirmed.

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,

Petitioner-Appellant,

V.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

Respondent-Respondent,

and

BOROUGH OF SOMERVILLE,

Intervernor.

SUPERIOR COURT

APPELLATE DIVISION

Decided by the Commissioner of Education May 31, 1977.

Decided by the State Board of Education October 4, 1978.

Argued December 17, 1979—Decided April 25, 1980.

Before Judges Seidman, Michels and Devine.

On appeal from final decision of State Board of Education.

William B. Rosenberg argued the cause for appellant. (Blumberg, Rosenberg, Mullen & Blumberg, attorneys; Mr. Rosenberg on the brief).

Richard J. Murray argued the cause for respondent (Mr. Murray and Thomas H. Dilts on the brief).

Thomas H. Dilts argued the cause for intervenor (Dilts & Kemp, attorneys; Mr. Dilts and Richard J. Murray on the brief).

John J. Degnan, Attorney General of New Jersey, filed a Statement in Lieu of Brief on behalf of State Board of Education (Erminie L. Conley, Assistant Attorney General, of counsel; Mary Ann Burgess, Deputy Attorney General, on the statement).

The opinion of the court was delivered by SEIDMAN, P.J.A.D.

The Board of Education of the Township of Branchburg (Branchburg) appeals from the final decision of the State Board of Education (State Board) affirming the denial by the Commissioner of Education (commissioner) of Branchburg's request to terminate the sending-receiving relationship with the Board of Education of the Borough of Somerville (Somerville).

For many years Branchburg has sent its high school students to Somerville under a sending-receiving relationship formalized in 1956 by a written agreement. Although the written agreement ended in 1965, the relationship continued pursuant to *N.J.S.A.* 18A:38-13. Prior to the opening of its newly constructed high school in 1970, Somerville notified Branchburg that because of projected student enrollment the sending-receiving relationship should be terminated. At a meeting of both boards in September 1970, a target commencement date of 1975 was set for the phasing out of Branchburg students from Somerville. But in May 1971 Somerville informed Branchburg that it would be "mutually desirable" to reconsider the target date because "with total utilization of our new facility even with

projected growth, we can continue to service the students of Branchburg and furnish fine education well beyond the original date of withdrawal."

Prior to May 1971, Branchburg had undertaken the planning of its own high school, purchasing a 76-acre tract for that purpose. However, a $5,210,000 bonding proposal to enable the construction of a high school with a capacity of 950 students was defeated by the Branchburg voters at a referendum held in December 1972. Branchburg subsequently commissioned various professional studies and formed several community groups, leading to recommendations in May 1975 that the contemplated high school was still Branchburg's best alternative. Although the high school remained in the planning stage and had not been approved by the Branchburg voters, Branchburg filed a petition with the commissioner in September 1975 for severance of the sending-receiving relationship.

Testimony *pro* and *con* was presented to a hearing examiner on eight days between March 26 and June 15, 1976. The hearing examiner issued his report to the commissioner in February 1977. He concluded that "the 'positive benefits' which would accrue if severance were granted are outweighed on balance by serious and compelling reasons of education and financial importance. . . ," and recommended that the petition be dismissed. The conclusion was based upon that which the hearing examiner considered to be the "primary facts" developed at the hearing: the present Somerville high school is a "good, perhaps superior, school" offering a well-rounded educational program to all students; the present pupil population of about 1250 in Somerville is an "almost ideal number"; though "technically" overcrowded, the pupil population is managed well; the financial impact of severance on both school districts would be "of great significance"; severance would result in the necessity to maintain two small high schools with limited programs and reduced educational opportunities, and factors of racial imbalance were of "more than minimal significance."

After reviewing the report and considering the exceptions, objections and replies filed by Branchburg and Somerville, the commissioner denied the application for severance. He viewed the controversy "as one with contested facts and disputed conclusion embracing a legal argument grounded on the passage of a comprehensive legislative enactment designed to insure a thorough and efficient educational program for all pupils." The question to be resolved was whether "such severance would be in the best interests of both the Branchburg and Somerville Boards in the joint desire of the Boards to provide an appropriate program of education for all of their high school pupils." He deemed a "key component" to be whether a " 'breadth of program' mandated as necessary by the Public School Education Act could be maintained by the Board at a time subsequent to severance." He noted the hearing examiner's conclusion that it could not without increased expenditures and higher per pupil costs.

The commissioner stressed the factor of school size, concluding that a student population below 800 was undesirable, and that this figure would not be reached in Branchburg (assuming a four year high school) in the near future. While cognizant that "program articulation" would be enhanced for Branchburg pupils by severance, and that there was "no opportunity in such relationship for an effective representation in school affairs for the citizens of Branchburg . . . an apparent contradiction to the mandate of the Public School Education Act of 1975. . . ," the commissioner expressed the view that the matter was one for legislative review and change, not administrative action.

On further appeal to the State Board, a majority of the Legal Committee believed that "[w]ith the Branchburg population steadily increasing, its application clearly has merit," and disputed the commissioner's position that a high school with less than 800 students is undesirable. Invoking "the philosophy of the Public School Education Act that there should be 'citizen involvement in educational matters'," the majority recommended that the commissioner's decision be reversed and the matter be remanded for further proceedings, particularly: to obtain up-to-date student population data and projections for both municipalities, for an analysis of the possibility of regionalization, and, "in default of a voluntary agreement for regionalization," permitting Branchburg to sever the relationship upon satisfaction of "such reasonable conditions as may be imposed by the Commissioner. . . ."

The minority of the Legal Committee stressed the racial considerations in recommending affirmance of the commissioner's decision.

The State Board affirmed the commissioner's action essentially for the reasons stated in his decision, though expressly disapproving of his position concerning the undesirability of a high school with fewer than 800 students. The State Board deemed "of the utmost importance" the effect severance would have on the racial composition of Somerville high school and the proposed Branchburg high school, stating that "[w]here we have a racially balanced school of high quality, we should preserve it unless other reasons for dismembering it are far stronger that [*sic*] they are here." Viewing with favor regionalization as a solution, the State Board directed the commissioner to "continue to explore the possibility with the parties."

On this appeal, Branchburg contends that (1) there is "good and sufficient reason" to terminate the relationship because Somerville high school is overcrowded, continuation of the relationship would be detrimental to the children of both communities, and Branchburg citizens are deprived of local involvement and community participation in their children's education; (2) regionalization is not a viable solution, and (3) the benefits to students from termination of the relationship outweigh any detriment to Somerville and will not cause any significant educational, financial or racial impact that cannot otherwise be remedied.

A sending-receiving relationship between school districts may not be severed "except for good and sufficient reason upon application made to and approved by the commissioner, who shall make equitable determinations upon any such applications." *N.J.S.A.* 18A:38-13. Here, the administrative agency charged with making the determination determined that "good and sufficient reason" had not been shown for terminating the relationship between Branchburg and Somerville. That determination is entitled to a presumption of correctness and will not be upset there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial credible evidence. *Thomas v. Bd. of Ed. of Morris Tp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), aff'd 46 *N.J.* 581 (1966); *Quinlan v. Bd. of Ed. of North Bergen Tp.*, 73 *N.J. Super.* 40, 46-47 (App. Div. 1962). We are satisfied from our thorough review of the record that the factual determinations of the hearing examiner, the commissioner and the State Board in this case are amply so supported.

Branchburg concedes that a virtually all-white school would be created in Branchburg and that the percentage of non-white students in Somerville would increase from 10.8% to 18.2% if severance were permitted. But the argument is advanced by Branchburg that the effect would be minimal and significance is attached to its plan to provide space for a specified number of non-white Somerville students on a voluntary transfer plan. We are not persuaded by these contentions in light of the strong State policy favoring racial balance in the public schools and the implementing authority vested in the commissioner. See *Jenkins, et al. v. Tp. of Morris School Dist. and Bd. of Ed.*, 58 *N.J.* 483 (1971); *Booker v. Board of Education, Plainfield*, 45 *N.J.* 161 (1975). The evidence presented at the hearing clearly demonstrated that Branchburg's voluntary transfer plan would have little, if any, effect on its creation of an otherwise all-white school. We shall not disturb the fact findings made and the conclusions reached on this issue by the commissioner and the State Board.

As to Branchburg's further contention that the benefits of termination outweighed any detrimental financial impact, it was generally admitted at the hearing that a severance would result in increased educational costs to both districts, the only dispute being over the extent of the increase. Branchburg's witness predicted that school taxes in that district would increase 18.2%, 14.7% and 11.2%, respectively, in the first three years of operation of the proposed high school, and that Somerville's per pupil cost would rise 15% in the first year following termination. Somerville's school superintendent, however, predicted a 29% increase in that year and a 47% rise by 1980. Branchburg's own proofs would support the findings of fact of the commissioner and the State Board. When Somerville's evidence is also considered, an even more compelling case was made for retaining the present relationship. It is further to be noted, in passing, that despite Branchburg's assurance of being "ready and willing to take on whatever financial consequences flow from termination of its sending-receiving relationship with Somerville," nowhere in the record is there any indication of a reasonable probability that the voters of Branchburg are now willing to assume the cost of the proposed new high school and the increase in educational expenses.

Branchburg stresses the fact that the student enrollment at Somerville exceeds its functional capacity and argues that overcrowding adversely affects the quality of education. But Branchburg does not claim that the quality of education at Somerville is inferior. In fact, as the hearing examiner found from undisputed evidence, Somerville was "a good, perhaps superior school" which "offers a well-rounded educational program to all pupils." There is also substantial credible evidence in the record to support the finding that while the high school was technically overcrowded, such overcrowding was well-managed. In short, a severance of the sending-receiving relationship would, in our view, break up a well-run high school and produce two high schools of lesser quality.

Branchburg asserts that the legislative policy of encouraging local involvement and community participation in the educational process outweighs the racial, financial and educational objections to severing the relationship. However, we do not construe the legislative declaration in *N.J.S.A.* 18A:7A-2 to be a mandate that controls to the exclusion of all other factors. The commissioner here was aware of the apparent contradiction between the policy declarations and the continuance of sending-receiving relationships in the absence of "good and sufficient reason" for termination, but he correctly weighed all the relevant factors in reaching his conclusion.

Finally, Branchburg argues at length that regionalization would not be a viable solution to the problem. However, the State Board recommended that the commissioner continue to explore the possibility of regionalization and saw no need to "continue this litigation in the meantime." We agree. Until a full study has been completed the appropriateness of regionalization cannot be determined.

The final decision of the State Board is affirmed.

[173 *N.J. Super.* 268 (*App. Div.* 1980)]

JOHN F. COULTER, JR.,	:	
Petitioner-Appellant,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE BOROUGH OF CALDWELL-WEST CALDWELL, ESSEX COUNTY,	:	APPELLATE DIVISION
Respondent-Respondent.	:	

Decided by the Commissioner of Education June 11, 1979.
Decided by the State Board of Education November 8, 1979.
Argued December 15, 1980—Decided December 22, 1980.
Before Judges Bischoff, Milmed and Francis.
On appeal from the decision of the State Board of Education.

Stephan C. Hansbury argued the cause for appellant (Harper & O'Brien, attorneys; Stephan C. Hansbury on the brief). Lois M. Van Deusen argued the cause for the respondent (McCarter & English, attorneys; Steven B. Hoskins of counsel; Lois M. Van Deusen on the brief).

PER CURIAM

The decision of the State Board of Education under review is affirmed substantially for the reasons expressed therein.

We add the following comments with respect to the violations of the Open Public Meetings Act (*N.J.S.A.* 10:4-6 et seq.). It is now clear that the Commissioner of Education and the State Board of Education have jurisdiction to determine issues arising under the Open Public Meetings Act as they relate to controversies under the school laws. *Sukin v. Northfield Bd. of Ed.*, 171 *N.J. Super.* 184, 187 (App. Div. 1979). Respondent Board of Education concedes the Open Public Meetings Act was violated in that adequate notice of the meetings was not given to the public contrary to *N.J.S.A.*10:4-10, nor do the minutes of the meetings of the Board state when the matters covered in executive sessions will be made public contrary to *N.J.S.A.*10:4-13. However, appellant was given notice of the relevant meetings, attended and participated. He was not prejudiced by any of the noted violations. Moreover, appellant did not appeal the violations of the Open Public Meetings Act within 45 days as required by the Act. *N.J.S.A.*10:4-15. Appellant contends that since he had 90 days within which to challenge the action of the respondent Board under the school laws, *N.J.A.C.*6:24-1.2, the time for a concurrent challenge under the Open Public Meetings Act is by necessity extended to 90 days in order to prevent duplication of action before different tribunals.

We disagree. The Open Public Meetings Act enacted in 1975 in clear and unmistakable terms provides that a proceeding may be instituted to void action taken by a public body at a meeting which does not conform to the act "within 45 days after the action sought to be voided shall be made public." There is no need for construction and no basis or reason for our extending the time period beyond that clearly established in the Act. Appellant's challenge to the action of the Board under this statute was untimely.

Affirmed.

[173 *N.J. Super.* 268 (*App. Div.* 1980)]

DOMINICK DI NUNZIO,	:	
Appellant,	:	
V.	:	SUPERIOR COURT
PEMBERTON TOWNSHIP BOARD OF EDUCATION,	:	APPELLATE DIVISION
Respondent.	:	

Decided by the Commissioner of Education November 9, 1978.

Decided by the State Board of Education February 7, 1979.

Argued January 28, 1980—Decided February 13, 1980.

Before Judges Bischoff and Botter.

On appeal from decision of the New Jersey State Board of Education.

Emerson L. Darnell argued the cause for appellant (Darnell and Scott, attorneys).

Ernest N. Sever argued the cause for respondent Pemberton Township Board of Education (Sever, Hardt & Main, attorneys).

John J. Degan, Attorney General of New Jersey, attorney for respondent New Jersey State Board of Education (Mary Ann Burgess, Deputy Attorney General, of counsel and on the Statement in Lieu of Brief).

PER CURIAM

Appellant Dominick DiNunzio holds certificates as a secondary school principal and school administrator. He was employed by the Pemberton Township Board of Education (Board) as vice principal of Pemberton Township High School from 1961 through 1965. In 1965 he was appointed acting, and later, fulltime principal of the school. In 1974 he was appointed administrative assistant to the superintendent of schools at a reduced salary. On December 2, 1974 appellant filed a petition with the Commissioner of Education protesting his transfer by the Board to the nontenured position of administrative assistant, requesting reassignment as a high school principal and contending he was entitled to be paid the salary of a high school principal.

While his petition was pending, he was reassigned by the Board to the position of elementary school principal. After hearing, the Commissioner determined that appellant was illegally transferred from his tenured position as high school principal, which illegal transfer continued until June 1975 when he was assigned principal of the elementary school and further that he had been underpaid during the school years 1973-1974 and 1974-1975 while he was assigned to the position of administrative assistant. The Commissioner, by decision dated January 21, 1977, ordered the Board to pay appellant the difference between what he was paid for those two years and what he would have earned as a high school principal. Appellant appealed to the State Board of Education March 14, 1977 and his appeal was dismissed as untimely. *N.J.S.A.* 18A:6-28. Appellant appealed to this court and then abandoned his appeal.

In April 1977 appellant's attorney wrote the Commissioner, inquiring whether, under the Commissioner's decision of January 21, 1977, he was entitled to across-the-board increases given to

the school administrators. By a decision of November 9, 1978, the Commissioner stated he considered the matter before him as a submission for clarification of a prior decision and stated appellant was seeking "to reopen the litigation for the limited purpose of additional payments to which he claims an entitlement."

Appellant asserted that the Commissioner's decision did not deal with the salary for the years 1975-1976 and 1976-1977. The Commissioner disagreed with this contention and held his prior directive was "clear and unequivocal." On this issue the decision of the Commissioner of January 21, 1977 had provided that:

> The Commissioner directs the Board, therefore, to pay petitioner the difference between the salaries he received for the 1973-74 and 1974-75 school years and the salaries he would have received in those years if he were paid as a high school principal on the zero (0) and first (1) steps of the administrators' salary schedule. If petitioner is serving now as an elementary school principal, he is entitled to placement on the third (3) step of the salary schedule for the 1976-77 school year in the elementary principal category, except that his salary of $18,800, as determined herein by the Commissioner, may not be reduced by the Board. . . . *N.J.S.A.* 18A:29-4.1.
>
> Except for the additional salary entitlement as set forth herein, there is no further relief to which petitioner is entitled, therefore, in all other respects, the Petition of Appeal is dismissed.

By his decision of November 9, 1978 on the request for clarification, the Commissioner stated:

> Petitioner's Memorandum of Law asserts that the Commissioner's decision did not deal with his base salary for the 1975-76 and 1976-77 school years. The Commissioner does not agree with this assertion. His directive is clear and unequivocal as emphasized *ante*.
>
> Accordingly, petitioner is entitled to placement on step two (2) of the salary schedule in effect in the elementary principal category for the 1975-76 school year and step three (3) for the 1976-77 school year.
>
> Petitioner does not contend that he has been denied a salary increment. Rather, he argues that across-the-board raises for the 1975-76 and 1976-77 school years should have been added to his base salary for the 1974-75 school year thus giving him an entitlement to more salary. . . .

On appeal the State Board of Education affirmed the Commissioner. Appellant's present appeal to this court followed.

Appellant argues the Commissioner's award raised his base pay of $18,000 to $18,800 and that increments in subsequent years must be added to the base of $18,800. This argument is without merit. It is clear that the $18,800 represented total compensation for the year and not base pay to be carried forward. The Commissioner's explanation of November 9, 1978 is entirely consistent with his opinion of January 21, 1977 and was the only issue considered by him on the request for clarification. To the extent that appellant seeks to raise issues relating to the January 21, 1977 decision, they are not properly before us.

No justiciable issue is presented and the appeal is: Dismissed.

ELAINE DI RICCO,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, November 15, 1979

For the Petitioner-Appellee, Rothbard, Harris & Oxfeld (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Appellant, Samuel A. Christiano, Esq.

Petitioner's employment contract as a nontenured nurse/health teacher was not renewed for a fourth year. The reason given to her by the Board was "your attendance record while in the employ of the Board of Education." She had been absent a total of 26 days during her three-year service. The Board did not contend that Petitioner's absences were not for valid reasons, nor did it require a physician's certificate. Furthermore, Petitioner was never formally notified by the Board, prior to its determination not to renew the contract, that her absenteeism was a source of concern. For all these reasons the Commissioner determined that the Board's stated reason for contract nonrenewal was improper, and he directed the Board to reinstate Petitioner with full back salary, thus giving her tenure.

The State Board affirms the Commissioner's decision for the reasons stated therein.

David Brandt, Paul Ricci and Timothy Weeks opposed in the matter.

June 11, 1980

Pending N.J. Superior Court

CHARLES EPPS, JR.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, November 15, 1979

For the Petitioner-Appellant, Philip Feintuch, Esq.

For the Respondent-Appellee, William A. Massa, Esq.

The State Board of Education denies request for oral argument and affirms the decision of the Commissioner.

April 8, 1980

VIRGINIA EUELL,	:	
Petitioner-Respondent,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOLS,	:	APPELLATE DIVISION
Respondent-Appellant.	:	

Decided by the Commissioner of Education August 11, 1978.
Decided by the State Board of Education November 8, 1979.

Argued: October 10, 1980—Decided: October 28, 1980.

Before Judges Kole and Pressler.

On appeal from New Jersey State Board of Education.

William F. Hartigan, Jr., argued the cause for appellant (McLaughlin & Cooper, attorneys; James J. McLaughlin, of counsel).

Nancy R. Lichtenstein argued the cause for respondent (Schragger, Schragger & Levine, attorneys).

A statement in lieu of brief was filed on behalf of New Jersey State Board of Education (John J. Degnan, Attorney General of New Jersey, attorney; Mary Ann Burgess, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

The Board of Education of Princeton Regional Schools appeals from a determination of the State Board of Education, affirming a decision of the Commissioner of Education, granting respondent Virginia Euell tenure rights in the position as assistant principal. On this appeal it contends:

(1) The respondent did not meet the statutory criteria for the acquisition of tenure as an assistant principal under *N.J.S.A.* 18A:28-5 and 6.

(2) The respondent was not eligible to obtain tenure between May and June 1973.

(3) The School Board did not change the respondent's title for its own accommodation or to evade the purpose of the rules of the Department of Education.

We have reviewed the record, as well as the interpretation of the statute here involved by the agencies below charged with its enforcement. We are persuaded that the Commissioner's findings of fact, as adopted by the State Board, are amply supported by sufficient credible evidence and that the determination below constituted an appropriate interpretation and application of such statutory provisions to the facts so found. We affirm the State Board's action essentially for the reasons expressed in the Commissioner's decision. *R.* 2:11-3(e) (1) (D) (E).

Affirmed.

IN THE MATTER OF THE	:	
TENURE HEARING OF FRED	:	
J. GAUS, II, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE TOWNSHIP	:	DECISION
OF CHESTER, MORRIS COUNTY.	:	
	:	

Decided by the Commissioner of Education June 6, 1979

For the Complainant Board, Schenck, Price, Smith and King (David B. Rand, Esq., of Counsel)

For the Respondent-Appellee, Saul R. Alexander, Esq.

This is a tenure case in which an elementary teacher was charged with six instances of corporal punishment, five other instances of conduct unbecoming a teacher, and four instances of insubordination. The Commissioner found the evidence sufficient to sustain charges that the respondent used vulgarities in addressing a pupil, embarrassed a pupil by reference to her use of toilet facilities, left his classroom unattended one day, and was insubordinate in two instances: (a) failing to teach penmanship and a new handwriting course as directed, and (b) improperly retaining pupil records in his desk and not taking them to the office as directed. The Commissioner also found that respondent had improperly taken a student's lip in his fingers, but that the incident did not rise to the level of corporal punishment. The Commissioner thus concluded that the charges of conduct unbecoming a teacher had been sustained and we agree. The Commissioner concluded that under all the circumstances dismissal of respondent would be an unduly harsh penalty, and he limited the disciplinary action to suspension of respondent without pay for 120 days. With regard to this conclusion we disagree with the Commissioner.

After a detailed review of the evidence with respect to the other charges as well as the lip incident, the State Board directs that respondent be dismissed from the Chester Township School System.

We find that there was substantial evidence in support of a number of the other charges, namely: pulling the hair of the pupil, throwing a book at a student and hitting his arm, handling in a rough manner two girls who were running out of a line, pulling the hair of another pupil twice, and knocking down a student while on a "dead run" to break up a fight which the respondent had observed. With respect to the lip incident, moreover, we find convincing evidence that the respondent's contact with the pupil had resulted in a lip injury which caused the pupil to ask for medical assistance, and that at one point the respondent had "grabbed" the student's lip to see whether indeed it was bleeding as a result of earlier contact with the respondent's hand.

