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# NEW JERSEY SCHOOL LAW DECISIONS

## Indexed

January 1, 1978 to December 31, 1978

## vol. 1

New Jersey
State Department of Education
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**In the Matter of the Tenure Hearing of**

**Anthony Grandrino,**

**School District of the Township of Gloucester, Camden County.**

## COMMISSIONER OF EDUCATION

## INTERIM ORDER

For the Complainant Board, John D. Wade, Esq.

For the Respondent, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

Respondent, a custodian with a tenure status employed by the Gloucester Board of Education, hereinafter "Board," was suspended from his custodial duties by the Board on November 10, 1975, subsequent to its certification of charges against respondent. On November 24, 1975, the Board filed its certification with the Commissioner of Education that the written charges against respondent would be sufficient, if true in fact, to warrant his dismissal or a reduction in his salary. *N.J.S.A.* 18A:6-11

One day of hearing on those charges was conducted on September 22, 1976 by a hearing examiner appointed by the Commissioner. The second day of hearing was scheduled for October 25, 1976 in the office of the Camden County Superintendent of Schools. On the appointed day the hearing examiner and a certified court reporter appeared to conduct the hearing; however, neither attorney appeared as scheduled. It was learned that counsel for respondent had communicated with counsel for the Board on October 22, 1976, and postponed the hearing set down for October 25, 1976. Respondent failed, however, to file his request for a postponement of the hearing with the Commissioner as provided in *N.J.A.C.* 6:24-1.11(b) as follows:

> "***(b) In hearings before the Commissioner, any postponement therein requested by one of the parties may be granted if the Commissioner determines that the request is based on good and sufficient reasons and accompanied by timely notice. 'Good and sufficient reasons' may include, but are not limited to:
>
> 1. Unavoidable appearance by the attorneys or either party before any court of this State or of the United States;
>
> 2. Illness of the petitioner, the respondent or their attorneys, evidenced by a doctor's certificate of illness, and/or an affidavit from the parties or their attorneys, at the discretion of the Commissioner."

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Subsequently, on November 12, 1976, the second day of hearing in the instant matter was continued. Respondent asserted that due to the postponement of the scheduled day of hearing on October 25, 1976, the Board took action to discontinue salary payments to respondent effective November 1, 1976. Respondent, therefore, propounded a Motion for Compliance by the Board with respect to *N.J.S.A.* 18A:6-14 which provides:

> "Upon certification of any charge to the Commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which event he shall be reinstated immediately with full pay as of the time of such suspension."

Respondent therefore moves that his salary be restored for the period of improper discontinuance by the Board on November 1, 1976.

The Commissioner has considered the facts, arguments and the documents which are a part of this record. He observes that *N.J.S.A* 18A:6-14 controls with respect to a suspended tenured employee and its enforcement is clearly enunciated in *Kathleen Pietrunti v. Board of Education of Brick Township*, 128 *N.J. Super.* 149 *(App. Div.* 1974), *cert.* denied 65 *N.J.* 573 *(Sup. Ct.* 1974), *cert.* denied 419 *U.S.* 1057 (1974) and *In the Matter of the Tenure Hearing of Paula M. Grossman, a/k/a Paul M. Grossman, School District of the Township of Bernards*, 127 *N.J. Super.* 13 *(App. Div.* 1974), *cert.* denied 65 *N.J.* 292 (1974), wherein the Court stated:

> "***It seems clear that in enacting it [*N.J.S.A.* 18A:6-14] the Legislature must have had in mind the economic hardship endured by teachers and other Board of Education employees suspended without pay pending the outcome of charges filed against them and certified for hearing to the Commissioner of Education. We are certain, moreover, of the Legislature's awareness that in many instances, because of the volume of matters awaiting hearing, a prompt disposition of charges is not feasible. Thus, the obvious intent and purpose of the amendment was to alleviate the financial plight

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of those affected by providing for the payment of their full salary (less sums received from other employment during suspension) from the 121st day following the certification of charges until the determination thereof by the Commissioner, or in the case of an appeal, by a Board from a decision adverse to it, until the determination of the appeal.***''

(127 *N.J. Super.* at 35-36)

There is the finding, however, that respondent did in fact cause a delay in the pursuit of a timely hearing in the instant matter. All days of delay in the hearing procedure caused by respondent shall be excluded from the 120 day provision. *In the Matter of the Tenure Hearing of Anthony Polito, School District of the Township of Livingston, Essex County,* 1974 *S.L.D.