We take special note of the fact that all of these incidents were related to elementary school pupils. The evidence regarding these incidents, taken cumulatively with the evidence in support of the charges sustained by the Hearing Officer and the Commissioner, convinces us that the welfare of young children in the school system calls for respondent's dismissal. While perhaps no one incident of itself would warrant such action, the record taken as a whole shows a pattern of conduct unbecoming a teacher and harmful to children attending the school. Indeed, in one instance, the child was so upset that he was afraid to come to school the next day.

In respect to a number of charges which were dismissed, the Hearing Officer evidently gave great weight to the fact that the child or children involved were not called as witnesses. In our view it is the better practice not to involve young children in this kind of controversy when other evidence

of a teacher's misconduct suffices to prove the charge, as was the case here. Furthermore, in this kind of case we see no reason to resolve doubts in favor of the teacher, although this was what the Hearing Officer did in several instances. A mere "preponderance of the believable evidence" is all that is needed to sustain a charge. *Park Ridge v. Salimone,* 36 *N.J. Super.* 485, 498 (App. Div. 1955), affirmed 21 *N.J.* 28 (1956); *In the Matter of the Tenure Hearing of John Orr, School District of Wyckoff Township,* 1973 *S.L.D.* 40, 48.

Finally, a monetary penalty such as was imposed here does not protect school children against the actions of a teacher who by temperament is likely to repeat unbecoming conduct which adversely affects a learning environment.

For all of the foregoing reasons the State Board orders the respondent dismissed from employment in the Chester Township School System, and that the Commissioner's decision be modified to conform with the views above expressed.

Attorney Exceptions are Noted

March 5, 1980

Pending N.J. Superior Court

JOHN W. GRIGGS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, June 21, 1979

For the Petitioner-Appellant, Stephen E. Klausner, Esq.

For the Respondent-Appellee, Richard J. Murray, Esq.

The Petitioner in this case is a tenured teacher whom the Board of Education ordered to submit to a psychiatric examination. The Board suspended him from his teaching duties with pay pending the psychiatric examination requested. The teacher resisted both the examination and the suspension, complaining that these actions were improper, unreasonable and discriminatory.

The Commissioner upheld the Board's order that Petitioner submit to a psychiatric examination, finding that Petitioner's due process rights were protected and that the Board's action was supported by sufficient documentation. He went on to hold, however, that the Board had no authority to suspend the tenured teacher in the absence of certification of charges against him, and the Commissioner therefore directed that the Board reinstate Petitioner with appropriate duty assignments until the psychiatric evaluation had been completed.

The State Board directs that the Commissioner's decision be affirmed insofar as it sustains the order for the psychiatric examination, but that it be modified so as to uphold the suspension. The statute governing the suspension here is *N.J.S.A.* 18A:25-6, which as noted in the Commissioner's decision provides in its pertinent language as follows:

> "The superintendent of schools may, with the approval of the president *** of the board *** employing him, suspend any *** teacher, and shall report such a suspension to the board *** forthwith. The board *** by majority vote of its membership, shall take such action for the restoration or removal of such person as it shall deem proper, subject to the provisions of chapter 6 and chapter 28 of this title."

The scheme of this statute is plain: the superintendent, with the approval of the Board president, performs the administrative act of suspending the teacher; thereafter the Board decides whether to reinstate or remove the suspended individual; but if the teacher has tenure, he can be removed only if the Board proceeds in accordance with the Tenure Employees Hearing Law (*N.J.S.A.* 18A:6-10 *et seq.*). In the light of the broad management powers of the Board under *N.J.S.A.* 18A:11-1, one must conclude that the Board itself or by its direction may invoke the suspension authority of 18A:25-6. That section does not make the filing and certification of charges a prerequisite to suspension of a tenured staff member, but it does recognize that the tenured employee may not be dismissed or reduced in compensation unless charges are certified and proven. If however, the suspension is *with* pay, as it was here, it causes neither dismissal nor reduction in compensation and therefore does not violate the tenure laws.

N.J.S.A. 18A:6-14 creates a separate and additional authority for suspensions in tenure

hearing cases. It applies only to Board action after charges have been certified to the Commissioner; it permits the Board to suspend either with pay (if this has not already been done) or without pay for up to 120 days. We do not read 18A:6-14 as carving out an exception to the procedure authorized by 18A:25-6. The latter is especially appropriate when the suspension is merely preliminary to a physical or psychiatric examination. The Board may well have inadequate grounds for a tenure proceeding while nevertheless having good reasons for the examination. The tenure rights of a staff member do not include the right to a duty assignment in school when the Board has concluded that his presence in school pending a psychiatric evaluation would not be in the best interests of the system.

The case of *Scachetti v. Board of Education of Rockaway Township*, 1977 *S.L.D.* 142, 153, cited in the Commissioner's opinion herein is distinguishable from the instant controversy because in *Scachetti* the Board suspended the Petitioner *without* pay pending his submission to a psychiatric examination. To the extent that decision of the Commissioner in *Scachetti* contains dictum inconsistent with the views hereinabove expressed, we believe that such dictum should not be followed.

The Commissioner's decision herein is affirmed, except that Petitioner's suspension with pay may be continued pending his psychiatric examination.

March 5, 1980

THEODORE C. HAHULA,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, October 29, 1979

For the Petitioner-Appellee, Saul R. Alexander, Esq.

For the Respondent-Appellant, Schwartz, Pisano & Nuzzi (Lawrence S. Schwartz, Esq., of Counsel)

The Petitioner herein, a tenured teacher with four years' naval service, was granted two years' credit on the salary schedule at the time of his initial employment. His petition claimed entitlement to a full four years' credit. The Commissioner agreed and directed the Board to place Petitioner at his appropriate level on the salary schedule "with required back pay".

Subsequent to the Commissioner's determination, the Appellate Division decided the cases of *Giorno v. Township of South Brunswick*, 170 *N.J. Super.* 162 (App. Div. 1979) and *Kloss v. Township of Parsippany-Troy Hills*, 170 *N.J. Super.* 153 (App. Div. 1979); and the State Board of Education rendered its decisions in *Union Township Teachers Association v. Board of Education of Union Township* (March 5, 1980) and *Lavin* v. *Board of Education of Hackensack* (March 5, 1980). In all of these decisions the tribunal held the doctrines of laches and estoppel applicable to claims for back pay based upon prior service credit.

In view of these precedents, and for the reasons stated therein, the State Board of Education reverses the decision below and remands this case to the Commissioner for reconsideration in the light of the authorities cited.

June 11, 1980

HAMILTON TOWNSHIP SUPPLEMENTAL TEACHERS ASSOCIATION *ET AL.*,	:	
PETITIONERS-APPELLEES,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, November 30, 1979

For the Petitioners-Appellees, Greenberg & Mellk (Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Appellant, Henry F. Gill, Esq.

This controversy presents the important question of whether supplemental teachers employed on an "as needed" basis and paid at an hourly rate can obtain tenure and related rights. The Commissioner has held in the affirmative. We have concluded that this decision was erroneous, and that supplemental instructors employed as were those in this case cannot achieve tenure in those positions, "with one exception hereinafter noted."

The Administrative Law Judge found the crucial facts concerning the terms of employment to be as follows:

1. The Board authorizes appointments and reappointments of supplemental instructors to serve and be paid at an hourly rate. After such authorization the instructors signify in writing their availability to serve on an "as needed" basis. Eventually each supplemental teacher is notified of his or her specific hourly schedule. The foregoing offer and acceptance constitute the employment contract between the parties.

2. The daily schedules for supplemental teachers do not exceed five hours and are thus shorter than the schedule of a regular classroom teacher.

3. Each supplemental instructor's daily schedule is subject to fluctuation as pupils are added to or withdrawn from supplemental instruction by the Child Study Team.

4. Supervision and evaluation of supplemental instructors is sporadic, some having never been supervised or subjected to written evaluation.

5. While supplemental instructors receive entitlement to 10 sick days with pay per year, they are not paid for any holidays.

6. They generally report for work about one week after school begins in September and continue working until about one week before school ends in June.

7. The pupils taught by Petitioners are selected by the Child Study Team as educationally handicapped and in need of supplemental instruction; they are taught in classes of from one to four pupils in periods one-

half hour in length, except that the supplemental teacher at the high school teaches pupils during periods coinciding with the scheduled classes for all pupils.

8. Supplemental instructors are not required to attend faculty meetings and have no playground, lunchroom, homeroom or bus-loading supervisory duties.

9. They are not enrolled in the Teachers' Pension and Annuity Fund.

In *Point Pleasant Beach Teachers Association* v. *Callam*, 173 *N.J. Super.* 11 (*App. Div.* 1980), the Court held that teachers employed under Title I of the Elementary and Secondary Education Act were not "teaching staff members" within the meaning of the Teacher Tenure Statute, *N.J.S.A.* 18A:28-5. While we note some differences between Title I teachers and the supplemental teachers involved here, we believe the two positions to have so many characteristics in common that the *Point Pleasant Beach* case is controlling here. In that decision the Appellate Division observed, among other things, that Title I teachers were hired annually as needed and on an hourly basis, that they individually submitted a written request for employment each year, that they were not evaluated as were classroom teachers, and that they acted primarily as tutors giving individual remedial aid to the children. All these elements are likewise present in the case of supplemental instructors in *Point Pleasant Beach*.

The Petitioners have emphasized two differences between Title I teachers and other supplemental teachers: (a) the latter perform special education services mandated by the Legislature in the Public School Education Act of 1975 (*N.J.S.A.* 18A:7A-1 *et seq.*) and the rules of the State Board implementing that legislation (*N.J.A.C.* 6:28-3.2(b)); Title I programs, on the other hand, are not mandated; and (b) Title I programs are funded by the Federal Government—an uncertain source of funding, whereas monies for supplemental instruction under state and/or local auspices do not suffer from such uncertainty. We do not consider these factors to change the essential character of the supplemental instructor's job: it is basically temporary and variable, depending upon the needs of children of the district from time to time. For example, in one year a school might need three supplemental reading teachers, while in the next year only two would be required; or if three were retained, their respective hours could be greatly shortened. Even though the general program for the handicapped is mandated, it requires, as the Appellate Division said of Title I, "a flexibility in operation which would be impeded if its instructors were granted tenure." *Point Pleasant Beach*, at 18.

The ruling below also conflicts with an earlier but recent decision of the Commissioner in *Kuboski* v. *Board of Education of South Plainfield*, 1978 *S.L.D.* 322. That case, like the instant one, presented the question whether service as a supplemental teacher could count toward tenure accrual. Petitioner there was employed in a per diem position for four hours per day, five days per week at an hourly rate of $6.00 per hour. Holding that Petitioner did not accrue time toward tenure while she was employed as a supplemental teacher, the Commissioner said:

> "***The Commissioner determines that those persons employed to perform duties to supplement the regular instructional program of the school's professional teaching staff members are not entitled, even if fully certified, to all the benefits or protection afforded regular teaching staff members unless they perform all of the principal duties and assume all of the principal responsibilities of regular teachers. The limited aspect of supplemental instruction does not include nor are those persons involved in such duties and responsibilities concerned with curriculum planning and development, comprehensive lesson planning, reporting in written and oral form to parents, ordering supplies, maintenance of pupil records, assigned duties other than for those specifically contracted, etc. This determination is grounded upon the general principle that significant differences exist between supplemental or compensatory education teachers who perform duties often in a one-to-one relationship or on a per pupil basis, and those professional teaching staff members entrusted

> with the prime responsibility for classroom instruction, educational planning and curriculum development. Tenure entitlement and an entitlement to the designation of 'teaching staff member' occurs in the latter instance and it does not occur in the former instance. The Commissioner so holds. Petitioner Kuboski's claim to a tenure status is denied.***"
>
> (at 332)

We see no reason to depart from the precedent established in the *Kuboski* case:

As previously indicated, one exception should be made to the foregoing rulings—the case of the Petitioner Manukas who teaches in the high school. She is assigned a schedule of rostered classes, works a full academic year (though fewer hours per day than ordinary teachers), teaches during all periods coinciding with the scheduled classes for all pupils, assigns and records report card grades, stands hall duty while classes pass and is regularly observed by the administration. In our view, these activities, which are common to the classroom teaching staff, establish such regularity of employment that this petitioner should be deemed a teaching staff member for purposes of obtaining tenure.

In accordance with the foregoing views, the Commissioner's decision herein is reversed except with respect to Petitioner Manukas and, as to her, the Commissioner is affirmed.

Attorney Exceptions are noted.

October 1, 1980

HERBERT HANNEMAN,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, COUNTY OF BURLINGTON,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, November 26, 1979

For the Petitioner-Appellee, Selikoff & Cohen (Joel S. Selikoff, Esq., of Counsel)

For the Respondent-Appellant, Barbour & Costa (John T. Barbour, Esq., of Counsel)

After the Petitioner herein had been employed for almost three years as a teacher of carpentry, the Respondent Board determined not to renew his contract for that position but to reemploy him as a teacher of mathematics. He was fully certified to teach both subjects. Upon challenge by the Petitioner, the Administrative Law Judge upheld the Board's right to make this new assignment as being within the scope of Petitioner's certificates.

The Commissioner, however, directed the Board to reassign Petitioner to his former position. The record showed that during the 1977-78 academic year, toward the end of which the new assignment was made, the Board had in its employ two teachers of carpentry, one of whom was Petitioner. The other teacher of carpentry held only an emergency certificate for that position. The Board abolished one of the carpentry positions for the 1978-79 academic year for reasons of efficiency and economy. Thereupon, instead of retaining Petitioner in the one remaining carpentry position, the Board again applied for an emergency certification for another employee to serve as a teacher of carpentry for the 1978-79 school year. Since an emergency certificate may properly be granted only when the local board declares its inability to locate a suitable certificated teacher (*N.J.A.C.* 6:11-4.4(b)), the Commissioner properly held that the Board's application was *ultra vires*, as the Petitioner was indeed available for the job. The Commissioner went further, however, and for some reason not clearly set forth, he directed the Board to reassign Petitioner as a carpentry teacher.

We believe that the Commissioner erred in making this order, and that the determination of the Administrative Law Judge was correct. The fact that Petitioner could have been continued in his former position as a teacher of carpentry did not mean that the Board had no alternative. In our view, the Board acted well within its discretionary authority in assigning Petitioner to the mathematics position. What it chose to do with respect to carpentry had no material bearing on the issue of Petitioner's assignment.

As has often been noted, and as the State Board recently ruled in *Williams v. Board of Education of Plainfield,* decided September 6, 1979, a board of education has plenary authority, by a majority vote of the whole board, to transfer any teaching staff member within the scope of hiscertificate, subject only to tenure rights and the requirement of good faith. Even where a teacher has tenure, he or she may be transferred to another position of equivalent rank, provided the compensation is not reduced. See *Williams, supra; Salowe v. Board of Education of Highland Park,* 1977 *S.L.D.* 832, 839; *Lascari v. Lodi Board of Education,* 36 *N.J. Super.* 426, 430 (App. Div. 1955); *Clark* v. *Rosen and Margate City Bd. of Ed.,* 1974 *S.L.D.* 678, 690, aff'd St. Bd. 1975 *S.L.D.* 1082, aff'd App. Div. 1976 *S.L.D.* 1134. This rule stems from the basic principle that "faculty selection must remain for the broad and sensitive expertise of the School Board and its officials ***." *Porcelli* v. *Titus,* 108 *N.J. Super.* 301, 312 (App. Div. 1969), *cert.* den. 55 *N.J.* 310

Petitioner has not shown that the Board acted arbitrarily or in bad faith in assigning him

as a teacher of mathematics after his position as teacher of carpentry was abolished. If the Board desired to retain one of the two carpentry positions but not to keep Petitioner in the remaining position, the Board of course faced the problem of procuring a fully certified teacher to fill the vacancy. If it could not succeed in finding such a person, the Board might decide to leave the job unfilled. In any event, Petitioner's availability did not give him any prior right to fill the vacancy in the carpentry department; the Board had the right to employ him in the mathematics department if that is where they wanted him.

For the foregoing reasons, the State Board reverses the Commissioner's decision and dismisses the petition.

Ruth H. Mancuso opposed in the matter.

Attorney's exceptions are noted.

May 7, 1980

MADELINE H. HUBBARD,	:	
Petitioner-Appellant,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF MANSFIELD, WARREN COUNTY,	:	APPELLATE DIVISION
Respondent-Respondent.	:	
	:	

Decided by the Commissioner of Education April 25, 1979.

Decided by the State Board of Education August 8, 1979.

Argued May 20, 1980—Decided May 29, 1980.

Before Judges Matthews and Ard.

On appeal from the State Board of Education.

Barry A. Aisenstock argued the cause for appellant (Rothbard, Harris & Oxfeld, attorneys).

Wayne Dumont, Jr. argued the cause for respondent.

PER CURIAM

Petitioner appeals from the decision of the State Board of Education rejecting her challenge to respondent's nonrenewal of her teaching contract at the end of her third year.

On appeal petitioner raises two arguments:

(a) Did the State Board err in ruling that she failed to prove that the nonrenewal was prompted by her exercise of her first amendment rights; and
(b) There was no factual basis for the reasons proffered by the District Board for its nonrenewal decision.

We find that the record provides a reasonable inference that it was not petitioner's expressions of disagreement which motivated the board, conduct which arguably would have been protected under *Givhan v. Western Line Consol. School Dist.*, 439 *U.S.* 410 (1979). Rather, it was her unwillingness to listen to her superiors and respond positively to criticism which the board chose not to tolerate. Since a teacher's freedom of speech must yield to legitimate administrative needs, we conclude that the board validly chose not to renew the contract of petitioner who had demonstrated no willingness to cooperate.

Having considered the arguments advanced in light of the record and applicable law, we conclude they are clearly without merit. *R.* 2:11-3(e)(1)(D) and (E).

Affirmed.

Cert. den. N.J. Supreme Court July 21, 1980.

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

SUPREME COURT

Decided by the N.J. Superior Court, Appellate Division, July 2, 1979

Argued November 13, 1979—Decided July 25, 1980

On certification to the Superior Court, Appellate Division, whose opinion is reported at 169 *N.J.Super.* 328 (1979).

William S. Greenberg argued the cause for appellants New Jersey Education Association and Jamesburg Education Association (*Greenberg & Mellk*, attorneys: *Dennis Daly*, on the briefs).

Stephen E. Klausner argued the cause for appellant Monroe Township Education Association.

Alfred E. Ramey, Jr., Deputy Attorney General, argued the cause for respondent State Board of Education (*John J. Degnan*, Attorney General of New Jersey, attorney; *Erminie L. Conley*, Assistant Attorney General, of counsel).

David B. Rubin argued the cause for respondent Jamesburg Board of Education (*Rubin, Lerner & Rubin*, attorneys).

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

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

David W. Carroll, General Counsel, argued the cause for amicus curiae The New Jersey School Boards Association (*Mr. Carroll* and *Paula A. Mullaly*, on the brief).

The opinion of the Court was delivered by CLIFFORD, J.

This case arises from an order of the Commissioner of Education, affirmed by the State Board of Education, which transferred tenured teachers previously employed at the now closed Jamesburg High School to the school districts of Monroe Township and Spotswood Borough. The issue is whether the Monroe and Spotswood districts can be required to treat the Jamesburg teachers as tenured faculty within their own systems. The Board of Education's decision answering that question in the affirmative was reversed by the Appellate Division, 169 *N.J.Super.* 328 (1979). That court held that in the absence of an agreement between the sending and receiving school districts under *N.J.S.A.* 18A:28-6.1, Monroe and Spotswood could not be compelled to accept the displaced Jamesburg instructors. We granted certification to review the effect of *N.J.S.A.* 18A:28-6.1 and the inherent power of the Commissioner of Education to order such a transfer, 81 *N.J.* 334 (1979). Pending review we stayed the Appellate Division judgment. We now dissolve the stay, modify the judgment below to provide for a limited remand, and, as modified, affirm the judgment of the Appellate Division.

I

On April 4, 1979, the State Board of Education ordered the Jamesburg Board of Education to close its only high school. That order was issued after public hearings on the matter and pursuant to the Commissioner of Education's determination that the school could not be operated in a thorough and efficient manner. At the State Board's direction Jamesburg residents who had been enrolled as students in the school's 9th through 12th grades were designated tuition pupils at the Monroe

Township High School. By an agreement authorized by the Commissioner, the Helmetta Board of Education and the Spotswood Board of Education entered into a sending-receiving arrangement under which Helmetta residents who had been tuition students at Jamesburg High school were enrolled as tuition students in the Spotswood school system.[1]

On May 1, 1979, the Commissioner found that upon the closing of Jamesburg High School, the tenured teachers employed at that facility should be transferred to the Monroe and Spotswood high schools in proportion to the number of Jamesburg students received by those districts.[2] In the opinion of the Commissioner, the transfer was authorized by *N.J.S.A.* 18A:28-6.1. Stating that only a "strained and narrow statutory interpretation" would allow the absence of an agreement between Jamesburg and Monroe and Spotswood to preclude the transfer of the tenured Jamesburg instructors, the Commissioner declared "it was implicit legislative intent to grant protection in employment rights to [tenured] teaching staff members" in such cases.

The Commissioner's order was unanimously upheld by the State Board of Education.[3] Acknowledging that no statute expressly authorized the Commissioner to order the transfer of the Jamesburg teachers, the State Board held that such action was justified by the public policy underlying education law with respect to the rights of tenured teachers. Citing other statutes concerned with employment security for tenured teachers, the State Board found they evinced a policy designed to "protect teaching staff members in their tenure, seniority and pension rights as far as practicable." *See N.J.S.A.* 18A:13-42, -49 and :28-15. Although the Board recognized that the "by agreement" language of *N.J.S.A.* 18A:28-6.1 distinguished it from statutes addressing compelled sending-receiving relationships, it found that the requirement of a sending-receiving agreement should not be interpreted to limit the application of the statute in the face of legislative concern with the rights of tenured teachers.

Applications by Monroe and Spotswood to stay the decision of the State Board were granted by the Appellate Division which, on its own motion, consolidated and accelerated the appeals. *In re Closing of Jamesburg High School,* 169 *N.J.Super.* 328 (1979). That court reversed and set aside the determinations of the Commissioner and the State Board of Education, concluding that the Commissioner lacked any authority, express or inherent, to transfer the instructors without the consent of the receiving districts. *Id.* at 333-34. Stating that "[a]dministrative officers may exercise only such authority as is conferred by statute, expressly or by unavoidable implication," *id.* at 334, the court found that *N.J.S.A.* 18A:28-6.1 did not confer such power. It noted that the words "by agreement with another board of education" had been inserted by amendment to the original draft of the statute, and ruled that in the absence of authority to the contrary, those words should be accorded their plain meaning. See *id.* at 331, 333. The Appellate Division determined that the disputed language was intended to limit the application of the statute to those situations in which the receiving district has consented to the transfer of the teachers. *Id.* at 333. To that end the court declared:

> While a school district may be compelled to become a receiving district [for displaced students], *N.J.S.A.* 18A:38-8, there is no provision in the law which compels a receiving district against its will to also accept the transfer of teachers from a school which has closed in another district.

1. The Commissioner of Education purported to close Jamesburg High School pursuant to the authority vested in him under *N.J.S.A.* 18A:7A-15; and the asserted authority for the order designating Monroe and Spotswood as the receiving districts for the Jamesburg students was *N.J.S.A.* 18A:38-8. These determinations, originating in a separate proceeding, were subsequently upheld by the Appellate Division in an unreported decision. Any implicit suggestion of the dissenters to the contrary notwithstanding, these prior determinations are not at issue here and we are not called upon to decide their propriety.
Additionally, no appellant has even cited *N.J.S.A.* 18A:7A-15, much less argued that that statute provides authority for the Commissioner's order at issue in this case. Surely the better practice for an appellate court is to eschew consideration of issues not created by the record, not raised on appeal, and not argued by the parties. *See United States Trust Co. v. State,* 69 *N.J.* 253, 257 (1976), rev'd on other grounds, 431 *U.S.* 1, 52 *L.Ed.*2d 92, rehearing den., 431 *U.S.* 975, 53 *L.Ed.*2d 1073 (1977); *Nieder v. Royal Indemnity Ins. Co.,* 62 *N.J.* 229, 234 (1973); see *infra* at —— (slip opinion at 11-12).
2. Under the State Board's order, 75% of the displaced Jamesburg students were sent to Monroe and the balance to Spotswood. In accordance with that distribution, twelve of the sixteen tenured Jamesburg teachers involved were sent to Monroe and the remaining four to Spotswood.
3. The affirmance of the Commissioner's findings was subject to the modification of the State Board that if possible, qualifying teachers be afforded the right to remain in the Jamesburg School system by filling available positions at the grade school level. *See N.J.S.A.* 18A:28-6.1.

> The desirability of such a provision is clearly for the legislature and not the courts to determine.
>
> [*Id.* at 333-34.]

This Court stayed the Appellate Division judgment in order to maintain the Monroe and Spotswood teaching staffs in status quo for the 1979-80 school year.

II

Our discussion here necessarily begins with a review of the statute in question. Encaptioned "Tenure upon Discontinuance of School," *N.J.S.A.* 18A:28-6.1 provides in pertinent part:

> Whenever, heretofore or hereafter, any board of education in any school district in this state shall discontinue any high school, junior high school, elementary school or any one or more of the grades from kindergarten through grade 12 in the district and shall, *by agreement with another board of education,* send the pupils in such schools or grades to such other district, all teaching staff members who are assigned for a majority of their time in such school, grade or grades and who had tenure of office at the time such schools or grades are discontinued shall be employed by the board of education of such other district in the same or nearest equivalent position ***. Teaching staff members so employed in such other district shall have their rights to tenure, seniority, pension and accumulated leave of absence, accorded under the laws of this State, recognized and preserved by the board of education of that district.
>
> [*N.J.S.A.* 18A:28-6.1 (emphasis added).]

Of central concern is the statute's provision that upon the discontinuation of a school, specified students and tenured teachers from that school may be transferred "by agreement with another board of education" to another school district. In this case it is acknowledged that there was no agreement by the Monroe or Spotswood Boards of Education to accept the transfer of tenured teachers formerly employed at Jamesburg High School. Monroe and Spotswood contend that although they can be required to receive the students from Jamesburg, see *N.J.S.A.* 18A:38-8, they cannot be obligated to accept the tenured teachers without their consent. Counsel for the appellants argue that the legislative intent to protect the rights of tenured teachers, rather than the existence of an agreement, is controlling.

The Appellate Division found *N.J.S.A.* 18A:28-6.1 to be clear in its terms and operation. It held the authority to transfer tenured teachers under the statute is plainly conditioned upon a consensual relationship between the sending and receiving school districts. Absent such an agreement, a transfer may not be undertaken. We agree. The words of the statute require exactly what they say—an agreement between the concerned Boards of Education. The statement is unequivocal. Fundamental principles of statutory construction require that "[i]f the [statutory] language is plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject the court cannot give it a different meaning." C.D. Sands, 2A *Sutherland Statutory Construction* §46.01 (4th ed.1973). This standard of interpretation has been consistently employed by the courts of this State. *See Fahey v. Jersey City,* 52 *N.J.* 103, 107 (1968); *Duke Power Co. v. Patten,* 20 *N.J.* 42, 49 (1955); *Imbriacco v. State Civil Service Comm'n,* 150 *N.J.Super.* 105, 109 (App.Div.1977); *In re Public Hearings on the Amended Determination of the Commuter Operating Agency for Fiscal Year 1975-1976,* 142 *N.J.Super.* 136, 158 (App.Div.), certif. den., 72 *N.J.* 457 (1976). It applies with equal force to resolve the question of construction presented in this case.

We find unpersuasive the appellants' contentions that the expressed legislative intent favoring the rights of tenured teachers should control this Court's interpretation of *N.J.S.A.* 18A:28-6.1. The statute's design is clear: to provide employment protection to tenured educational instructors transferred *by consensual arrangement* to another school district, and to furnish the same protection to tenured teachers in the *receiving* district. However, that salutary objective cannot be secured by extending

the law to situations in which it was not intended to apply. The statute's requirement of a consensual arrangement is manifest. Such a construction in no way evades the purpose of the law. *See Suter v. San Angelo Foundry & Mach. Co.*, 81 *N.J.* 150, 160 (1979); *Hasbrouck Heights Hosp. Ass'n v. Borough of Hasbrouck Heights*, 15 *N.J.* 447, 453 (1954). Rather, it recognizes the limitation on tenure protection which the legislature itself has chosen to impose. We do not perceive any intention on the part of the legislature to grant unqualified preservation of tenure rights in every instance of a school closing or formation of a sending-receiving relationship.

Our duty is to construe and apply the statute as enacted. We are not at liberty to presume the legislature intended something other than what it expressed by its plain language. This Court will not engage in conjecture or surmise which will circumvent the plain meaning of the act. *Gangemi v. Berry*, 25 *N.J.* 1, 10 (1957); *Bravand v. Neeld*, 35 *N.J.Super.* 42, 52 (App.Div.1955). Appellants' recourse lies with the legislature, not with this Court.

III

Similarly without merit are the appellants' contentions that the Commissioner of Education possesses the inherent authority under *N.J.S.A.* 18A:28-6.1 to order the transfer of the tenured Jamesburg teachers to the Monroe and Spotswood School Districts. In their view the grant of jurisdiction to the Commissioner "to hear and determine * * * all controversies and disputes arising under the school laws", *N.J.S.A.* 18A:6-9, vests him with the power to fashion substantive rules pertaining to teacher tenure. Appellants claim that this jurisdiction, coupled with the demonstrated legislative concern regarding educational tenure, effectively justifies the Commissioner's action in this case. They are mistaken.

Unlike the decision to close Jamesburg High School, the Commissioner's determination to transfer the Jamesburg teachers to Monroe and Spotswood did not purport to be in any way grounded upon considerations of affording the students a thorough and efficient education. See *N.J.S.A.* 18A:7A-15; *n.* 1 *supra* at (slip opinion at 4).[4] At oral argument appellants conceded as much. Rather, the ruling was based on the Commissioner's interpretation of *N.J.S.A.* 18A:29-6.1. In that regard he found that "*N.J.S.A.* 18A:28-6.1 does control in the instant matter [and that] it was the implicit legislative intent to grant protection in employment rights to teaching staff members with long and satisfactory service in such circumstances as here presented."

Assessing the Commissioner's findings we must first note that *N.J.S.A.* 18A:28-6.1 in fact does not support his action in the instant matter. As previously illustrated, *supra* at (slip opinion at 7), the statute expressly requires an agreement between the involved Boards of Education. That prerequisite was conspicuously absent here, thus precluding sanction of the transfer under the statute.

We must reject also the notion that the Commissioner has the inherent authority under *N.J.S.A.* 18A:28-6.1 to order such a transfer. "[A]n administrative officer is a creature of legislation who must act only within the bounds of the authority delegated to him." *Elizabeth Fed. Sav. & Loan Ass'n v. Howell*, 24 *N.J.* 488, 499 (1957). Where there exists reasonable doubt as to whether such power is vested in the administrative body, the power is denied. *Swede v. City of Clifton*, 22 *N.J.* 303, 312 (1956). Although the declared purpose of *N.J.S.A.* 18A:28-6.1 is to provide employment security to tenured faculty, our reading of the statute reveals no indication that this objective can be achieved other than by the means provided—namely, consensual arrangement. Specifically, we fail to see any indication that the statute provides the Commissioner with the discretion to require such a result.

In holding the Commissioner was without the authority to compel the transfer in this case, the Appellate Division relied upon the decision of this Court in *Burlington Cty. Evergreen Mental Hosp. v. Cooper*, 56 *N.J.* 579 (1970). The reference is appropriate. In *Cooper*, the Court was presented with the question of whether the Public Employment Relations Law, *N.J.S.A.* 34:13A-1 *et seq.*, granted

4. The question of whether the Commissioner's action in this case might be justified under his pervasive authority to provide for thorough and efficient education was neither raised by the Commissioner nor argued by the parties. *N.J.S.A.* 18A:7A-15; *N.J.S.A.* 18A:7A-5(c),(g). As it is beyond the scope of the appeal now before the Court, any determination of the issue would be inappropriate.

the Public Employment Relations Commission the power to proscribe certain activities as constituting unfair labor practices in violation of the Act. The Commission maintained that such authority was inherent in its broad jurisdictional grant to prevent and settle labor disputes in the public and private sectors. Rejecting the Commission's argument, the Court declared:

> Whether PERC should be invested with authority to hear and decide unfair labor practice charges and to issue various types of affirmative remedial orders respecting them is an important policy question. In our judgment, a policy question of that significance lies in the legislative domain and should be resolved there. A court should not find such authority in an agency unless the statute under consideration confers it expressly or by unavoidable implication.
>
> [56 *N.J.* at 598][5]

The reasoning in *Cooper* is applicable to the matter at hand. Whether the Commissioner or, for that matter, the State Board of Education can enlarge the bounds of existing protection of teachers' tenure is "an important policy question." Clearly, such power is not conferred by the express terms of *N.J.S.A.* 18A:28-6.1. Similarly, the grant of jurisdiction to the Commissioner and of supervisory power to the State Board does not by unavoidable implication vest either with the power to create substantive law governing teacher tenure. *N.J.S.A.* 18A:28-6.1 plainly does not provide for the transfer of the tenured teachers under the facts here presented and neither the Commissioner nor the State Board possesses the inherent authority under the statute to order such action.

Finally, we note that the invalid order of the State Board may have caused local school boards in Monroe and Spotswood to discharge instructors in their schools to accommodate tenured employees from Jamesburg. We therefore remand the matter to the Commissioner of Education to determine whether this has occurred, and to fashion any appropriate remedy. *See N.J.S.A.* 18A:6-9. To this limited extent we modify the judgment below. We do not retain jurisdiction.

The stay is dissolved. The judgment of the Appellate Division is modified to provide for a limited remand, and, as modified, is affirmed.

Justices Schreiber, Handler and Pollock join in this opinion.

Chief Justice Wilentz and Justice Sullivan have filed separate dissenting opinions in which Justice Pashman joins.

[83 *N.J.* 540 (1980)]

5. It should be noted that in 1974, the Public Employment Relations Commission was granted exclusive jurisdiction over unfair labor practices. L. 1974 c. 123 §1; *see Patrolmen's Benevolent Ass'n v. Montclair*, 70 *N.J.* 130 (1976); *N.J.S.A.* 34:13A-5.4(c). The analysis employed by the *Cooper* Court, however, remains undisturbed and unimpaired. *See Board of Trustees of Mercer Cty. College v. Sypek*, 160 *N.J. Super.* 452, 462 (App.Div.), certif. den., 78 *N.J.* 327 (1978).

IN THE MATTER OF THE TENURE	:	
HEARING OF HENRY P. KARSEN,	:	
SCHOOL DISTRICT OF THE CITY	:	STATE BOARD OF EDUCATION
OF CLIFTON, PASSAIC COUNTY.	:	DECISION

Decided by the Commissioner of Education, October 31, 1979

For the Petitioner-Appellee, Segreto and Segreto (James V. Segreto, Esq., of Counsel)

For the Respondent-Appellant, Lordi, Imperial and Dines (Patrick English, Esq., of Counsel)

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

April 8, 1980

JOHN J. KETAS,	:	
Respondent-Appellant,	:	
V.	:	SUPERIOR COURT
WOODSTOWN-PILESGROVE REGIONAL BOARD OF EDUCATION,	:	APPELLATE DIVISION
Petitioner-Respondent.	:	
	:	

Decided by the Commissioner of Education July 24, 1979.

Decided by the State Board of Education February 6, 1980.

Submitted December 22, 1980—Decided December 31, 1980.

Before Judges Seidman, Antell and Lane.

On appeal from final decision of State Board of Education.

Acton & Point, attorneys for appellant (Lawrence W. Point on the brief).

Jordon & Jordon, attorneys for respondent Woodstown-Pilesgrove Regional Board of Education (John D. Jordon on the brief).

John J. Degnan, Attorney General of New Jersey, attorney for respondent State Board of Education (Alfred E. Ramey, Jr., Deputy Attorney General, of counsel).

PER CURIAM

This is an appeal from a determination by the State Board of Education that John J. Ketas was statutorily disqualified from serving as a member of the Woodstown-Pilesgrove Regional Board of Education because of a claim he was asserting against the board.

Ketas was secretary and business administrator of the local board until his resignation in January 1978, effective June 30 of that year. A dispute arose over his receipt of additional pay prior thereto for accumulated vacation time. The board claimed that he had received more than he was entitled to and demanded reimbursement. On January 8, 1979, it authorized the institution of suit. Ketas filed his nominating petition on February 21 to stand for election to the board. The complaint in this matter was filed on March 2, 1979. Ketas was elected to a three-year term on April 3, 1979. He filed his answer and counterclaim to the complaint (apparently after his election). The counterclaim sought indemnification from the board for costs and expenses incurred in defending the suit and also compensatory and punitive damages for alleged libel.

The board thereupon petitioned the Commissioner of Education for a declaration that because Ketas had asserted a claim against the board he was prevented by *N.J.S.A.* 18A:12-2 from being a qualified member of the board, or, alternatively, that if allowed to serve he should be prevented from participating in and voting upon matters pertaining to the lawsuit. The commissioner ruled that the limited dispute did not constitute a continuing inconsistent interest, contract or claim, and that Ketas' abstention from participation in pertinent board proceedings would be an appropriate safeguard to the interest of the public.

Upon the board's appeal to the State Board of Education, the latter's Legal Committee

reported that in its view the filing of the counterclaim created a conflict of interest that disqualified Ketas from membership as long as the counterclaim was being litigated. It recommended that the State Board reverse the commissioner, declare the seat vacant and order the vacancy filled through appointment by the county superintendent. The State Board rendered a decision in which it reached the same conclusion as that of the Legal Committee and issued its order accordingly. From that decision and order this appeal was taken.

N.J.S.A. 18A:12-2, one of three sections of the article pertaining to the qualifications of members of district boards of education, provides in plain and unambiguous language that "[n]o member of any board of education shall be interested directly or indirectly in any contract with or claim against the board." We agree with the determination of the State Board of Education that Ketas disqualified himself from board membership by filing the counterclaim and would not be eligible to serve on the board as long as the counterclaim was being litigated.

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

MARJORIE A. LAVIN,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, June 6, 1979

For the Petitioner-Appellee, Goldberg & Simon (Gerald M. Goldberg, Esq., of Counsel)

For the Respondent-Appellant, E. Gerard McGovern, Esq.

The original Legal Committee Report in this case, which involved proper credit for military service, recommended among other things that back salary due the Petitioner be paid up to but not exceeding six years prior to the date that the petition was filed.

Subsequent to that report, it was brought to the attention of the Legal Committee that the Appellate Division of the Superior Court had very recently decided two cases which applied the equitable doctrines of laches or estoppel to controversies very similar to this one. In *Giorno* v. *Township of South Brunswick,* 170 *N.J. Super.* 162 (App. Div. 1979), the Plaintiff police officer claimed salary credit for several years for prior service with the County Park Police, pursuant to *N.J.S.A.* 40A:9-5. He did not make the claim, however, until several years after employment in his new position. Holding that the Plaintiff could enjoy the prior service credit only from the date of filing the complaint, the Court said (170 *N.J. Super.* at pages 166-167):

> "Here we are satisfied that the long period between plaintiff's employment and the commencement of this action should bar retroactive relief on grounds of laches or estoppel. Municipal governments must provide for operating expenses on a current annual 'cash basis,' *N.J.S.A.* 40A:4-3, except for unforeseen, pressing needs, *N.J.S.A.* 40A:4-46, or as otherwise permitted by law. *** It is desirable to have the issue of transferred service credits resolved before the employment commences, or at least at an early date. On the facts of this case it seems equitable to allow the claim only from the date of the filing of the complaint. It was then for the first time that the municipality should have anticipated its potential liability for salary differentials based upon plaintiff's prior years of service as a police officer."

Likewise, in *Kloss v. Township of Parsippany-Troy Hills,* 170 *N.J. Super.* 153 (App. Div. 1979), the Court barred on the ground of equitable estoppel the claims of several police officers for prior service credit, holding that the credit should be allowed for back salary and related items only for the period beginning with the commencement of the action.

In view of these Appellate Division decisions, the State Board does not accept the original Legal Committee Report, but remands the same to the Legal Committee for further study and report in the light of the recent decisions above cited.
January 9, 1980

Pending N.J. Superior Court

HERBERT LEVITT and THE ELIZABETH EDUCATION ASSOCIATION,	:	
Petitioner-Respondent,	:	SUPERIOR COURT
V.	:	APPELLATE DIVISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH,	:	
Respondent-Appellant.	:	

Decided by the Commissioner of Education July 10, 1978

Decided by the State Board March 7, 1979

Argued February 11, 1980--Decided March 3, 1980.

Before Judges Allcorn and Morgan.

On appeal from New Jersey State Board of Education.

Malachi J. Kenney argued the cause for the appellant (Murray, Granello & Kenney, attorneys; Robert Emmet Murray, of counsel; Bruce J. Ackerman, on the brief).

Gerald M. Goldberg argued the cause for the respondents (Goldberg & Simon, attorneys; Mr. Goldberg, of counsel; Louis P. Bucceri, on the brief).

A statement in lieu of brief was filed by John J. Degnan, Attorney General, on behalf of the State Board of Education.

PER CURIAM

The determination of the State Board of Education is affirmed substantially for the reasons expressed in its decision of March 7, 1979. Nor do we perceive any error or impropriety in the calculation of one day's pay at the rate of 1/200th of annual salary. *Campbell v. Civil Service*, 39 *N.J.* 556 (1963).

Affirmed.

ADRINNE LOGANDRO,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, August 6, 1979

For the Petitioner-Appellee, Selikoff & Cohen (Joel S. Selikoff, Esq., of Counsel)

For the Respondent-Appellant, Murray, Granello & Kenney (James P. Granello, Esq., of Counsel)

The central issue in this case is whether the law requires a board of education, when granting an unpaid maternity leave of absence, to allow a tenured teacher to use her accumulated sick leave during her period of disability due to pregnancy, when her disability occurs during her leave of absence. The Commissioner held herein that the Petitioner did have the right to use her accumulated sick days in that fashion. We believe that the Commissioner erred in his exposition of the governing law, but that because of the special circumstances hereinafter related, the Commissioner's decision should be affirmed as to the result.

The Petitioner herein requested a maternity leave of absence for the 1978-79 school year and the use of her accumulated sick days during the period she would be disabled due to pregnancy, which was determined by her doctor to be from October 1, 1978 until January 2, 1979. The Board granted the maternity leave for the school year but denied the requested use of accumulated sick leave. In directing that the Board allow petitioner to use her accumulated sick days during the disability period above mentioned, the Commissioner based his ruling on the proposition that disability due to pregnancy had to be treated the same as any other disability in respect to sick leave—a proposition with which we agree. He went on, however, to declare as a general proposition that "a teacher on leave of absence is still an employee of the Board", and from that he concluded that the teacher could still use her sick leave for disability occurring during the leave of absence. On this last point the Commissioner fell into error.

At the outset of our discussion, we note the Board's contention that this controversy was rendered moot by a consent judgment entered in the Superior Court approximately one month before the Commissioner's decision was handed down. In the consent judgment, the Board, for reasons best known to itself, agreed to payment of the sick leave requested by the Petitioner, along with the same relief requested by several other Plaintiffs in that case. We agree with the Petitioner's view, as set forth in its brief, that the entry of the consent judgment did not constitute *res judicata* as to the issues litigated before the Commissioner. Furthermore, because of the widespread importance of the questions posed by the instant litigation, the State Board should express its views on the subject for the future guidance of local boards.

The cardinal rule with respect to sick leave in pregnancy cases is that such leave must be made available for pregnancy disability to the same extent that it is made for other disabilities. P.L. 95-555, 92 Stat. 2076; *Castellano v. Linden Board of Education*, 158 *N.J. Super.* 350 (App. Div. 1978), affirmed 79 *N.J.* 407 (1979); *Gilchrist* v. *Haddonfield Board of Education*, 155 *N.J. Super.* 358 (App. Div. 1978); *Cinnaminson* v. *Silver*, 1976 *S.L.D.* 738, affirmed State Board of Education 1979 *S.L.D.* 817 That principle, however, is not the issue here; there was no showing that the Board's policies with respect to

sick leave during long-term personal leaves without pay was any different for pregnancy than for other types of disability.

The key issue in this controversy is whether the Board may refuse to pay sick leave for every kind of disability arising during an extended unpaid leave of absence. We believe the Board has this right. We find no statute or judicial decision to the contrary. As the *amicus* brief of the New Jersey School Boards Association correctly points out, the question of what benefits, if any, are to be paid or made available during unpaid leaves of absence is, except where governed by statute, left up to collective negotiations between the Board and the Teachers' Association or between the Board and individual employees.

We believe that the Commissioner further erred when he indicated in his opinion that other emoluments, such as medical and hospitalization coverage, would have to continue during an unpaid leave of absence. Without exploring this subject further, we deem it sufficient to point out, as does the *amicus* brief above mentioned, that some benefits are mandated by statute while others are usually spelled out in an employment agreement, and that it would be inappropriate for the State Board at this time to launch into a discussion of what benefits, if any, must continue during the leave period, and for how long.

Despite the foregoing, we have concluded from the record in this case that Petitioner was never given the choice between taking the full year's maternity leave, or working until her disability commenced and then taking her sick leave followed by unpaid maternity leave. The Board's policy of not granting sick leave for disability due to pregnancy was well established when Petitioner applied for her maternity leave. This policy effectively denied Petitioner the right to use her sick leave if she worked to the start of her disability.

Because of this special situation the State Board affirms the Commissioner's decision insofar as it directed the Board to allow Petitioner to use her accumulated sick days during her pregnancy-related disability.

June 11, 1980

MANALAPAN-ENGLISHTOWN EDUCATION ASSOCIATION,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	
	:	

Decided by the Commissioner of Education August 30, 1979

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

For the Respondent-Appellee, Dawes, Gross & Youssouf (Joseph D. Youssouf, Esq., of Counsel)

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

February 6, 1980

DOMINICK J. MANCIA,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WILDWOOD, CAPE MAY COUNTY,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, October 5, 1979

For Petitioner-Appellant, McCarter and English (James A. Woller, Esq., of Counsel)

For the Respondent-Appellee, Bruce M. Gorman, Esq.

The Petitioner in this case had acquired tenure as a high school principal and was subsequently appointed assistant superintendent. Thereafter Petitioner requested a year's sick leave and an agreement with the Board to appoint him thereafter as a teacher because he could not cope with the pressure of administration. The Board granted both requests. Subsequently the Petitioner sought reinstatement as assistant superintendent or, in the alternative, as high school principal. The Commissioner held that Petitioner's agreement with the Board constituted a bona fide resignation from any entitlement to an administrative position, and that he was entitled only to position of teacher with a tenure status.

The State Board affirms the Commissioner's decision for the reasons stated therein. However, we would further note that rather than terming Petitioner's agreement as a resignation from administrative positions, it should be designated as an abandonment. See *Matter of Tenure Hearing of Virginia Caputo, School District of Clifton,* 1975 *S.L.D.* 616; *Driscoll v. Clifton Board of Education,* 1976 *S.L.D.* 7, affirmed by the State Board, 1976 *S.L.D.* 14.

January 9, 1980

IN THE MATTER OF THE TENURE HEARING OF GEORGE MILLIGAN, SCHOOL DISTRICT OF THE TOWNSHIP OF WHITE, WARREN COUNTY.	:	STATE BOARD OF EDUCATION DECISION

Decided by the Commissioner of Education, October 15, 1979

For the Petitioner-Appellee, James A. Tirrell, Jr., Esq.

For the Respondent-Appellant, Rothbard, Harris & Oxfeld (Nancy Iris Oxfeld, Esq., of Counsel)

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

February 6, 1980

CAROL MOREMEN AND THE MIDDLETOWN TOWNSHIP ADMINISTRATORS AND SUPERVISORS ASSOCIATION,	:	
Petitioners-Appellants,	:	
V.	:	SUPERIOR COURT
THE BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	APPELLATE DIVISION
Respondent-Respondent.	:	

Decided by the Commissioner of Education November 9, 1978.

Decided by the State Board of Education August 8, 1979.

Argued May 20, 1980—Decided June 6, 1980.

Before Judges Fritz, Kole and Lane.

On appeal from New Jersey State Board of Education.

Richard A. Friedman argued the cause for appellants (Ruhlman and Butrym, attorneys; Mr. Friedman, on the brief).

Peter P. Kalac argued the cause for respondent (Kalac, Newman & Griffin, attorneys; Mr. Kalac, on the brief).

John J. Degnan, Attorney General of New Jersey, attorney for the State Board of Education, filed a statement in lieu of brief (M. Kathleen Duncan, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

This is an appeal from a decision of the State Board of Education affirming the determination of the Commissioner of Education who, finding no merit to the objections of the individual appellant to the report of the hearing examiner, dismissed her appeal.

Before us she and the negotiating agent for her position appeal, contending "a salary schedule as set forth in a negotiated agreement becomes binding policy upon a board of education, such that it cannot continue to follow, or adopt policies which conflict with the terms of the negotiated agreement."

We have reviewed the record carefully and considered the arguments of counsel both in their briefs and before us. We are in substantial agreement with the written comments of the hearing examiner and the Commissioner of Education. The findings of fact which appear therein might reasonably have been reached on sufficient credible evidence in the whole record and we will not disturb them. *Parkview Village Asso. v. Bor. of Collingswood*, 62 *N.J.* 21, 34 (1972). We find the issues raised by appellants to be clearly without merit. *R.* 2:11-3(e) (1) (D) and (E).

Affirmed.

WILLIAM MUELLER,	:	
Petitioner-Appellant,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY,	:	APPELLATE DIVISION
Respondent-Respondent.	:	

Decided by the Commissioner of Education April 28, 1978.

Decided by the State Board of Education October 4, 1978.

Argued March 25, 1980—Decided April 7, 1980.

Before Judges Antell and Pressler.

On appeal from the State Board of Education.

William Mueller argued the cause pro se.

Peter N. Perretti, Jr. argued the cause for respondent (Riker, Danzig, Scherer, Debevoise & Hyland, attorneys; Paul J. Hart, on the brief).

John J. Degnan, Attorney General of New Jersey, filed a statement in lieu of brief for the State Board of Education (M. Kathleen Duncan, Deputy Attorney General, of counsel and on the statement).

PER CURIAM.

Petitioner herein appeals from a determination of the Commissioner of Education denying petitioner's allegation that the Board of Education of the Borough of Glen Ridge (hereinafter respondent) violated his contractual, statutory and constitutional rights by voting not to renew his contract. Petitioner served respondent as a social studies teacher (and part time coach) from September 1973 through June 1976. Pursuant to *N.J.S.A.* 18A:27-10, petitioner was notified by letter that he would not be offered a contract of employment for the ensuing school year. Petitioner alleged that respondent failed to notify him of any unsatisfactory performance and to provide assistance to improve. An arbitration panel granted petitioner damages in the amount of two years salary. The Commissioner of Education determined that petitioner was adequately compensated by the arbitration panel's award and declined to grant petitioner reinstatement. The State Board of Education affirmed the Commissioner's decision.

On appeal, petitioner makes the following points:

I. The respondent's violation of *N.J.S.A.* 18A:27-3.1 entitles the appellant to reinstatement as a teacher in the Glen Ridge School District.

II. Respondent acted arbitrarily and capriciously in denying the appellant tenure.

III. Petitioner has been denied the procedural protections of due process of law.

An action of a local school board which lies within the area of its discretionary powers, such as the decision whether to reemploy a nontenured teacher, may not be upset unless it is found to be patently arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Petitioner herein has failed to meet this test.

An appellate court should not substitute its judgment for the specialized and expert judgment of the Commissioner of Education, since to do so would constitute a judicial exercise of the administrative function. *Schinck v. Bd. of Ed. of Westwood Consol. School Dist.*, 60 *N.J. Super.* 448, 476 (App. Div. 1960).

Having thoroughly reviewed the record on appeal, we affirm the decision of the Commissioner of Education as affirmed by the State Board of Education. *Kopera* and *Schinck, supra.*

Affirmed.

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPH MURPHY,	:	
SCHOOL DISTRICT OF MANALAPAN-	:	STATE BOARD OF EDUCATION
ENGLISHTOWN, MONMOUTH COUNTY.	:	DECISION
	:	

Decided by the Commissioner of Education, August 24, 1979

For the Board of Education, Dawes, Gross & Youssouf (John Dawes, Esq., of Counsel)

For the Respondent-Appellee, Chamlin, Schottland, Rosen, Cavanagh and Kelley (Michael D. Schottland, Esq., of Counsel)

This is an appeal from an order of the Commissioner dismissing charges certified to the Commissioner in a tenure case on the ground that the local board did not act within the time prescribed by *N.J.S.A.* 18A:6-13, which says in its pertinent part:

> "If the board does not make such a determination within 45 days after receipt of the written charge *** the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon."

It appears from the papers filed in this matter that on June 28, 1978 the Board notified Respondent of the receipt of certain charges against him and granted him 30 days in which to submit a written response. The letter of June 28 further advised Respondent that additional time would be granted if requested. No response or statement of position was ever received from Respondent. On August 30, 1978 his counsel inquired as to the disposition of the charges, and on September 25, 1978 the Board voted to certify the same to the Commissioner.

The State Board directs that the Commissioner's order to dismiss the charges be vacated, and that the Commissioner be directed to proceed to hear and determine the same pursuant to the Tenure Employees' Hearing Act (*N.J.S.A.* 18A:6-11 *et seq.*). We thus follow the reasoning and the decision of the Commissioner in *Matter of the Tenure Hearing of Feitel, School District of the City of Newark*, 1977 *S.L.D.* 451, which was affirmed by the State Board 1977 *S.L.D.* 458.

In *Feitel* the Board notifed Respondent on June 11, 1976 that charges of misconduct had been filed against her, and she was given 10 days therefrom to submit to the board a written statement and evidence in opposition to the charges. Through exchanges of correspondence the Board granted Respondent an extension of time to July 3, 1976 in which to submit her statement and evidence. Respondent filed the same on July 7, 1976. The Board certified the charges to the Commissioner on July 30th. The Respondent thereupon moved to dismiss the charges because of the Board's alleged failure among other things to comply with *N.J.S.A.* 18A:6-13. The Commissioner rejected this contention and directed that the tenure proceedings continue. He reviewed in detail the statutory history of the Tenure Employees' Hearing Act, observing that prior to Chapter 304 of the Laws of 1976 a charge filed with the board did not have to be supported by a statement of evidence under oath nor did the affected employee have to be notified until the board, in its limited function, determined whether to certify the charge to the Commissioner. *N.J.S.A.* 18A:6-13 required the board to make its determination within 45 days after receipt of the written charge, and under the circumstances then prevailing, this was a reasonable time within which to investigate the matter and make its decision. In 1975, however, the law underwent an extensive revision. The new procedure enacted into section 18A:6-11 calls for the following initial steps:

> "Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the sec-

> retary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary."

The Commissioner then read into the new statute a regulation that the employee be allowed 15 days from the date of service of the charge within which to file a statement with any supporting evidence. He concluded with the following holding:

> "The Commissioner holds with respect to *N.J.S.A.* 18A:6-11, as amended, that the board may not properly consider a filed charge and the evidence in support thereof until the fifteen day period for the affected employee to file a statement has elapsed. Consequently, the forty-five day period provided the board in *N.J.S.A.* 18A:6-13 to determine whether to certify to the Commissioner begins to toll when the employee files his statement or when the allotted time for the employee to file the statement expires. Until then, filed charges are not properly cognizable by a local board of education. The Commissioner so holds."
>
> (1977 *S.L.D.* at 455-56)

Since the Respondent had not filed her statement of position until July 7, 1976, the Commissioner further held that the Board certification on July 30, 1976 was well within the 45-day limitation of *N.J.S.A.* 18A:6-13.

As already noted, the State Board of Education affirmed the foregoing decision for the reasons expressed in the Commissioner's decision. The Commissioner also cited the *Feitel* case and arrived at a similar result in *Matter of Tenure Hearing of Stephen Levitt, School District of the City of Newark,* 1977 *S.L.D.* 976. We see no reason why those precedents should not be adhered to. In our view, they correctly apply the principle that all statutes pertaining to a subject matter must be read together and when section 18A:6-13 is read along with the new 18A:6-11, we conclude that the former must be construed to mean that the 45-day statutory period begins to run after the receipt by the Board of the written charge and the completion of the other procedural steps required before the matter becomes cognizable by the local board.

We would make one modification, however, in the rule enunciated by the Commissioner in *Feitel.* While the Commissioner declared that 15 days should be allowed from the date of service of the charge for the employee to file his statement, the statute sets forth no specific period; it merely mandates that the board give the employee "an opportunity to submit a written statement of position" etc. The Legislature evidently left it to the local board to determine what would be a reasonable time for the employee to respond under the particular circumstances.

In the instant case, the Board generously allowed the Respondent 30 days within which to file his statement, with such additional time as he might request. Since these periods occurred during the summer vacation, it was reasonable for the Board not to require the teacher to file his statement before the end of the summer, whereupon the Board would consider the charges, the Respondent's statement of position and all of the evidence at the scheduled Board meeting of September 25th. We believe that the 45-day limitation set forth in Section 18A:6-13 began to run in the present case on August 30, 1978, when the Respondent evidently indicated that he was not going to submit a statement on his own behalf. Since the Board action on September 25th was well within 45 days after the charges became cognizable by the Board and the time limitation began to run, the charges are properly before the Commissioner for determination.

Attorney Exceptions are noted.

February 6, 1980

NORTH BERGEN FEDERATION OF TEACHERS, LOCAL 1060 AMERICAN FEDERATION OF TEACHERS, AFL-CIO, NANCY SOMICK, MARTIN SLUTZKY, ELEANORE DELLA TORRE, DONNA TRIVISONNA, DIANE BRAUER, CAROLYN BODMER and KAREN COMMINS,	:	
Respondents and Cross-Appellants,	:	SUPERIOR COURT
		APPELLATE DIVISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	
Appellant and Cross-Respondent.	:	

Decided by the Commissioner of Education March 3, 1978.

Decided by the State Board of Education November 8, 1978.

Argued February 20, 1980—Decided March 5, 1980.

Before Judges Matthews, Ard and Polow.

On appeal from decision of the State Board of Education.

Robert H. Greenwood argued the cause for appellant and cross-respondent (Greenwood, Weiss & Shain, attorneys; Joseph V. Cullum and Robert Greenwood, on the brief).

Victor P. Mullica argued the cause for respondents and cross-appellants.

A statement in lieu of brief was filed on behalf of New Jersey State Board of Education by John J. Degnan, Attorney General, attorney (Mary Ann Burgess, Deputy Attorney General, of counsel and on the statement).

PER CURIAM

This appeal involves a decision of the State Board of Education reinstating Della Torre, Trivisonna and Brauer to their teaching positions together with compensation for lost salary after mitigation of damages. Although refusing to reinstate the remaining respondents, the decision directed the North Bergen Board of Education to pay their salaries for the school year 1973-1974 less mitigation. The North Bergen Board of Education appealed all affirmative relief afforded the respondents and a cross-appeal was filed on behalf of Commins, Somick, Slutzky and Bodmer as well as the North Bergen Federation of Teachers with respect to that portion of the decision which refused to reinstate them.

This controversy was initiated by the North Bergen Board of Education's nonrenewal of the seven respondents, nontenured teachers, for the 1973-1974 school year. After a protracted hearing, the examiner found that the nonrenewals resulted from improper political interference by the mayor and recommended that an order be issued directing the North Bergen Board of Education to

restore respondents to their teaching positions with reimbursement for lost salary. The commissioner of education concurred with the determination and findings of the hearing examiner. The North Bergen Board of Education appealed the commissioner's order, pursuant to *N.J.S.A.* 18A:6-27, to the State Board of Education. The State Board of Education affirmed the commissioner's decision as to the respondents Brauer, Della Torre and Trivisonna. However, it reversed the commissioner's determination as to Bodmer, Commins, Slutzky and Somick. The State Board of Education concluded that the action of the latter group of teachers, by themselves or through their family, in procuring their teaching positions through political influence precluded them from complete relief by way of reinstatement. In refusing to reinstate, the State Board of Education concluded that these teachers had unclean hands and therefore were not entitled to complete relief. However, the State Board of Education also concluded that the doctrine of unclean hands was not so rigid as to preclude all relief under the circumstances of this case. It therefore directed the North Bergen Board of Education to pay those teachers who were not reinstated their salaries for the school year 1973-1974 less any earnings in mitigation. The State Board of Education also affirmed the commissioner's denial of respondents' prayer for counsel fees and costs.

Our study of the entire record supports the findings and conclusions of the State Board of Education. In reaching this result, we have considered ". . . . 'the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge of their credibility. . . ." *Mayflower Securities v. Bureau of Securities*, 64 *N.J.* 85, 92-93 (1973); *Close v. Kordulak Bros.*, 44 *N.J.* 589, 599 (1965).

Moreover, with regard to the issue concerning the hearing examiner's rulings admitting hearsay evidence, *N.J.S.A.* 52:14B-10 specifically states that administrative agencies are not bound by the Rules of Evidence, whether statutory, common law or formal Rules of Court. Accord, *Weston v. State*, 60 *N.J.* 36, 50-52 (1972); *Application of Howard Savings Bank*, 143 *N.J. Super.* 1, 6 (App. Div. 1976).

The North Bergen Board of Education also contends that the hearing examiner erred when he called the former superintendent of the North Bergen school system, Dr. Herman Klein, to testify at the hearing, and that the superintendent's testimony, even if he was properly called as a witness by the hearing examiner, was hearsay and did not support the hearing examiner's ultimate findings. We disagree.

The commissioner of education is vested with jurisdiction to hear and determine all controversies and disputes arising under the school laws. *N.J.S.A.* 18A:6-9. The State Board of Education, or the commissioner with the approval of the State Board, is empowered to make rules governing the hearing of such disputes. *N.J.S.A.* 18A:6-26. Pursuant to this authority, the commissioner or his representative ". . . shall have authority to administer oaths and affirmations, examine witnesses and receive evidence, issue subpoenas, rule upon offers of proof, take or cause depositions to be taken whenever the ends of justice would be served thereby. . . ." *N.J.A.C.* 6:24-1.12. We are satisfied that the above rule is sufficient authority for the hearing examiner's decision to call Dr. Klein as a witness.

Furthermore, our independent examination of the record leads us to the conclusion that Dr. Klein gave substantial non-hearsay testimony which supports the hearing examiner's findings, and we will not disturb them.

Affirmed.

Cert. den. N.J. Supreme Court May 13, 1980.

POINT PLEASANT BEACH TEACHERS ASSOCIATION, RUTH O'NEIL, ELAINE HENNESSEY and MARJORIE WATSON,	:	
Petitioners-Appellants,	:	SUPERIOR COURT
V.	:	APPELLATE DIVISION
DR. JAMES CALLAM and BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY,	:	
Respondents-Respondents.	:	

Decided by the Commissioner of Education December 9, 1977.

Decided by the State Board of Education January 10, 1979.

Argued February 25, 1980—Decided March 27, 1980.

Before Judges Bischoff, Botter and Morton I. Greenberg.

On appeal from the State Board of Education.

Martin B. Anton argued the cause for appellants.

Seymour J. Kagan argued the cause for respondents (Berry, Summerill, Piscall, Kagan and Privetera, attorneys).

Ruhlman and Butrym, submitted a brief for Amicus Curiae the New Jersey Education Association (Cassel R. Ruhlman, Jr. and Richard A. Friedman, on the brief).

David W. Carroll submitted a brief on behalf of Amicus Curiae New Jersey School Board Association (Christine D. Weger, on the brief).

John J. Degnan, Attorney General of New Jersey, submitted a Statement in Lieu of Brief on behalf of the New Jersey State Board of Education (M. Kathleen Duncan, Deputy Attorney General, on the Statement).

The opinion of the court was delivered by BISCHOFF, P.J.A.D.

The sole issue presented by this appeal is whether teachers employed under Title I of the Elementary and Secondary Education Act, 20 *U.S.C.A.* 276 *et seq.*, are "teaching staff members" within the meaning of the teacher tenure statute, *N.J.S.A.* 18A:28-5. The Commissioner of Education held that they were teaching staff members and therefore were entitled to acquire tenure. The State Board of Education on appeal held they were not and reversed. This further appeal followed.

Petitioners Ruth O'Neil, Elaine Hennessey and Marjorie Watson were members of the petitioner Point Pleasant Beach Teachers Association (Association) employed by the Board of Education of the Borough of Point Pleasant Beach of Ocean County (Board) and assigned to the Board's Title I program, a federally funded project providing special instruction under the Elementary and Secondary Education Act, 20 *U.S.C.A.* 236 *et seq.*

The individual petitioners were all required to hold and did hold valid teaching certif-

icates issued by the New Jersey State Board of Examiners and have taught in the Point Pleasant Beach School System for a sufficient length of time to acquire tenure. Petitioner Hennessey was initially hired by the Board as a supplemental instruction teacher from January until June 1969. She was thereafter employed annually as a Title I supplementary reading teacher from October 1, 1970 until June 1976. Her daily teaching hours were four hours in 1972-73 and 1973-74, and five hours in 1974-75 and 1975-76. Petitioner Watson was employed by the Board as a Title I teacher from February 1972 until June 1976. Her daily teaching hours were two hours in 1972-73, three hours in 1973-74 and four hours in 1974-75 and 1975-76. Petitioner O'Neil was continuously employed by the Board as a Title I teacher from October 1, 1969 until June 1976 and acted as coordinator of the program for the 1975-76 school year. Her daily teaching hours increased from three to four hours, then five hours, and finally to six hours when she was appointed coordinator.

Petitioners were paid on an hourly basis during the school year and worked daily, the same as other teachers in the district. Petitioners' duties required them to execute weekly lesson plans, schedule pupils to receive special instruction, order supplies and materials, arrange and conduct parent conferences twice each year, maintain individual progress folders for each pupil and report the pupil's progress to the homeroom teachers, and attend PTA meetings and staff conferences. They did not, however, have any homeroom or playground duties and did not receive a free lunch period. Petitioners were covered by the Point Pleasant Beach Teachers Agreement between petitioner Association and defendant Board, although the Board claims they were never mentioned in negotiations and did not receive contracts.

In December 1975 the individual petitioners sought clarification from the Superintendent of Schools on their right to tenure, sick leave, pension benefits and health and accident insurance. The Superintendent of Schools informed the president of the teachers' association that teachers under the Title I program were not entitled to fringe benefits, though the individual petitioners "probably" had part time tenure.

On April 14, 1976 petitioners filed a petition with the Commissioner of Education seeking a declaration that they were entitled to tenure under *N.J.S.A.* 18A:28-5, retroactive fringe benefits and other relief. On October 1, 1976, when petitioners reported for work, they were informed that Title I funds were unavailable and that the program and their teaching positions had been discontinued.

After a hearing the Commissioner held that petitioners were entitled to part time tenure and seniority rights as teaching staff members under their certification. He rejected petitioners' challenge to the Board's abolition of the Title I program. On appeal, the State Board of Education held that petitioners were hired as temporary employees and did not acquire the status of teaching staff members.[1]

N.J.S.A. 18A:28-5 provides in part:

> *The services of all teaching staff members including all teachers,* principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services *and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners,* serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure. . . , after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

[1]Petitioners apparently did not appeal the commissioner's finding that the school board abolished their positions in good faith and that issue is not raised on this appeal.

(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

(c) the equivalent of more than three academic years within a period of any four consecutive academic years;

* * *

[Emphasis added.]

The term "teaching staff member" is defined by *N.J.S.A.* 18A:1-1, which provides in part:

> "Teaching staff member" means a member of the professional staff of any district or regional board of education***holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse.

Each petitioner in this case was employed for the equivalent of three academic years within four consecutive academic years and held a position which required a teaching certificate issued by the Board of Examiners. They fall within the literal terms of *N.J.S.A.* 18A:1-1 and 18A:28-5, and therefore could be considered eligible for tenure. Moreover, petitioners performed teaching functions substantially similar to those performed by staff members. See *Downs v. Bd. of Ed. of Hoboken*, 13 *N.J. Misc.* 853 (Sup.Ct. 1935).

Substitute teachers would also appear facially to qualify for tenure under the statute. But it is now well settled that they are not "teaching staff members" within the meaning of *N.J.S.A.* 18A:28-5 and time served as a substitute teacher is not to be counted toward tenure. *Schulz v. State Bd. of Ed.*, 132 *N.J.L.* 345 (E. & A. 1945); *Biancardi v. Waldwick Bd. of Ed.*, 139 *N.J. Super.* 175 (App. Div. 1976), aff'd o.b. 73 *N.J.* 37 (1977). Nor do guidance counselors working part time in an adult evening school established as an optional program acquire tenure in their position. *Capella v. Bd. of Ed. Camden Cty. Voc. Tech. Sch.*, 145 *N.J. Super.* 209 (App. Div. 1976).

Whether a professional employee of a Board of Education qualifies as a teaching staff member eligible for tenure depends upon the nature of the employment tendered and accepted. This determination can only be made after an examination of the terms, conditions and duties of the employment and a consideration of the conduct of the parties. *Biancardi v. Waldwick Bd. of Ed., supra* at 213.

The facts presented here disclose many areas where the relationship between petitioners and the Board differed substantially from the relationship between the usual teaching staff member and the Board.

Unlike the regular teaching staff, petitioners were hired annually without written contract, for the period starting October 1 continuing to June "as needed" and were paid on an hourly basis. Petitioners individually submitted a written request for employment each year and waited for notification of re-employment, implicitly admitting they did not have tenure, were not eligible to acquire tenure (*N.J.S.A.* 18A:27-10) and that their employment was temporary and contingent upon federal funding. *Biancardi v. Waldwick Bd. of Ed., supra* at 177. While petitioners performed duties functionally similar to those of other teachers, they were restricted to the Title I program and acted primarily as tutors giving individual remedial aid to the children.

N.J.S.A. 18A:27-3.1 requires that all non-tenured teaching staff members be evaluated at stated intervals and *N.J.S.A.* 18A:27-10 requires the Board of Education to give to each non-tenured

teaching staff member either a written contract of employment or notice that such employment will not be offered. It is undisputed that petitioners were not evaluated and were not given either a written contract or notice of termination. And while petitioners must certainly have been aware that other teachers were being evaluated and tendered contracts, petitioners did not protest this disparate treatment either in person or through the union grievance procedure until the letter of December 1975. This letter, which was written three, four or five years after petitioners' employment, was their first assertion of any right to either tenure or fringe benefits. Moreover, petitioners never made application for membership in the Teachers Pension and Annuity Fund, *N.J.S.A.* 18A:66-1 *et seq.*

A further element to be considered in determining if a professional employee qualifies as a teaching staff member is whether the program in which he is employed requires a flexibility in operation which would be impeded if its instructors were granted tenure. *Capella v. Bd. of Ed. of Camden Cty. Voc. Tech. Sch., supra* at 214-215. In that connection, the source of funds for the program is relevant. It relates directly to the question of whether petitioners were offered and accepted temporary employment. The source of the funds is relevant only insofar as it sheds light on the nature of petitioners' employment and it was in that manner that the State Board of Education considered it, stating:

> When because of uncertainty in the source of funding, a local board in good faith hires a professional employee on a basis plainly understood to be temporary, such appointment does not give the employee the status of a teaching staff member.

The State Board held that petitioners were hired on a temporary basis, understood that to be the nature of their employment and accepted it as such. The record fully supports that conclusion, and the decision of the State Board of Education is:

Affirmed.

[173 *N.J.Super.* 11 (*App. Div.* 1980)]

In the Matter of	:	
VERONA EDUCATION ASSOCIATION,	:	
Respondent-Appellant,	:	SUPERIOR COURT
and	:	APPELLATE DIVISION
BOROUGH OF VERONA BOARD OF EDUCATION,	:	
Petitioner-Respondent.	:	
RAMSEY TEACHERS' ASSOCIATION and CECELIA O'TOOLE,	:	
Petitioners-Appellants,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY,	:	
Respondent.	:	

Decided by the Commissioner of Education June 5, 1978.

Decided by the State Board of Education January 10, 1979.

Argued April 15, 1980; Decided May 30, 1980.

Before Judges Crane, Milmed and King.

On appeal from final administrative determinations of the Public Employment Relations Commission and New Jersey State Board of Education.

Theodore M. Simon argued the cause for appellants (Goldberg & Simon, attorneys; Sheldon M. Pincus, on the briefs).

George H. Buermann argued the cause for respondent Borough of Verona Board of Education (Shepard, Cooper, Harris, Dickson, Buermann & Camp, attorneys).

Arthur C. Fullerton argued the cause for respondent Board of Education of the Borough of Ramsey (Sullivan and Sullivan, attorneys; John J. Sullivan, of counsel).

Sidney H. Lehmann, General Counsel, filed a statement in lieu of brief on behalf of Public Employment Relations Commission (James F. Schwerin, Deputy General Counsel, on the statement).

John J. Degnan, Attorney General, filed a statement in lieu of brief on behalf of New Jersey State Board of Education (Mary Ann Burgess, Deputy Attorney General, of counsel and on the statement).

David W. Carroll, General Counsel, filed a brief on behalf of New Jersey School Boards Association, *Amicus Curiae* (John E. Collins, on the brief).

PER CURIAM

The Verona Education Association appeals from a final administrative determination of the Public Employment Relations Commission that the matter of extended sick leave which may be granted pursuant to *N.J.S.A.* 18A:30-6 is an illegal subject of negotiations. The Ramsey Teachers' Association appeals from a final administrative determination of the New Jersey State Board of Education reaching the same conclusion as did the Public Employment Relations Commission. The appeals have been consolidated.

Each of the appellants argues that *N.J.S.A.* 18A:30-7, as evidenced by Supreme Court holdings and legislative history, controls the disposition of the matter *sub judice*, that the determinations below were in error and that earlier precedents are no longer controlling in light of legislative history and the Commissioner of Education's re-examination of the sick leave statutes.

We have carefully considered the contentions of appellants and have concluded that they are clearly without merit. *R.* 2:11-3(e)(1)(E). See *Bd. of Ed. Piscataway Tp. v. Piscataway Main.*, 152 *N.J. Super.* 235, 246-247 (App. Div. 1977).

Affirmed.

HEATHER J. REID, ET AL.,	:	
Petitioners-Respondents,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY, ET AL.,	:	APPELLATE DIVISION
Respondents-Appellants.	:	

Decided by the Commissioner of Education December 8, 1978.

Argued October 15, 1980—Decided November 7, 1980.

Before Judges Fritz, Polow and Joelson.

On appeal from New Jersey State Board of Education.

Henry F. Gill argued the cause for appellants.

Melvin S. Narol argued the cause for respondents (Jamieson, McCardell, Moore, Peskin & Spicer, attorneys; Mr. Narol, of counsel and on the brief).

John J. Degnan, Attorney General of New Jersey, attorney for State Board of Education, filed a statement in lieu of brief (Alfred E. Ramey, Jr., Deputy Attorney General, of counsel).

PER CURIAM

Heather J. Reid, a high school student suspended for being under the influence of alcohol on school premises, appealed administratively to the commissioner of education (commissioner). Ultimately he directed that upon her further application to the local board of education, that board should proceed to "a full review of the merits of the matter including testimony of principal participants to the dispute," and "render its determination . . . with a record of the Board's proceedings . . . [to] form a basis for appellate review by the Commissioner." This determination was affirmed by the state board of education (state board). The local board appeals. We affirm.

Jurisdiction in the commissioner over this matter is invested by *N.J.S.A.* 18A:6-9:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner.

In the exercise of this jurisdiction, the commissioner "has broad powers and responsibilities to supervise public education in the State and effectuate constitutional and legislative policies concerning it." *Piscataway Tp. Bd. of Ed. v. Burke*, 158 *N.J.Super.* 436, 440-441 (App.Div. 1978), app. dism. 79 *N.J.* 473 (1978). We are satisfied that this remand falls within the discretionary authority of the commissioner.

The nature of the order resulting from this controversy demonstrates the application of the expertise of the commissioner rather than a determination of any legal question (let alone one of constitutional dimension). In such case when such an order falls well within the ambit of the authority

delegated, it is "entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such . . . was arbitrary, capricious or unreasonable." *Thomas v. Bd. of Ed. of Morris Tp.*, 89 *N.J.Super.* 327, 332 (App.Div. 1965), aff'd 46 *N.J.* 581 (1966).

We emphasize that we are determining only the propriety of this exercise of discretion by the commissioner and saying only that in the circumstances here present we have not been persuaded that his remanding this case to the local board was arbitrary, capricious or unreasonable. We need not and so do not determine the right of the student to an adversary type testimonial hearing in a suspension case.

At oral argument counsel for the local board argued that in any event any remand for a hearing required by the commissioner should be before an administrative law judge. We can understand, perhaps, why this suggestion was not forwarded on the initial appeal to the commissioner. This predated the effective date of *N.J.S.A.* 52:14F-1 *et seq.* But there is no suggestion of this argument in the proceedings before the state board and those postdated this effective date. Nor is the issue raised in the briefs before us. In such circumstance we decline to consider the unbriefed issue. *State v. Souss*, 65 *N.J.* 453, 460 (1974); *Nieder v. Royal Ind. Ins. Co.*, 62 *N.J.* 229, 234 (1973).

Affirmed.

SARA RIELY,	:	
Respondent,	:	
V.	:	SUPERIOR COURT
THE BOARD OF EDUCATION OF HUNTERDON CENTRAL HIGH SCHOOL, HUNTERDON COUNTY,	:	APPELLATE DIVISION
Appellant.	:	

Decided by the Commissioner of Education September 9, 1978.

Decided by the State Board of Education December 6, 1978.

Argued January 7, 1980—Decided March 4, 1980.

Before Judges Seidman, Michels and Devine.

On appeal from interlocutory decision of State Board of Education.

James P. Granello argued the cause for appellant (Murray, Granello & Kenney, attorneys; Mr. Granello of counsel, Mark J. Blunda on the brief).

Sanford R. Oxfeld argued the cause for respondent (Rothbard, Harris & Oxfeld, attorneys; Mr. Oxfeld of counsel and on the brief).

John J. Degnan, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of the State Board of Education (Erminie L. Conley, Assistant Attorney General, of counsel; Alfred E. Ramey, Jr., Deputy Attorney General, on the statement).

PER CURIAM

Respondent Sara Riely, an untenured teacher whose contract was not renewed for the 1976-1977 school year by appellant Board of Education of Hunterdon Central High School (board), filed a petition of appeal with the Commissioner of Education seeking reinstatement with back pay to her position as a teacher of English. The board moved to dismiss the petition on the ground that it had been filed out of time. It contended, additionally, that the petition was barred by reason of an adverse award in an arbitration proceeding instituted by the teacher under the grievance provisions in the collectively negotiated agreement between the board and the teachers' association. The commissioner denied the motion to dismiss and directed that the matter "move forward expeditiously to a full plenary hearing to determine if petitioner is entitled to reinstatement." The board's appeal to the State Board of Education was dismissed. We granted the board's motion for leave to appeal and stayed further proceedings pending our determination of the matter. We are satisfied from our review of the record that the petition of appeal was filed out of time and should have been dismissed.

Respondent was notified of the nonrenewal of her contract in a letter from the supervisor of instruction dated April 13, 1976. She was accorded an informal hearing before the board at her request on May 10, 1976. The following day, the board sent a letter informing her that its prior decision not to renew her contract remained unchanged.

In May 1976, respondent availed herself of the grievance machinery in the contract between the board and the teachers' association and demanded binding arbitration on the issue of the procedural propriety of the nonrenewal of her teaching contract. The board acquiesced and the issue framed by the parties for submission to binding arbitration was, "did the Board violate the Agreement in terminating Sara Riely? If so, what shall the remedy be?" After a hearing, the arbitrator found against respondent. He rejected as without substance her contention that the board had violated established procedures and past practice in failing to grant her an interview after notifying her of its intention not to renew her contract. He further found no factual or legal basis for any claimed violation of board rules, regulations or policies. Finally, the arbitrator dismissed the teacher's claim that the adverse evaluation of her proficiency was made by a department chairman who was not a certified supervisor as required by State Board rules and regulations and was therefore invalid. He concluded from the proofs that the department had been properly appointed and was, if not *de jure*, a *de* facto certified supervisor. The award, dated May 1, 1977, was that the "Board of Education of the Hunterdon Central High School did not violate the Agreement in terminating Sara Riely."

On June 20, 1977, respondent filed a petition of appeal with the commissioner, averring therein that (1) despite previous excellent evaluations and observations, and without prior notification, she was notified orally of the nonrenewal of her contract, (2) the department chairman who made the underlying observations "lacked the appropriate certification to observe and evaluate" and (3) the reason given was untrue and not an appropriate ground for nonretention.

On September 19, 1978, the motion to dismiss the petition was denied. The commissioner held that it had been filed within 90 days of the arbitrator's award and was therefore timely. The State Board's decision dismissing the appeal is dated December 6, 1978. It is to be noted that *N.J.A.C.* 6:24-1.2, states in pertinent part that a petition to the commissioner to determine a controversy or dispute arising under the school laws must be filed within 90 days after receipt of the notice by the petitioner of the action concerning which the hearing is requested. However, this rule was adopted October 6, 1976, and thus was not in effect when the board's letter was issued. Nevertheless, the commissioner's ruling runs counter to his own interpretation of the applicability of that regulation.

In *Wagner v. Bd. of Ed. of Bridgewater-Raritan Regional School District*, 1978 *S.L.D.* —— (November 3, 1978), a nontenured teacher who was notified in March 1976 that her contract would not be renewed for the 1976-1977 school year, filed a grievance and demanded arbitration. The board refused to participate in the arbitration and, on March 21, 1977, rejected the arbitrator's award which favored the teacher. The latter filed a petition with the commissioner in June 1977, again challenging the nonrenewal. The board moved to dismiss and the commissioner granted the motion. Recognizing that *N.J.A.C.* 6:24-1.2 was not in effect when the board gave notice to the teacher that her contract would not be renewed, the commissioner nonetheless reasoned that it should have been obvious to petitioner after *Union Cty. Bd. of Ed. v. Union Cty. Teach. Assn.*, 145 *N.J. Super.* 435, 437 (App. Div. 1976), certif. den. 74 *N.J.* 248 (1977), and the "rule changes codified in Title 6, Chapter 24, that administrative relief should be requested from the Commissioner." He determined that the petitioner had 90 days from the adoption of the rule in which to file her appeal, and her waiting for the arbitrator's ruling and its rejection by the board before appealing more than six months later clearly rendered the appeal out of time.

The commissioner's rationale is buttressed by the recent case of *Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Assn.*, 79 *N.J.* 311, 326-327, *n.* 4 (1979), in which the court cautioned that while advisory arbitration was an appropriate intermediate procedural step for handling a dispute over the withholding of a teacher's salary increment, a matter otherwise within the managerial discretion of the board of education, a teacher who proceeds to arbitration is not thereby relieved from compliance with the 90-day requirement of *N.J.A.C.* 6:24-1.2 for filing a petition of appeal with the commissioner. In such case, the commissioner will await the completion of the arbitration proceedings and the rendering of an advisory decision before conducting a hearing on the petition.

In the case under review, the facts strongly support the dismissal of the petition as untimely. Respondent chose to proceed to *binding* arbitration on her asserted grievance concerning the board's alleged violation of reemployment procedures and past practices. These issues were properly

within the scope of mandatory arbitration under the grievance machinery established in the collectively negotiated contract. See *Newark Teachers Union v. Bd. of Ed. of Newark*, 149 *N.J. Super.* 367, 373-374 (Ch. Div. 1977); *cf. State v. State Supervisory Employees Association*, 79 *N.J.* 54, 90 (1978); *In re Byram Township Board of Education*, 152 *N.J. Super.* 12, 27 (App. Div. 1977). They would not in any event have been cognizable by the commissioner. See *Red Bank Bd. of Ed. v. Warrington, et al.*, 138 *N.J. Super.* 564 (App. Div. 1976). Further, the arbitrator's award was final as to the matters within the scope of the issue framed by the parties and may not be relitigated before the commissioner.

If, as it appears, respondent now contends that her appeal to the commissioner involves matters that were not, or could not, have been submitted for arbitration, in that such matters were exclusively within the managerial discretion of the local board, then clearly there was no reason to withhold the appeal to the commissioner during the pendency of her arbitration proceedings. Respondent had ample time to file the petition after the promulgation of *N.J.A.C.* 6:24-1.2. It is evident to us that she gambled on a favorable arbitration award and, having lost, then decided to seek further relief at the hands of the commissioner. By then, her petition was out of time.

Since we conclude, for the reasons stated, that the petition should be dismissed, we do not address the remaining points argued by the parties. The decision of the State Board of Education is reversed and the matter is remanded with direction to dismiss the petition. We do not retain jurisdiction.

Dismissed by State Board on April 8, 1980.

[173 *N.J. Super.* 109 (*App. Div.* 1980)]

WILLIAM E. SCHELL,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, October 9, 1979

For the Petitioner-Appellee, Peter P. Frunzi, Jr., Esq.

For the Respondent-Appellant, Crowell & Otten (Robert E. Otten, Esq., of Counsel)

The State Board denies request for oral argument and reverses the Commissioner's decision for the reasons expressed in the Administrative Law Judge's decision.

May 7, 1980

Pending N.J. Superior Court

IN THE MATTER OF THE TENURE	:	
HEARING OF BLANCHE SHEETS,	:	
SCHOOL DISTRICT OF THE	:	STATE BOARD OF EDUCATION
TOWNSHIP OF COLTS NECK,	:	DECISION
MONMOUTH COUNTY.	:	
	:	

Decided by the Commissioner of Education, December 3, 1979 and February 28, 1980

For the Petitioner-Appellant, Carton, Nary, Witt & Arvantis (Robert J. Saxton, Esq., of Counsel)

For the Respondent-Appellee, Morgan & Falvo (Joseph F. DeFino, Esq., of Counsel)

The State Board reverses the Commissioner's decision for the reasons expressed in the Administrative Law Judge's decision.

June 11, 1980

RITA M. SLATTERY,	:	
PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, December 20, 1979

For the Petitioner-Appellee, Stephen E. Klausner, Esq.

For the Respondent-Appellant, Soriano & Gross (Daniel C. Soriano, Esq., of Counsel)

This is another case where a tenured teaching staff member requested a maternity leave of absence for the ensuing school year, but after giving birth during that ensuing year, she requested the use of her accumulated sick leave during the period of her temporary disability. The Commissioner directed the Board of Education to compensate petitioner for the days of her pregnancy-related disability to the extent of her sick leave entitlement.

The State Board recently decided in *Logandro v. Cinnaminson Board of Education,* Docket No. 44-79, that a local board may refuse to pay sick leave for every kind of disability arising during an extended unpaid leave of absence, and that so long as disability due to pregnancy or childbirth was treated in the same manner as any other disability, the staff member had no cause of action against the Board. The Commissioner's decision below does not follow the State Board's ruling in *Logandro,* and it must therefore be reversed.

However, as further noted in *Logandro* a staff member must be given the choice between taking a maternity leave during which her disability due to pregnancy or birth will not entitle her to use her sick leave, or working until her disability commences, and then taking sick leave followed by maternity leave. In the instant case the record does not clearly show whether or not petitioner was afforded such a choice. Accordingly, this controversy should be remanded to the Commissioner for a finding of fact on this question and for disposition of this case in accordance with the views expressed by the State Board in *Logandro.*

November 5, 1980

RITA SPIEWAK, PEGGY DABINETT, PATRICIA O'REILLY AND THE RUTHERFORD EDUCATION ASSOCIATION,	:	
PETITIONERS-APPELLEES,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, December 18, 1979

For the Petitioner-Appellees, Goldberg & Simon (Theodore M. Simon, Esq., of Counsel)

For the Respondent-Appellant, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

The State Board of Education reverses the Commissioner's decision in light of the recent Appellate Division's decision in *Point Pleasant Beach Teachers Association et al. v. Callam*, 173 *N.J. Super.* 11 (*App. Div.* 1980).

July 2, 1980

Pending N.J. Superior Court

EDITH E. TRAUTWEIN, Petitioner-Respondent,	:	
v.	:	SUPERIOR COURT
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, COUNTY OF SOMERSET, Respondent-Appellant.	:	APPELLATE DIVISION

Decided by the Commissioner of Education April 28, 1978.

Decided by the State Board March 7, 1979.

Argued March 10, 1980—Decided April 8, 1980.

Before Judges Seidman, Michels and Devine.

On appeal from State Board of Education.

William P. Westling argued the cause for appellant (Westling & Lime, attorneys; Mr. Westling on the brief).

Jack Wysoker argued the cause for respondent (Mandel, Wysoker, Sherman, Glassner & Weingartner, attorneys; Mr. Wysoker on the brief).

John J. Degnan, Attorney General of New Jersey, filed a statement in lieu of brief on behalf of the State Board of Education (Alfred E. Ramey, Jr., of counsel).

PER CURIAM

Respondent Edith E. Trautwein, a high school teacher employed by the Board of Education of the Borough of Bound Brook (board), was denied a non-mandatory salary increment for the 1976-1977 school year on the ground of excessive absenteeism. She pursued her remedy of administrative review, culminating in a reversal of the board's action by the Commissioner of Education and and an affirmance of the latter by the State Board of Education. The board appealed. The issue to be resolved is whether, if the teacher's absences were deemed by the board to be so excessive as to constitute good cause for the withholding of the increment, such determination was reasonably based.

Preliminarily, it should be noted that *N.J.S.A.* 18A:29-14 authorizes a board of education to withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of an employee in any year. Such action must be by a recorded roll call majority of the full membership of the board. Written notice thereof to the person concerned, together with a statement of reasons, is required within ten days, and an appeal lies to the commissioner under rules prescribed by him.[1] It is also appropriate at this point to note that the decision to withhold an increment is a matter of essential managerial prerogative which has been delegated by the Legislature to the local board of education. *Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Assn.*, 79 *N.J.* 311, 321 (1979).

[1] *N.J.A.C.* 6:24-4.1 provides that a petition by a teacher against the action of a board of education in withholding a salary increment shall fall in the general rules of procedure for the determination of a controversy or dispute under the school laws (*N.J.S.A.* 18A:6-9) contained in *N.J.A.C.* 6:24-1.1 *et seq.*

The underlying facts are not in substantial dispute. Mrs. Trautwein was notified by letter in March 1976 that a hearing concerning her sick and personal leave record would be held by the board at its April 9 meeting. At the hearing, described in the minutes as informal, which Mrs. Trautwein attended with counsel, it was established and not disputed that she had been absent a total of 238 1/2 days since September 1, 1964. The average was 20.6 days per year, about four times the absentee rate of the typical teacher in the local school system. These absences were caused by the teacher's personal illnesses as well as illnesses of her husband and daughter. Her teaching performances for the years 1974 through 1976 were rated as "excellent" to "good". With respect to the effect of her absences on her classes, the superintendent of schools stated that "research from Columbia University has shown that substitute teachers typically are able to accomplish very little as replacements for regular classroom teachers." The board adopted a resolution in which, after expressing concern over Mrs. Trautwein's excessive absenteeism "despite repeated warnings by letters and evaluation conferences," the determination was made to place the withholding of Mrs. Trautwein's salary increment for 1976-1977 on the board's agenda for April 19. A copy of the minutes was mailed to Mrs. Trautwein.

At that meeting, the board adopted a further resolution by vote of a majority of its membership to employ Mrs. Trautwein for the ensuing school year at a salary which did not include the increment. She accepted the formal offer of employment "without prejudice to my rights to contest any withholding of increment before the Commissioner of Education." Thereafter, Mrs. Trautwein filed a petition of appeal with the commissioner claiming an absence of good cause for the withholding of the increment and alleging procedural deficiencies. Ostensibly to cure any such deficiencies, the board adopted another resolution reaffirming and ratifying the earlier one. This resolution stated that Mrs. Trautwein had been absent a total of 12 days during the current school years prior to February 28, 1976, "which absentee record has been read in light of absences by this teacher in previous years." It contained the finding that, by reason of the continued absences, the students were "required to learn for [*sic*] substitute teachers, who, in the nature of the case, cannot give these students the quality of teaching each of them are [sic] by right entitled," so that, as a consequence, "Mrs. Trautwein's personal effectiveness as a teacher are [*sic*] diminished even when she is present in the classroom." The board concluded "from this record that by reason of these absences, Mrs. Trautwein has not met that standard of performance required to entitle her to a salary increment for the school year 1976-1977."

A hearing was held on Mrs. Trautwein's petition, following which the hearing examiner submitted a report in which he observed that the "salient facts in this matter are not in dispute." He summarized the issue: (1) Do petitioner's many absences constitute good cause for withholding her increment. (2) Is the action of the Board in withholding petitioner's increment procedurally defective. The hearing examiner concluded that the board's action should be set aside "because it was grounded on improper reasons" and the action "did not follow the precise requirements of *N.J.S.A.* 18A: 29-14." He questioned the board's consideration of Mrs. Trautwein's past record in deciding to withhold the increment, it appearing that during the 1975-1976 school year "there were no absences exceeding her entitlement." Acknowledging that the board was not required to prove its reasons for withholding an increment, the hearing examiner said, nevertheless, that there was "no showing whatsoever that petitioner was other than an 'excellent/good' teacher," and that support for the board's reasons was reflected only in the statement in the board's minutes of the April 1976 meeting, that "research has shown that substitute teachers are ineffective replacements for classroom teachers."

The commissioner in adopting the report, acknowledged that "[t]here is no question that excessive absenteeism may constitute good cause for withholding a teacher's increment." However, the commissioner held that the board should not have counted days missed in the 1974-1975 school year in determining that 13 days of absence in 1975-1976 was excessive. He also found no "*prima facie* showing that her performance was lessened."

On further appeal to the State Board the legal committee made a recommendation to the State Board that the commissioner's decision be affirmed. But it disagreed with commissioner's view that the prior absences could not be considered, stating that "a teacher's entire record of absenteeism may properly be considered by the Board, although as time recedes into the past the earlier record becomes less relevant to the present." The conclusion reached was that "the absences were not so numerous as to justify the withholding of her increment for the ensuing school year."

After receiving comments from counsel for the parties, the committee prepared a new report, recommending that the board's action be sustained. Expressing the view that while legitimate and excused absences do not *per se* constitute "good cause" for withholding an increment, the committee said that absences, even if excused, might become so numerous as to affect adversely the educational program for which the teacher is responsible. The committee stated further that a finding by the local board, as was the case here, that excessive absenteeism resulted in inefficiency in the conduct of the teacher's classes, furnished sufficient ground for withholding the increment. The committee took note of the board's finding that the absentee rate in this case was about four times that of the typical teacher in Bound Brook, and that Mrs. Trautwein's absenteeism remained excessive despite repeated warnings by letters and evaluation conferences. The committee said that the commissioner's function was not to substitute his judgment for those who made the evaluation but to determine whether they had a reasonable basis for their conclusions. The committee was unable to conclude that the board here lacked a reasonable basis for the conclusions reached. Additionally, as to procedural deficiencies, the committee found that the board had substantially complied with the requirements of the statute.

Because the legal committee found itself deadlocked on which report to submit, both were presented to the State Board. At the latter's meeting to consider the matter, a motion to reverse the commissioner's decision failed to pass because of a tie vote. On the rationale that the vote was in effect an affirmance of the commissioner's decision, a motion to affirm was then made and was adopted by a six to four vote. The State Board, in its written decision, incorporated verbatim the first report of the legal committee and, using the language of the committee's first report, stated its decision was based

> . . . on the proposition that while the Petitioner's absences for the 12 months or more preceding the Board's action of April 6, 1976 were unusually numerous and should be considered material, each one of them was legitimate and excused, in the case of Petitioner's personal illness, by a certificate from her physician. In the light of this and other relevant circumstances, the absences were not so numerous as to justify the withholding of her increment for the ensuing school year.

In *Kopera v. West Orange Bd. of Education*, 60 *N.J.Super.* 288 (App. Div. 1960), we discussed the role of the commissioner in an appeal by a teacher who was denied an increment and a raise because of an unsatisfactory evaluation of her performance. The denial was affirmed by the commissioner, who, in turn, was affirmed by the State Board. The appellant contended that she might be deprived of the increment and raise only if the local board proved that she was in fact unsatisfactory, and, therefore, when she challenged her rating it was the burden of the board to prove its correctness in an adversary hearing at which it was the duty of the commissioner to make his own independent findings whether the facts existed as claimed by the board. The board's position was that the discretionary action of the board may not be upset unless patently arbitrary, without rational basis induced by improper motives. It argued that the only question before the commissioner was whether the board had the right to require a satisfactory rating as a condition precedent to an increment or raise, or, at most, whether those who made the evaluation had a reasonable basis for their conclusions.

We agreed that the latter "accurately defines the review required here." 60 *N.J. Super.* at 295-296. We said that the scope of the commissioner's review is not to substitute his judgment for that of those who made the evaluation but to determine whether a reasonable basis existed for the evaluation. We added:

> . . . since the proceeding before the Commissioner was the first "hearing" afforded appellant of the type specified in *Masiello, supra* [25 *N.J.* 590 (1958)], we think the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the *mise en scene*; and that the burden of proving unreasonableness is upon the appellant. [60 *N.J. Super.* at 296-297.]

The matter was remanded, however, because of the commissioner's omission to say what he found to be the underlying facts, or whether he found the evaluation unreasonable.

We do not understand *Kopera* to mean that the commissioner's review is limited merely to a consideration of whether the local board's decision was supported by the facts in its possession. When, as here, the hearing is had before the commissioner, or his designee, for the first time, the commissioner's obligation, of course, is to make a *de novo* and independent decision on the facts. *In re Masiello*, 25 *N.J.* 590, 606 (1958).

Here, however, the underlying fact of Mrs. Trautwein's record of absenteeism over the years was not controverted. It is evident, moreover, that nowhere in the chain of administrative review is there disagreement with the general proposition that a teacher's excessive absences may constitute good cause for the local board's withholding of a salary increment. While the hearing officer voiced a reservation as to the board's use of the teacher's past absenteeism in light of her current satisfactory attendance record, and the commissioner held that the board should not have taken into account the teacher's absences during the preceding school year, the rejection of this narrow view by both the legal committee and the State Board, and the holding that past conduct over a reasonably relevant period of time may properly be considered by the local board, removed one of the underpinnings of the commissioner's decision. Another was the commissioner's finding that "no *prima facie* showing was made that her performance was lessened," but this improperly placed the burden of proof on the board rather than on the teacher, where it belonged. In any event, these deficiencies in the commissioner's decision may be disregarded, since neither the reports of the legal committee nor the final determination of the State Board was based upon those findings. The ultimate ruling, as noted earlier, was that while Mrs. Trautwein's absences preceding the board's action were "unusually numerous and should be considered material," nevertheless, because of their legitimacy, coupled with "other relevant circumstances," they "were not so numerous as to justify the withholding of her increment for the ensuing school year."

It is clear to us that we have here no more than a difference of opinion between the local board and the State Board on whether, in the circumstances, the teacher's absences, despite the State Board's acknowledgment that they were "unusually numerous" and were to be considered "material," warranted the withholding of the increment. Such divergence, in our view, is an insufficient basis for affirming the commissioner's reversal of the local board's decision. There was no determination that the board's decision was arbitrary or unreasonable or in any way constituted an abuse of the board's legislatively vested discretion in the matter. In fact, the conflicting reports submitted by the legal committee, as well as the closeness of the votes taken by the State Board, would tend to negate any conclusion that the local board acted unreasonably in withholding the increment.

As for the procedural defects asserted by petitioner and found by the commissioner, on which the State Board's decision is silent, we are in complete agreement with the view expressed in the second report of the legal committee that the statute had been substantially complied with and no prejudice inured to petitioner.

The decisions of the commissioner and the State Board are reversed. We affirm the determination of the local board to withhold petitioner's increment.

Cert. denied 84 *N.J.* 469 (1980)

IN THE MATTER OF THE BOARD :
:
OF EDUCATION OF THE CITY : SUPERIOR COURT
: APPELLATE DIVISION
OF TRENTON, MERCER COUNTY. :
:

Decided by the Commissioner of Education November 7, 1979.

Decided by the State Board of Education November 8, 1979.

Argued November 12, 1980—Decided December 23, 1980.

Before Judges Matthews, Morgan and Morton I. Greenberg.

On appeal from the New Jersey State Board of Education.

Bruce M. Schragger argued the cause for appellant (Schragger, Schragger & Lavine, attorneys; Merlino, Rottkamp & Grillo, on the brief).

Mary Ann Burgess, Deputy Attorney General, argued the cause for respondent State Board of Education (John J. Degnan, Attorney General, attorney; Stephen Skillman, Assistant Attorney General, of counsel; Alfred E. Ramely, Jr. and Ms. Burgess, Deputy Attorneys General, on the brief).

Frederica Hochman argued the cause for intervenors Puerto Rican Congress and Council of Puerto Rican Organizations (Kathryn A. Brock, attorney).

The opinion of the court was delivered by MATTHEWS, P.J.A.D.

On February 5, 1979, the Commissioner of Education ordered the Trenton Board of Education and its superintendent to show cause at a hearing to begin March 5, 1979 why the commissioner should not appoint a special agent or take other appropriate action to remedy educational deficiencies in the district school system. Prior to the hearing, a notice of motion to intervene was filed by the Puerto Rican Congress and the Council of Puerto Rican Organizations, requesting leave to intervene in proceedings relating to the board's alleged failure to provide an adequate bilingual education. The motion was granted.

Hearings on the order to show cause were held on March 5, 6, 13, 15, and 21, 1979, before an Assistant Commissioner of Education, Division of Controversies and Disputes. At the close of the State's case, the board moved to dismiss and, alternatively, for summary judgment. The hearing officer's initial decision, rendered October 5, 1979, advised the commissioner to deny both motions; made findings of fact with respect to each alleged educational deficiency, and recommended a plan for corrective action.

The decision of the commissioner, dated November 7, 1979, denied the board's motions to dismiss and for summary judgment; adopted the findings of the hearing examiner, and found that the recommended plan for corrective action was "entirely suitable," with the exception of one item. The State Board of Education issued an administrative order on November 8, 1979, directing implementation of the plan for corrective action. This appeal followed.

During 1977 the State Department of Education received information indicating that certain deficiencies existed in the Trenton public school system. The commissioner accordingly directed that the system be monitored and investigated. As a result of that action, the department was able to document numerous deficiencies in a report issued in January 1978. Consequently, the Trenton board

was ordered to prepare a plan to remedy those deficiencies. The Trenton board submitted a remedial plan to the commissioner in March 1978. However, that remedial plan was never fully implemented and, on February 5, 1979, the commissioner ordered the board to show cause why corrective action should not be taken. That order alleged continuing deficiencies in special education, bilingual education, and affirmative action programs; in the safety and adequacy of school facilities; in timely submission of reports and documents required by law, and inefficiency of administrative procedures, sufficiency of the 1978-79 school budget, and employment of teaching staff members to fulfill the needs of the school district.*

The State presented numerous witnesses and exhibits at the March 1979 hearing. Based upon the evidence, the hearing examiner found: (1) Special education: The board has failed to provide adequate personnel and services for evaluation and classification of handicapped pupils; has failed to develop and implement an educational plan for each such pupil; has failed to provide adequate resource rooms and programs for handicapped pupils; has failed to avail the school district of available funds for special education, and teaching staff members have failed to refer potentially handicapped pupils to child study teams. (2) Affirmative action: In view of the board's past performance in the area of affirmative action, corrective measures are necessary to insure implementation of the affirmative action plan approved in August 1979. (3) School facilities: Numerous health and safety deficiencies exist in six elementary schools. (4) Bilingual education: The board has failed to provide adequate bilingual educational programs for eligible pupils. (5) Submission of reports: The board has consistently failed to submit required reports and documents in a timely manner. (6) Efficient administrative procedures, sufficiency of the 1978-1979 school budget, and employment of teaching staff members: The board has impeded the adoption of plans for compensatory education and affirmative action; has disregarded recommendations of administrative and supervisory staff and officials of the Department of Education, and does not act as a unified body. Furthermore, the board's minutes are kept in a manner which obfuscates the record of transaction of business. The board has also failed to follow proper procedures, pursuant to *N.J.A.C.* 6:8-4.3, for employing teaching staff members; there is evidence of "gross mismanagement" by the board in the employment, transfer, and promotion of personnel; some members of the board act as patrons for individuals seeking employment, transfer, or promotion; the board's policy of requiring that three candidates be recommended for each available position is inefficient, and finally, the board has continued the illegal practice of requiring that staff recommendations identify the person's race and sex.

In short, the report discloses that the educational system of the City of Trenton is in an abysmal state, due almost entirely to the mismanagement and incompetence of the members of the local board of education.

The board accepts, it claims, for purposes of this appeal, the factual findings of the hearing examiner which were adopted by the commissioner in his decision rendered on November 7, 1979. The ground for this appeal is the plan for corrective action recommended by the hearing examiner and adopted by the commissioner.

That corrective action plan provides:

> The Commissioner shall appoint and assign a monitor general to full time service within the district as a general supervisor of all activities conducted by the school district. The monitor general shall report directly to the Commissioner concerning the total operation of the school district for the 1979-80 and 1980-81 school years.
>
> . . . The school district shall assume the cost for the services of the monitor general and two assistants, as well as for secretarial support services, to a maximum of $125,000 per year.

The plan also provides for continued monitoring by Department of Education and county personnel and allows the commissioner to require the board to engage the services of an independent auditor, to

*Allegations of the order regarding failure to provide programs for gifted children and failure to employ qualified aides were not addressed at the hearing and, accordingly, were dismissed by the hearing examiner.

order transfer of moneys in the school budget, and to direct the county board of taxation to raise additional fiscal resources. The monitor general and the county superintendent must approve any budget increase. The plan requires that the county superintendent conduct in-service training programs for board members, district administrative and supervisory staff, and other teaching staff members. In the area of affirmative action, the monitor general and county superintendent must monitor implementation of the board's affirmative action plan and the district must submit monthly progress reports. Regarding special, compensatory, and bilingual education programs, the monitor general and county superintendent "shall be empowered to direct the district's personnel to take all steps necessary to operate a thorough and efficient program [of special, compensatory, and bilingual education]." District personnel must "prepare a comprehensive plan for the provision of needed school facilities" and must formulate plans for staffing all educational programs in the district. The monitor general and county superintendent must review all personnel staffing recommendations and present them to the board for formal approval. "The board shall not be permitted to table such recommendations, but shall conduct a recorded roll call vote upon them as required by law. If any board member wishes to oppose such recommendations, he/she shall state such objection which shall be recorded in the minutes of the meeting. No recommendation of personnel shall be identified by any code designating sex and/or race." Also, included in the plan is a provision that the board may not make any recommendations for appointment, transfer, or promotion of certified support service personnel; may not require that three candidates be recommended for each position of employment, and may only consider personnel matters once each month as a committee of the whole. The corrective action plan includes, as well, provisions regarding board operations and submission of annual reports detailing progress in meeting the requirements of the plan.

The commissioner's decision adopted in full the findings of the hearing examiner as well as the recommended plan for corrective action, with one exception: the commissioner reduced the amount the school district must assume for the cost of services of the monitor general and support staff from $125,000 to $85,000 per year. The State Board of Education's administrative order of November 8, 1979 directed the board to implement the corrective action plan.

The Trenton board first argues that N.J.S.A. 18A:7A-15 is so devoid of standards and guidelines so as to constitute an unlawful delegation of legislative power to the State Board.

I.

The corrective plan is imposed under the authority of *N.J.S.A.* 18A:7A-14 and 15, which provide:

> . . . If the commissioner shall find that a school or a school district has failed to show sufficient progress toward the goals, guidelines, objectives and standards, *including the State goal and any local interim goal concerning pupil proficiency in basic communications and computational skills,* established in and pursuant to this act, he shall advise the local board of education of such determination, and shall direct that a remedial plan be prepared and submitted to him for approval. If the commissioner approves the plan, he shall assure its implementation in a timely and effective manner. If the commissioner finds that the remedial plan prepared by the local board of education is insufficient, he shall order the local board to show cause why the corrective actions provided in section 15 of this act should not be utilized. [*N.J.S.A.* 18A:7A-14]
>
> If, after a plenary hearing, the commissioner determines that it is necessary to take corrective action, he shall have the power to order necessary budgetary changes within the school district, to order in-service training programs for teachers and other school personnel, or both. If he determines that such corrective actions are insufficient, he shall have the power to recommend to the State board that it take appropriate

> action. The State board, on determining that the school district is not providing a thorough and efficient education, notwithstanding any other provision of law to the contrary, shall have the power to issue an administrative order specifying a remedial plan to the local board of education, which plan may include budgetary changes *or other measures the State board determines to be appropriate*. Nothing herein shall limit the right of any party to appeal the administrative order to the Superior Court. [*N.J.S.A.* 18A:7A-15; emphasis supplied]

The board contends that the lack of standards or guidelines delineating "other [appropriate] measures" renders the statute unconstitutional. We disagree.

N.J.S.A. 18A:7A-14 and 15 are part of the Public School Education Act of 1974, *N.J.S.A.* 18A:7A-1 *et seq.* In *Robinson v. Cahill* (*Robinson* V), 69 *N.J.* 449, 467 (1976), the Court found the act "is in all respects constitutional on its face." Regarding *N.J.S.A.* 18A:7A-15, the Court stated:

> The Constitution imposes upon the Legislature the obligation to ". . . provide for the maintenance and support of a thorough and efficient system of free public schools . . ." The imposition of this duty of course carries with it such power as may be needed to fulfill the obligation. The statutory language quoted and discussed above [*N.J.S.A.* 18A:7A-14 and 15] constitutes a delegation of this power to the State Commissioner of Education as well as to the State Board of Education to see that the constitutional mandate is met. They have, for this purpose, been made legislative agents. They have received a vast grant of power and upon them has been placed a great and on-going responsibility.
>
> [69 *N.J.* at 460-461]

It is axiomatic that the Legislature may commit a subject to the judgment of an administrative agency with a statement of the goal to be reached rather than the path to be followed to reach it. *Shelton College v. State Bd. of Ed.*, 48 *N.J.* 501, 516-518 (1967). The exigencies of modern government have increasingly dictated the use of general rather than minutely detailed standards. *Ward v. Scott*, 11 *N.J.* 117, 123-124 (1952). See also, *Avant v. Clifford*, 67 *N.J.* 496, 550 (1975). Rather than requiring detailed standards to protect against the arbitrary exercise of administrative authority, our courts have emphasized procedural safeguards, plus legislative, judicial or executive checks. *Avant v. Clifford*, above, 67 *N.J.* at 551. The existence of such safeguards is an important factor in determining whether a grant of power to an administrative agency is invalid because of lack of proper limitations upon agency discretion. *Ibid.* See also 1 *Cooper, State Administrative Law*, at 74-91 (1965); 1 *Davis, Administrative Law Treatise*, § 3:15 at 207-208 (2 ed. 1978).

The delegation of power to the State Board of Education under *N.J.S.A.* 18A:7A-15 is broad: in cases where the State board determines that the school district is not providing a thorough and efficient education, it has "the power to issue an administrative order specifying a remedial plan to the local board of education, which plan may include budgetary changes *or other measures the State board determines to be appropriate.*" (Emphasis supplied). This broad grant of power, however, is accompanied by safeguards. *N.J.S.A.* 18A:7A-14 provides for notice and a hearing before corrective action may be taken by the State board. The hearing before the commissioner must be conducted pursuant to regulations, *N.J.A.C.* 6:24-1.11 to 1.19, which provide, among other things, for the issuance of subpoenas, the offering of evidence, a stenographic transcript of the proceeding, and a written decision by the commissioner, including findings of fact and conclusions of law. Any party may appeal the administrative order to the Superior Court. *N.J.S.A.* 18A:7A-15. Thus, those affected by the administrative order have the opportunity to present their views fully to the administrative agency before official action is taken; judicial review is available to protect any abuses. These procedural and judicial safeguards, in our view, prevent an unlawful delegation of power to the State board.

II.

The board contends that it is beyond the statutory authority of the State board to order the commissioner to "assign a monitor general to full time service within the district as a general supervisor of all activities conducted by the district."

> . . . the grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statutory responsibilities and that the courts should readily imply such incidental powers as are necessary to effectuate fully the legislative intent. [citations omitted] In determining whether a particular administrative act enjoys statutory authorization, the reviewing court may look beyond the specific terms of the enabling act to the statutory policy sought to be achieved by examining the entire statute in light of its surroundings and objectives. [*New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 *N.J.* 544, 562 (1978)]

See also *In re Suspension of Heller*, 73 *N.J.* 292, 303 (1977). We find that authority to appoint a monitor general with general supervisory powers may readily be inferred from Title 18A. *N.J.S.A.* 18A:4-10 delegates to the State board "[t]he general supervision and control of public education in this state, except higher education. . . ." The commissioner is charged with the duty of supervising State schools and enforcing rules prescribed by the State board. *N.J.S.A.* 18A:4-23. In order to carry out this responsibility, the commissioner may assign duties to inspectors, assistants, and employees of the State Department of Education. *N.J.S.A.* 18A:4-22(d). Thus, the appointment of an assistant to supervise implementation of a plan to remedy deficiencies within a school system is an incidental power reasonably necessary and appropriate to effectuate the commissioner's statutory responsibilities. See *New Jersey Guild of Hearing Aid Dispensers v. Long*, above, 75 *N.J.* at 562.

The board also objects to the provision of the corrective action plan which authorizes the monitor general and county superintendent to "direct the district's personnel to take all steps necessary to operate a thorough and efficient program [of special, compensatory, and bilingual education]." We disagree with the board's contention that the State board has exceeded its statutory authority in imposing this provision. Under *N.J.S.A.* 18A:7A-15, the State board has the power to issue an administrative order specifying a remedial plan to the local board of education. This plan may include whatever measures the State board deems appropriate to remedy educational deficiencies within the school district. *N.J.S.A.* 18A:7A-15. The responsibility for specifying such measures is explicitly placed upon the State board and there is nothing in the statute or elsewhere in Title 18A which suggests that the State board may not carry out this responsibility through its designated agents.

As modified by the commissioner's decision of November 7, 1979, the corrective action plan requires that the board assume the cost of the services of the monitor general, two assistants, and secretarial support services. The board argues that there is no authority in Title 18A for payment by local school districts for services of Department of Education employees. In our view, this provision of the corrective action plan does not contravene the express policy of Title 18A, thus requiring it to be set aside. Here, the State board has authorized the commissioner to appoint an assistant to supervise implementation of the corrective action plan in the Trenton public schools. The appointment of this assistant is necessitated by the moribund administration of the local school board. His function is to fill the void created by the non-feasance of that body. While the appointee is probably a state employee in the technical sense, his activities are carried out exclusively for the local district which in actuality is a creature of the state instituted as the agent to carry out the constitutional mandate to educate our young.

Finally, the board argues that the provision of the plan which requires board members to state on the record reasons for any objection to personnel recommendations violates their right to free speech. The constitutionally guaranteed right to free speech includes, of course, both the right to speak freely and the right to refrain from speaking at all. *Wooley v. Maynard*, 430 *U.S.* 705, 714 (1977). However, local school board members are public officers charged with a public duty. School board members are obliged to examine qualifications of teachers, to exercise judgment and discretion in their selection, and to confer and compare judgments in order to reach proper results. *Townsend v. School Trustees*, 41 *N.J.L.* 312, 313 (Sup. Ct. 1879). In sum, the selection of teachers is "an act judicial in its nature . . ." *Ibid.* Public officers acting in a quasi-judicial capacity are required to state reasons for their actions. See *Application of Howard Savings Institution of Newark*, 32 *N.J.* 29, 52 (1960).

III.

The board alleges that it was denied due process because its case was investigated, prosecuted, and adjudicated by the State Department of Education. The board does not claim any "actual bias on the part of the hearing examiner but rather that the probability of actual bias [in] . . . the entire process is too high to be constitutionally tolerable." This contention we find to be without merit. "The wisdom of creating an agency with a responsibility for both initiating and adjudicating a proceeding is a legislative function, and not a judicial one." *In re Information Resources,* 126 *N.J. Super.* 42, 52 (App. Div. 1973); *In re Larsen,* 17 *N.J. Super.* 564, 569-570 (App. Div. 1952). "[T]he mere fact that the administrative agency has investigated the matter in question does not render it or its members incompetent, consistent with due process, to adjudicate the case as presented at the evidentiary hearing." *Rite Aid Corp. v. Bd. of Pharmacy of State of N.J.*, 421 *F. Supp.* 1161, 1177 (D.N.J. 1976), app. dis. 430 *U.S.* 951, 97 *S. Ct.* 1954, 51 *L. Ed.* 2d 801 (1977). See also *Withrow v. Larkin,* 421 *U.S.* 35, 55, 95 *S. Ct.* 1456, 1468, 43 *L. Ed.* 2d 712, 728 (1975).

We have no hesitancy in concluding that the determination of the State board should be affirmed in all respects. The program of the commissioner as endorsed by the State board represents in our judgment an intelligent and conscientious compliance with the constitutional mandate that the young citizens of our State receive a thorough and efficient education.

Affirmed.

[176 *N.J. Super.* 553 (App. Div. 1980)]

UNION TOWNSHIP TEACHERS ASSOCIATION, ON BEHALF OF JOSEPH CALIGUIRE, JR. *ET AL.*,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT-CROSS APPELLANT.	:	

Decided by the Commissioner of Education August 27, 1979

Decided by the State Board of Education November 8, 1979

For the Petitioners-Appellants, Rothbard, Harris and Oxfeld (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Cross Appellant, Simone and Schwartz (Howard Schwartz, Esq., of Counsel)

For the *Amicus Curiae* New Jersey School Boards Association, David W. Carroll, Esq. (Paula A. Mullaly, Esq., on the Brief)

Fifty-four members of the professional staff of the Respondent's School District filed claims in this case alleging failure of the Respondent Board to give equivalent years of employment credit for time spent in the military service of the United States, pursuant to *N.J.S.A.* 18A:29-11. Petitioners asked the Commissioner to have the Board place each Petitioner at the appropriate step of the salary guide and to compensate each with the proper amount of back pay. Two of the claims go back as far as the 1949-50 school year, and many more start with the 1951-52 or the 1952-53 school year. The Commissioner rejected the defenses of the statute of limitations and equitable estoppel interposed by the Board, and awarded a total of $135,385 to and among 25 of the petitioners. The remaining 29 claims were rejected.

The State Board affirms the Commissioner's decision with respect to the 29 dismissals for the reasons given in his opinion. With respect to the other 25 Petitioners, we believe that in view of decisions by the Courts and by the State Board of Education, the Commissioner erred in (1) not applying the six-year statute of limitations, (2) not sustaining the defense of equitable estoppel where appropriate, and (3) granting a full year's military service credit for each year where more than six months (but less than a full year) had been spent by the staff member in the military service.

That the statute of limitations applies was determined by the Supreme Court in *Miller v. Board of Chosen Freeholders of Hudson County*, 10 *N.J.* 398 (1952) and by the State Board of Education in *Castner v. Board of Education of Plumsted Township*, decided December 3, 1979. These determinations have been most recently buttressed by the decision of the Appellate Division of the Superior Court in *Greenwald v. Camden Board of Education*, Docket No. A-1051-77, decided October 31, 1978. The Plaintiff there had served in the Armed Forces from May 1942 through December 1945. He was hired as a teacher by the defendant Board in 1947 and worked until June 30, 1976, when he retired. During his

entire employment he received compensation fixed by the salary guide agreed upon by the Board and the teachers' union. In 1977 the Plaintiff demanded that the Board reimburse him for additional monies which he claimed should have been paid to him under *N.J.S.A.* 18A:29-11, which admittedly entitled Plaintiff to a higher salary than what he received when he originally began work. The Appellate Division upheld a judgment of the trial court in favor of the Board, saying (slip opinion, page 3):

> "The court below rejected plaintiff's contention and held that since the claim was made 30 years after he commenced working, it was barred by the statute of limitations, *N.J.S.A.* 2A:14-1.
>
> "We agree. Like the trial judge, we deem the case of *Miller v. Bd. of Chosen Freeholders, Hudson County,* 10 *N.J.* 398 (1952) to be controlling."

It might be argued from the foregoing language that in any case where the claim for military service credit was not made until more than six years after the teacher could originally have advanced it, the statute of limitations would bar the claim for every year in which the teacher did not receive the proper military service credit. We doubt that the Appellate Division intended to so rule. Plaintiff in the *Greenwald* case had reached his maximum on the salary scale far more than six years before he retired and subsequently brought the court action; therefore, the Court did not have to determine the validity of a claim for underpayment during any of the six years immediately preceding the filing of the complaint. Unless or until a court holds otherwise, we will assume that the statute of limitations does not bar claims pertaining to any of the six years in question.

We would also hold that no military service credit may be allowed for a part of a year of such service; only a full year will suffice, because the statute (*N.J.S.A.* 18A:29-11) speaks only of equivalent *years* of employment credit and makes no provision for credit for any lesser period than one year.

We further believe that the defense of equitable estoppel applies generally to the claims for back pay which have not been barred by the statute of limitations, in view of the recent decisions of the Appellate Division in *Giorno v. Township of South Brunswick,* 170 *N.J. Super.* 162 (*App. Div.* 1979) and *Kloss v. Township of Parsippany-Troy Hills,* 170 *N.J. Super.* 153 (*App. Div.* 1979). In *Giorno* the Plaintiff was employed as a patrolman with the Middlesex County Park Police for five and one-half years, then became a police officer with South Brunswick in December 1967. *N.J.S.A.* 40A:9-5 provided for carrying over credit for prior periods of employment on transferring from one position to another in municipal or county government. Nevertheless there was no discussion about credit for service at the time Plaintiff was hired by South Brunswick, and he entered service there at the first step on the range for patrolman. The Appellate Division found that while the Plaintiff had not waived his statutory right to prior service credit, he could enjoy that right only from the date of filing of the complaint; the claim for retroactive relief was barred on the grounds of laches or estoppel. Judge Botter said for the Court (170 *N.J. Super.* at pages 166-167):

> "***Absent an express waiver, plaintiff is entitled to receive credit for his prior service with the County Park Police. This does not mean, however, that he is entitled to all the relief he has sought. *Libby v. Union Cty. Freeholders Bd.,* 125 *N.J. Super.* 471 (App. Div. 1973), upheld the grant of longevity pay for the years following commencement of the action but remanded for proofs as to waiver and laches as a bar to retroactive relief. Here we are satisfied that the long period between plaintiff's employment and the commencement of this action should bar retroactive relief on grounds of laches or estoppel. Municipal governments must provide for operating expenses on a current annual 'cash basis,' *N.J.S.A.* 40A:4-3, except for unforeseen, pressing needs, *N.J.S.A.* 40A:4-46, or as otherwise permitted by law. ***It is desirable to have the issue of transferred service credits resolved before the employment commences, or at least at an early date. On the facts of this case it seems equitable to allow the claim only from the date of the filing of the complaint. It was then for the first time

> that the municipality should have anticipated its potential liability for salary differentials based upon plaintiff's prior years of service as a police officer.***"

Similarly, in the *Kloss* case the Court barred on the ground of equitable estoppel the claims of several police officers for prior service credit, saying (170 *N.J. Super.* at pages 159-160):

> "***We agree with the trial judge's view that defendant entered into negotiated contracts in reliance on the provision that its terms provided all the benefits owing to their employees and all the expense defendant would encounter. While we hold that these general terms cannot serve to deprive plaintiffs of rights bestowed by statute, absent an express waiver of those rights, a fair accommodation in this case, in our view, is to credit plaintiffs with all qualifying prior service in calculating salary, vacation time and longevity pay for the period beginning with the commencement of this action. See *Pfeffer v. Delran Tp.*, 159 *N.J. Super.* 497, 505-506 (Law Div. 1978). As noted in *Giorno, supra,* subject to certain exceptions, *N.J.S.A.* 40A:4-46, municipal governments must operate on a current 'cash basis.' *N.J.S.A.* 40A:4-3; see *N.J.S.A.* 40A:4-57. Moreover, it is important to encourage the prompt assertion and resolution of a claim for transferred service credits, preferably before employment begins.***"

To summarize, the State Board directs that the Commissioner's decision be affirmed in part, reversed in part, and remanded to the Commissioner in accordance with the foregoing opinion.

Attorney Exceptions are noted

March 5, 1980

JEANNETTE A. WILLIAMS, PETITIONER-APPELLEE,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY, RESPONDENT-APPELLANT.	:	DECISION

Decided by the Commissioner of Education, June 1, 1979 and July 27, 1979

Decided by the State Board of Education, September 6, 1979

For the Petitioner-Appellee, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

For the Respondent-Appellant, King and King (Victor E.D. King, Esq., of Counsel)

This case presents the vital issue of how far the power of a board of education to transfer teaching staff members is limited by tenure rights.

Petitioner here was a tenured High School Principal, having held that position since February 1, 1972. In February 1976 the Board transferred her to the position of Administrative Assistant in the District's central office, where she continued at the same salary, i.e. $32,560, until September 1, 1976. On that date she was transferred to the position of Elementary School Principal, a 10-month job, but again at a salary of $32,560. Petitioner contended that both of these transfers were invalid: the first because there was no recognized certificate for the title, and the second because it was a demotion to a position with lesser salary potential.

The Hearing Officer ruled against both claims, finding that the Administrative Assistant position was comparable to that of High School Principal, and that the Elementary Principalship was also comparable to that of the High School and involved no reduction in salary to the Petitioner.

The Commissioner disagreed with the Hearing Examiner on both points. Following his decision in *Morra v. Jackson Board of Education,* 1979 *S.L.D.* 81, affirmed in part State Board 89, the Commissioner observed in the instant case that no determination had been obtained from the County Superintendent as to what certificate, if any, was required for the Administrative Assistant position; that absent such determination it could not be known whether the new post was eligible for tenure; and that "a certificated tenure employee may not be unilaterally transferred without consent to other than a tenure-eligible position." He further determined that the subsequent transfer of Petitioner over her protests to a 10-month principalship in an elementary school was invalid because it "had a grossly disproportionate salary expectation." Ruling that if a position continues to exist, "the tenured holder thereof may not be transferred to a position with lesser expectancy", the Commissioner directed the Board to reinstate Petitioner as High School Principal, together with any salary increments to which she would have been entitled had she continued to serve in that position.

Because of the important questions involved, the State Board of Education invited several organizations to submit briefs as *Amicus Curiae.* Briefs were received from the New Jersey Education Association, the New Jersey Association of Elementary and Middle School Administrators, the New Jersey Association of Secondary School Principals and Supervisors and the New Jersey School Boards Association. Those briefs, as well as the ones submitted by the parties to this controversy, have been most helpful in presenting argument on both sides.

With respect to the first transfer, i.e. to the Administrative Assistant position, the State Board affirms the Commissioner's decision. It was decided in *Morra, supra,* that a board of education

has no authority to transfer a tenured administrator without his consent to an unrecognized position for which the certification requirements had not been previously ascertained. We see no reason to overturn that precedent.

On the transfer to the elementary principalship, however, the State Board reverses the Commissioner and upholds the transfer for the reasons hereinafter set forth.

The authority to transfer tenured teaching staff members and the limitations on such authority stem essentially from three statutes:

> *N.J.S.A.* 18A:25-1, which simply provides that "No teaching staff member shall be transferred, except by a recorded roll call majority vote of the full membership of the board of education by which he is employed."
>
> *N.J.S.A.* 18A:28-5, which provides that "The services of all teaching staff members ***as are in positions which require them to hold appropriate certificates issued by the board of examiners***shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation" except as set forth in the Tenure Employees Hearing Act.
>
> *N.J.S.A.* 18A:28-6, which grants tenure in a new position after a prescribed probationary period for any teaching staff member "under tenure or eligible to obtain tenure under this chapter, who is transferred or promoted with his consent to another position covered by this chapter***."

The foregoing statutes have led to voluminous litigation, in which the courts, the Commissioner of Education and the State Board have endeavored to interpret the law so as to achieve an acceptable balance between the need of a board of education to appoint and transfer staff members as may be best for the educational program and the policy of protecting tenured staff members with job security and financial security during "good behavior and efficiency". Out of this litigation has emerged the concept of tenure as protecting the professional standing or status of the teaching staff member, the courts having used such terms as "rank", "demotion" and "comparable positions". In *Viemeister v. Prospect Park Board of Education,* 5 *N.J. Super.* 215, 218 (*App. Div.* 1949), the Court said:

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

Likewise, in *Bigart v. Paramus Board of Education,* 1971 *S.L.D.* 123, 132, the Commissioner stated with regard to a transfer that "the work assigned must be of a rank equivalent to that by which the tenure status was acquired***." In *Cheeseman v. Gloucester City Board of Education,* 1 *N.J. Misc.* 318, 319 (*Sup. Ct.* 1923), the Court observed that "a transfer is not a demotion or a dismissal." See also *Lascari v. Lodi Bd. of Ed.,* 36 *N.J. Super.* 426, 430 (*App. Div.* 1955).

Where the transfer is to a position of equivalent rank, the Board may act without the staff member's consent. *Boor v. Newark Board of Education,* 1979 *S.L.D.* 517 The phrase "with his consent" appearing in section 18A:28-6 applies only to transfers which are promotions or demotions, i.e. to a different rank. We cannot rationally construe the statute in any other fashion, for a tenured staff member already enjoys tenure within his rank, albeit in no particular assignment therein. *Bigart v. Paramus Bd. of Ed., supra; Clark v. Rosen and Margate City Bd. of Ed.,* 1974 *S.L.D.* 678, aff'd St. Bd. 1975 *S.L.D.* 1082, aff'd N.J. Superior Court App. Div. 1976 *S.L.D.* 1134 The legislative history of the statute bears out this interpretation. Before the passage of this section as Chapter 231 of the Laws of 1962, a tenured teacher who was promoted to principal obtained tenure as a principal immediately. As observed in the *amicus* brief of the School Boards Association, local boards understandably preferred to hire administrators from outside the district in order to have the benefit of a three-year probationary period in which to

evaluate the new administrator. The purpose of Chapter 231, as reflected in the sponsor's statement, was to make promotions within a district subject to a two-year probationary period for tenure in the higher position to be achieved. Thus the employing board would enjoy a two-year period in which to evaluate the new administrator's performance, and at the same time internal applications for promotions would be encouraged. The consent language was inserted because the acceptance of a promotion would put the employee in a nontenure status in the new position for two years, and the Legislature thought that the employee should not be forced into such a situation.

The law thus protects the rank or status of a tenured professional employee. It also prevents the employing board from reducing the compensation of such an employee except by proceedings under *N.J.S.A.* 18A:6-10 *et seq.* But for these two limitations, which may be said to give job security and financial security, the board of education has plenary authority, by a majority vote of the whole board, to transfer its professional personnel in good faith for the best interests of the school system. *Lascari v. Lodi Bd. of Ed., supra; Bradley v. Freehold Bd. of Ed.,* 1976 *S.L.D.* 596, 600; *DiNunzio v. Pemberton Twp. Bd. of Ed.,* 1977 *S.L.D.* 24

In determining whether a transfer is to a position of comparable rank or causes a reduction in compensation within the meaning of *N.J.S.A.* 18A:28-5, we believe in using a balancing test, weighing the interest of the teaching staff member in job and financial security on the one hand and the best interests of the school program on the other. Using this test, we have reached the following conclusions:

> 1) We agree with the Commissioner that a tenured professional employee may not be transferred without his consent to other than a tenure-eligible position. A non-tenure position affords the holder no security in that job; the position does not carry with it the status of one which requires a special certificate; and, since its rank is not definable, it can hardly be deemed equal to or comparable with a tenured position. For these reasons the transfer of Petitioner to the Administrative Assistant position was invalid.
> 2) Assuming for the moment that the salary received by the employee is not reduced, a transfer from the position of High School Principal to that of Elementary School Principal does not constitute a demotion. Although, as one *amicus* brief has pointed out, there are numerous differences in the duties of the two positions, the certification required is the same; tenure could be acquired in both positions; and the duties to be performed by an elementary school principal are of no less importance from an educational standpoint than those of a high school principal. In fact, one can argue that the early grades are the most significant in the education of a child. In any event, a particular individual may have talents which are more suited to dealing with the problems of young children than those of older ones. The board of education must retain the flexibility to transfer its principals between schools in such manner as will, in the board's judgment, make best use of the aptitudes and qualifications of its principals.

Numerous precedents reinforce the foregoing conclusion. In *Burlew v. Madison Township Bd. of Ed.,* 1969 *S.L.D.* 40, the Commissioner upheld the transfer of an elementary school principal to the assignment of "principal of the evening school and research assistant", ruling that this transfer to another principalship did not violate Petitioner's status. In *DiNunzio v. Pemberton Township Bd. of Ed., supra,* which is closely in point with the instant case, the Commissioner sustained the transfer of a tenured high school principal to an elementary principalship. Finally, in the recent case of *Morra v. Jackson Township Bd. of Ed., supra,* the State Board ruled that the Petitioner's tenure rights did not entitle him to retain a secondary school principalship, but that he could be transferred to any position comparable to the one he already held and which his certificate would qualify him to fill, provided his tenure rights were not otherwise infringed.

To buttress his decision the Commissioner noted the seniority regulations under *N.J.A.C.* 6:3-1.10, wherein a high school principal is recognized as a separate category from that of elementary principal for seniority purposes. The seniority rules, however, have no relevance to the subject of "rank" or "comparable positions" for the purpose of determining the legality of involuntary transfers. The rules are designed to determine seniority as between teaching staff members in case of a reduction in force pursuant to *N.J.S.A.* 18A: 28-9 *et seq.* The Commissioner recognized this principle in *Bigart v. Paramus Bd. of Ed., supra,* where the Petitioner claimed that her seniority rights precluded her transfer. The Commissioner therein said:

> "***Seniority rights, as set forth in *N.J.S.A.* 18A:28-9 *et seq.*, give a right to priority of employment where there has been a reduction in force, and have no application here.***"

We also observe that under 18A:28-6 an individual transferred from high school principalship to the corresponding elementary school position continues to accumulate seniority in the high school spot while serving in the elementary school. Implementing the statute, *N.J.A.C.* 6:3-1.10 provides in subparagraph (g):

> "Whenever a person shall move from or revert to a category, all periods of employment shall be credited toward his seniority in any or all categories in which he previously held employment."

For all of the foregoing reasons, Petitioner here did not suffer a demotion or reduction in rank when she was transferred to the elementary school, provided that her compensation was not reduced within the meaning of section 18A:28-5.

> 3) We have concluded that no such reduction occurred. Petitioner was receiving an annual salary of $32,560 when she left the high school position, and she continued to receive an annual salary of $32,560 when serving in the elementary school. The Commissioner held that Petitioner's compensation was reduced because the elementary position had a grossly disproportionate salary expection: in that the salary ratio for the latter job was 1.4 as compared to the 1.7 ratio pertaining to the high school principalship. Pointing out that Petitioner could anticipate no salary increments for several years to come, he ruled that a transfer to a position of "lesser expectancy" was invalid under the tenure laws.

We find nothing in the applicable statutes or in court decisions construing the prohibition against the reduction in compensation as requiring a transferred tenured employee to be paid in *future* years according to the same schedule of increments as was in force in her old position when she was transferred. *N.J.S.A.* 18A:28-5 does not mention expectancy; it provides only that tenured staff shall not be "reduced in compensation". The concept of salary expectation has crept into the law through a few decisions within the State Department of Education. After thoroughly reviewing the law on this point, we have concluded that both on reason and authority those decisions which have read the expectancy requirement into the transfer and tenure statutes should be overruled.

As the *amicus* brief of the School Boards Association points out, a person's salary expectancy for future years is conjectural at best. We know of no law which prevents a board of education from negotiating a less generous schedule of future increments for all employees, tenured or not. The collective negotiations process frequently changes provisions for increments and other fringe benefits for various categories of personnel. If future benefits can be reduced for employees not tranferred, the same should hold true for those who are transferred. Moreover, to require a board of education to pay all transferred tenured personnel in accordance with future salary schedules which might be adopted for their respective earlier positions would cause endless confusion in negotiations and administration of employee contracts.

Court decisions have also indicated that tenure rights do not include future salary ex-

pectations. In *Greenway v. Camden Board of Education,* 129 *N.J.L.* 47 (*Sup. Ct.* 1942), a tenured high school teacher was transferred to the junior high school. He contended that his transfer constituted a reduction in salary because the maximum salary prescribed for the former job exceeded that fixed for the junior high or intermediate school. The annual salary paid to the teacher, however, was the same after as before the transfer. Upholding the action of the board of education and rejecting the teacher's claim that he had vested rights in the high school salary increments, the Supreme Court said:

> "The failure to receive an increase of salary does not constitute a reduction." (at 47)

The Court of Errors and Appeals, in affirming the Supreme Court, likewise held that "unaccrued increments under a salary schedule *** do not take the classification of 'salary' within the intendment of section 18:13-17" (the former version of 18A:28-5).

Decisions of the Commissioner have also applied this doctrine. In *DiNunzio v. Pemberton Township Bd. of Ed., supra,* where a high school principal was assigned to be principal of two elementary schools, the Petitioner claimed violation of his tenure rights in that the increases received in his new position were less than those granted the high school principal, so that his salary became substantially less than that of his former position. At the time of the transfer the Petitioner has been receiving compensation of $18,800 per year. The Commissioner rejected the claim that Petitioner should be paid on the secondary school guide, holding that his proper salary was to be determined by the guide for elementary principal category, except that it could not be less than $18,800. In *Ward v. Voorhees Township Bd. of Ed.,* 1979 *S.L.D.* 279, Petitioner was involuntarily transferred from the principalship of a large elementary school to the principalship of a smaller one. The principals of the larger elementary schools were entitled under the salary guides to receive $500 more than those at the smaller schools. The Commissioner held that failure to pay her the extra $500 did not mean that Petitioner's salary as a tenured principal had been reduced, and he declined to interfere with the results of the negotiations process.

Insofar as other decisions of the Commissioner, such as *Gamvas v. Lakewood Township Bd. of Ed.,* 1976 *S.L.D.* 509, invalidated a transfer because of lower salary "expectancy", we are of the opinion that those cases should now be overruled for the reasons above set forth.

The attorneys for the Board of Education have taken exception to that portion of the Legal Committee's report which recommends that the Commissioner's decision with reference to the first transfer be affirmed. Counsel argues that the record does not show any way or the other whether a job description for the position of Administrative Assistant was submitted to the County Superintendent and a determination made that a special certificate was required for the position. Counsel argues that under these circumstances that Board is entitled to a presumption that all steps relating to the establishment of that position were taken as required by *N.J.A.C.* 6:11-3.6.

We believe that such presumption should not be made in the present case because (a) the burden is on a local board of education, when establishing an unrecognized position, to take the steps required by the regulations in order to validate it; (b) clearly it was easier for the Board to prove that it took the necessary steps than for the Petitioner to prove the contrary; and (c) the Superintendent testified that while the position had existed previously and there was a job description for it, he admitted that there was no specific certificate requirement for the position in the rules of the State Board. At that point, if the Superintendent had been able to show that the certificate requirement had otherwise been determined, he would have undoubtedly done so. From the lack of such testimony, we infer that the County Superintendent never did determine that a special certificate was required for the position.

Petitioner's counsel has argued, in essence, that the elementary principalship was not comparable in rank to that of the high school because the salary ratio for the latter was 1.7 as compared with 1.4 for the elementary principal's job. In our view, salary expectancies at any given moment do not determine rank; nothing in the tenure statutes states or implies that two otherwise comparable positions must have identical salary expectancies before an incumbent may be transferred from one to the other. Compensation is treated separately in the tenure laws. So long as it is not reduced, a tenured employee

has not suffered a loss of tenure rights merely because he is transferred to a job which has a comparable rank, albeit a lesser salary expectancy.

To summarize the Commissioner's decision is affirmed in regard to the Administrative Assistant position but reversed with respect to Petitioner's assignment as elementary school principal; her transfer to the latter position should be sustained; and, since there is no further relief to which Petitioner is now entitled,the petition is dismissed.

E. Constance Montgomery and William Colon
Opposed in the Matter

January 9, 1980

JEANNETTE WILLIAMS, Petitioner-Appellant,	:	
V.	:	SUPERIOR COURT
BOARD OF EDUCATION OF PLAINFIELD, Respondent-Respondent.	:	APPELLATE DIVISION

Argued October 21, 1980—Decided November 6, 1980.

Before Judges Matthews, Morgan and Morton I. Greenberg.

On appeal from the New Jersey State Board of Education.

Emil Oxfeld argued the cause for appellant (Rothbard, Harris & Oxfeld, attorneys; Barry A. Aisenstock, on the brief).

Victor E. D. King argued the cause for respondent (King, King & Goldsack, attorneys).

Alfred E. Ramey, Jr., Deputy Attorney General, argued the cause for the New Jersey State Board of Education (John J. Degnan, Attorney General, attorney; Erminie L. Conley, Assistant Attorney General, of counsel).

David W. Carroll argued the cause for *Amicus Curiae* New Jersey School Boards Association.

The opinion of the court was delivered by MATTHEWS, P.J.A.D.

Petitioner, a tenured high school principal employed by the Plainfield Board of Education, challenges the determination of the State Board of Education that the local board could properly transfer her from her tenured position to the position of elementary school principal (for which she was equally qualified) and that such transfer took place without a reduction in salary. She contends, as she did below, that even though she initially suffered no reduction in salary, there was clearly a reduction in her future salary expectancy because the formula used by the local board to determine salary increments is a lower rate or ratio for elementary school principals than for high school principals. The State Board held that the prohibition against reduction in salary found in *N.J.S.A.* 18A:28-5 for tenured employees did not contemplate salary expectancy but rather referred only to the amount of compensation paid the tenured employee at the time of the transfer.

Petitioner had been employed by the board as principal of Plainfield High School from February 1972 through February 1976. This employment was categorized as a 12-month employment with a salary as of February 1976 of $32,560 per year.

Because of certain deficiencies in her performance, petitioner was transferred to the position of administrative assistant at the school district's central office, a non-tenure-eligible position.

Petitioner served in that position until June 1976 when the board transferred her to the position of principal of Emerson Elementary School. Her salary was frozen at the amount she was earning as principal of the high school. Under the board's formula for administrative positions, a high school principal's salary increment is calculated at a ratio of 1.76 times the base teacher's salary; an elementary school principal's salary is calculated at a ratio of 1.4.

Petitioner appealed to the Commissioner of Education on July 21, 1976. She alleged the initial transfer to administrative assistant and the subsequent transfer to elementary school principal were illegal and violative of her tenure status.

A hearing was held before a hearing examiner in June and August 1977. The hearing examiner filed a written report finding the initial transfer to the position of administrative assistant "procedurally faulty" in violation of *N.J.S.A.* 18A:25-1 which prohibits transfers of teaching staff members except by recorded roll call majority vote of the full membership of the board of education. The hearing examiner, however, found that despite this procedural irregularity the board later ratified the action making it valid. The hearing examiner also found petitioner's transfer to elementary school principal to be proper and within the purview of discretion which may be exercised by the board, particularly because she suffered no salary reduction.

The commissioner, however, disagreed with the hearing examiner's finding and conclusion with respect to both transfers. He found the first transfer illegal as violative of *N.J.S.A.* 18A:25-1 because the board did not have the authority to validate a transfer to a position with an unrecognized title. The commissioner found that "a certificated tenure employee may not be unilaterally transferred without consent to other than a tenure-eligible position"—a description which the position of administrative assistant could not meet.

The commissioner similarly determined that petitioner's subsequent unilateral transfer to an elementary school principalship was improper because the elementary school position had a grossly disproportionate salary expectation when compared to that of a high school principal. He directed the board to reinstate petitioner as a high school principal and to restore any salary increments which she was denied.

The State Board of Education turned the matter over to its legal committee which filed its report on November 16, 1979. The legal committee recommended that the commissioner's decision with respect to petitioner's transfer to the administrative assistant position be affirmed because transfer of a tenured administrator without his consent to an unrecognized title was improper. The committee, however, recommended that the commissioner's decision with respect to the second transfer be reversed.

The State Board of Education adopted the legal committee's report virtually verbatim holding that petitioner's transfer to the elementary school principalship was a proper transfer to a position of equivalent rank and could occur without appellant's consent. As long as the salary is not reduced, a transfer from the position of high school principal to that of elementary school principal is not a demotion: the certification required is the same, tenure can be acquired in both positions and the duties to be performed are of no less importance from an educational standpoint. Seniority rights, according to the State Board, are irrelevant in determining whether a rank or comparable position is involved in a transfer. Seniority has relevance only where a reduction in the employment force is necessary and for no other purpose.

The State Board concluded that appellant suffered no reduction in rank with respect to salary since she retained the same salary she had been earning as a high school principal when she was transferred to the elementary school position. The board found no requirement that transferred tenured employees be paid in future years according to the same schedule of increments that were in force in the position from which the employee was transferred. The only statutory requirement is that there be no reduction in compensation; there is no statutory requirement barring reduction in salary expectancy. The board specifically overruled any prior decisions which had read an expectancy requirement into the transfer and tenure statutes.

Petitioner contends here that her transfer to the position of elementary school principal from that of high school principal is illegal because it violates her tenure rights. She argues that the commissioner's position should be adopted by this court, that is, that a reduction in salary expectancy upon transfer of a tenured employee renders such transfer invalid. She claims that transfer to a position with a lesser salary expectancy amounts to a reduction in rank and as such violates her rights as a tenured

employee. Petitioner urges us to reject the State Board's decision which eliminated the concept of salary expectancy as a factor for consideration when determining whether a transfer is invalid because it effected a reduction in the tenured employee's compensation. She states that the established fact that, as an elementary school principal, her salary will be determined by a ratio of 1.4 rather than the ratio of 1.76 utilized for high school principals, is dispositive of the reduction in compensation issue in her case. She reasons that, although her compensation was not reduced immediately upon her transfer, she now can expect less in the way of salary increase each year that she remains as an elementary school principal as compared to that which she would realize as a high school principal.

Petitioner, as a tenured teacher, is protected by a statutory scheme the purpose of which is to establish a competent and efficient school system by affording to principals and teachers "a measure of security in the ranks they hold after years of service." Because this statutory scheme is an "important expression of legislative policy" our courts have held that it should be given "liberal support, consistent, however, with legitimate demands for governmental economy." *Viemeister v. Bd. of Education of Prospect Park,* 5 *N.J. Super.* 215, 218 (App. Div. 1949).

N.J.S.A. 18A:28-5 is part of that statutory scheme providing tenure to certain enumerated employees of local boards of education. That statute, in pertinent part, provides that "the services of all teaching staff members including all . . . principals . . . shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for" certain enumerated reasons and then only in the manner prescribed in *N.J.S.A.* 18A:6-10. According to *N.J.S.A.* 18A:28-5 tenure is acquired after employment in a given position for the period of time specified in that statute.

Petitioner does not challenge her transfer from high school principal to elementary school principal as an invalid reduction in rank on the ground that she had attained tenure as a high school principal. Her sole argument on appeal is that her transfer from a high school principalship to an elementary school principalship resulted in a reduction of compensation and thus a reduction in her rank, because her salary expectancy is less as an elementary school principal than as a high school principal.

Petitioner relies upon *Gamvas v. Lakewood Township Board of Education,* 1976 *S.L.D.* 509 which the State Board expressly overruled. In *Gamvas,* petitioner, a tenured principal, agreed to be transferred to a new position, director of occupational education, with the understanding that the new position would be comparable to his former position as principal. Included in that understanding was that the salary would likewise be comparable. The first year petitioner held the new position the salary was the same; however, the directorship was awarded an increment lower than that awarded to high school principal. Noting the specific oral agreement between the local board and petitioner with respect to the salary, the hearing officer found that the subsequent decrease in salary for the directorship constituted a violation of petitioner's tenure rights. The commissioner agreed with the conclusion of the hearing examiner, holding:

> . . . if a position continues to exist the tenured holder thereof may not be transferred to a position with lesser expectancy. [at 515]

In so holding the commissioner relied upon two other school law decisions: *Cassidy v. Jersey City Board of Education,* 1938 *S.L.D.* 368 (1930), aff'd St. Bd. 1938 *S.L.D.* 372 (1930); *MacNeal v. Ocean City Board of Education,* 1938 *S.L.D.* 374 (1926), aff'd St. Bd. 1927 *S.L.D.* 377, aff'd N.J. Sup. Ct. 1928 *S.L.D.* 377. According to the commissioner, both decisions hold that transfer to a position with lesser salary expectation was not a transfer to a comparable position. *Id.* at 514

Petitioner, here argues that the approach taken by the commissioner in *Gamvas* with respect to the concept of salary expectancy should be followed by us as the proper approach. She argues that since any further salary increments or adjustments in her position as elementary school principal will be determined by the application of a 1.4 ratio, while future adjustments in a high school principal's salary are formulated by using a 1.76 ratio, her transfer to the former position from the latter is invalid because of the lesser salary expectancy involved.

While our courts have yet to address the concept of salary expectancy using that precise term, some reported decisions do discuss the significance of increases or increments in salary and the deprivation thereof in relation to a claim of a reduction in salary overall. In *Greenway v. Board of Education of Camden,* 129 *N.J.L.* 461 (E & A. 1942), the court rejected appellant's argument that a local board's establishment of the salary schedule providing for annual increments is a conclusive and irrepealable act. The court observed that local boards were under no statutory duty to create salary increments. Thus,

> . . . Increments, as used here, are the periodic, consecutive additions or increases which do not become a part of the salary of a teacher until they accrue under the rule making such provision; and, until the accrual, the modification or repeal of the rule so providing does not constitute a reduction of the current salary. [129 *N.J.L.* at 464]

Similarly, the former Supreme Court rejected the contention of petitioners there who contended that the local board of education improperly refused to conform to a salary schedule which fixed annual salary increments. In *Offhouse v. State Board of Education,* 131 *N.J.L.* 391 (Sup. Ct. 1944), app. dism'd. 323 *U.S.* 667 (1944), the court, citing *Greenway* with approval, held that unaccrued increments do not take on the classification of salary within the meaning of those statutes prohibiting a reduction in salary for tenured employees. 131 *N.J.L.* at 395.

More recently in *Kopera v. West Orange Bd. of Education,* 60 *N.J. Super.* 288 (App. Div. 1960), this court rejected an argument of a tenured teacher that the denial of an increment was in effect a reduction in salary in violation of that teacher's tenure rights. Citing both *Offhouse* and *Greenway* we held that "the failure to receive an increase of salary does not constitute a reduction." 60 *N.J. Super.* at 297. The court continued:

> Tenure is a status, a protection, not a contract, *Redcay v. State Board of Education,* 130 *N.J.L.* 369 (Sup. Ct. 1943), affirmed 131 *N.J.L.* 326 (E. & A. 1944). As a status, tenure protects all teachers who have it, the merely adequate as much as the excellent. However, that does not give all the same rights to increase or promotion. [60 *N.J. Super.* at 298]

While all of the cases just cited predate the enactment of *N.J.S.A.* 34:13A-5.1, *et seq.,* (*L.* 1968, *c.* 303), they nevertheless support the position that future increases in salary, or salary expectation, is not an appropriate factor to be considered when determining the validity of a transfer since tenured employees have no vested right in any future increases in salary.

Turning to the applicable statutes, there is no suggestion, much less an express statement, that future salary increases or adjustments are to be considered in determining the validity of a transfer which is otherwise proper. *N.J.S.A.* 18A:28-5 merely prohibits "reduc[tion[in compensation" except for the reasons stated and in the manner prescribed therein.

We also note that the two cases upon which the commissioner relied in *Gamvas v. Lakewood Township Board of Education,* above, (and upon which appellant in this case relies) are inapposite. In *Cassidy v. Jersey City Board of Education,* 1938 *S.L.D.* 368, the petitioner was a principal of a school for the handicapped who was transferred to the position of principal in an ordinary school. As principal of the former institution she received an additional $200 over that paid to principals of ordinary schools. The commissioner affirmed the transfer but found that petitioner's $200 reduction in salary was improper. The commissioner's determination that petitioner was properly transferred was affirmed by the State Board which noted that, due to a retroactive salary increase, petitioner had not suffered a reduction in salary but had indeed ended up with $150 more in the new position. Thus, the transfer in *Cassidy* did not involve a transfer to a position with a lesser salary expectancy and was affirmed by the State Board on that basis.

In *MacNeal v. Ocean City Board of Education,* 1938 *S.L.D.* 374, the petitioner, a tenured principal, was transferred to a teaching position at a reduced salary—clearly a prohibited demotion

under tenure rules and improper. In the present case, appellant was transferred from one principalship to another.

Finally, petitioner relies upon *Will v. United States*, 478 *F. Supp.* 621 (N.D. Ill. 1979), wherein it was held that congressional enactment of a law prohibiting any cost of living adjustment to take effect with respect to the salaries of federal district court judges violated the compensation clause of Article III, §1 of the United States Constitution because it directly diminished the compensation to which the plaintiff judges were entitled. 478 *F. Supp.* at 625-626. The court there reasoned that since the compensation clause prohibited diminishing the compensation of judges "who hold their offices during good behavior" once Congress fixed a procedure by which salary increases are calculated, it could not subsequently reduce or repeal that provision without violating the Constitution. By analogy, petitioner argues that since her compensation was fixed when she was employed as high school principal, transferring her to the elementary school principalship with its lesser ratio of calculating future increments amounted to a violation of the tenure act, which act appellant compares to the compensation clause of the United States Constitution.

We fail to find an analogy. A tenure act provision clearly does not have the impact of a constitutional provision. Nor does its purpose in anywise equate with the purpose of the compensation clause of the Constitution. That clause was enacted to preserve the independence of the judiciary, "that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support." *Will v. United States*, above, 478 *F. Supp.* at 629, quoting from *O'Donoghue v. United States*, 289 *U.S.* 516, 531 (1932). Tenure laws, on the other hand, are enacted simply to give employment security to those teachers who have served in a certain position for the prescribed number of years.

We conclude that we should affirm the State Board's determination.

[176 *N.J. Super.* 154 (*App. Div.* 1980)]

WOODSTOWN-PILESGROVE REGIONAL BOARD OF EDUCATION, SALEM COUNTY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
JOHN J. KETAS,	:	DECISION
RESPONDENT-APPELLEE.	:	

Decided by the Commissioner of Education, July 24, 1979

For the Petitioner-Appellant, Jordan and Jordan (John D. Jordan, Esq., of Counsel)

For the Respondent-Appellee, Acton and Point (Lawrence W. Point, Esq., of Counsel)

This controversy raises the question whether a former Board Secretary and Business Administrator, who was elected to a seat on the Board of Education, has a disqualifying conflict of interest when the Board has brought suit against him to recover funds allegedly paid to him improperly and the Defendant has counterclaimed against the Board for compensatory and punitive damages.

In our view, a conflict of interest clearly exists, the former employee has disqualified himself from Board membership by filing the counterclaim, and he will not be eligible to serve on the Board as long as the counterclaim is being litigated. We are governed by *N.J.S.A.* 18A:12-2, which reads as follows:

> "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board."

This section and related statutes incorporate the fundamental common law rule that:

> "Public servants shall not be interested, directly or indirectly, in any contract made with public agencies of which they are members. Public service demands an exclusive fidelity. The law tolerates no mingling of self-interest." *Ames v. Board of Education of Montclair,* 97 *N.J. Eq.* 60, 64 (Ch. 1925).

Lack of a conflicting interest is a qualification for board membership. The Appellate Division of the Superior Court so ruled in *Visotcky v. City Council of Garfield,* 113 *N.J. Super.* 263 (1971), where a teacher in a school system was held ineligible to serve as a member of the board of education employing him. The Court's opinion said:

> "It is noteworthy that *L.* 1960, *c.* 93, § 1 is listed as a source of *N.J.S.A.* 18A: 12-1 and 2. The 1960 statute combined sections 1 and 2 in one paragraph, thus indicating the several qualifications required. The separation into sections under the same Article indicate an attempt at clarity. We read into *N.J.S.A.* 18A:12-1 and 2 the need for all the qualifications expressed therein." (at 267)

The rule applies not only to a pecuniary interest, but to a psychological or personal interest as well. As the Court said in *Aldom v. Borough of Roseland,* 42 *N.J. Super.* 495, 502 (*App. Div.* 1956):

> "The interest which disqualifies is not necessarily a direct pecuniary one,

> nor is the amount of such an interest of paramount importance. It may be indirect; it is such an interest as is covered by the moral rule: no man can serve two masters whose interests conflict. Basically the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official. And in the determination of the issue, too much refinement should not be engaged in by the courts in an effort to uphold the municipal action on the ground that his interest is so little or so indirect."

To the same effect see *Griggs v. Princeton Borough,* 33 *N.J.* 207 (1960).

The Courts have further declared it to be essential not only that the judgment of the public body be a righteous one, but also that it be rendered "in such a manner as will beget no suspension of the pureness and integrity" of the action. *Aldom v. Borough of Roseland, supra; Hochberg v. Borough of Freehold,* 40 *N.J. Super.* 276, 284 (*App. Div.* 1956).

In the instant case the Respondent is patently interested in a claim against the Board by reason of his counterclaim, which seeks among other things indemnification from financial loss together with compensatory and punitive damages for a complaint sounding in libel.

We respectfully disagree with the Commissioner's view that the controversy between the parties is so limited that it may be remedied merely by Respondent's abstaining from any discussion of or voting on the matters in dispute. The Respondent is not merely defending his rights under his former employment contract with the Board (which might in itself disqualify him, although we do not now decide that question). He has gone much further here, actively suing the Board for compensatory and punitive damages. Obviously Respondent's conflict with the Board is strong and persistent. In this situation the law requires a person to choose between sitting on the Board and litigating his claims against it. So long as the litigation over the counterclaim continues, the Respondent lacks eligibility to be a member of the petitioning Board.

The counterclaim was not filed until after Respondent's election to the Board. However, even if he were validly elected, his assertion of claims against the public body for compensatory and punitive damages caused him to be removed as a board member for lack of an essential qualification for the office, and his seat became vacant.

The State Board reverses the Commissioner's order, and declares the Respondent's seat vacant. The State Board further directs that the vacancy be filled through appointment by the County Superintendent pursuant to *N.J.S.A.* 18A:12-15(a).

Attorney Exceptions are noted

Jack Bagan abstained in the matter

February 6, 1980

New Jersey
State Department of Education
225 West State Street
Trenton, N.J. 08625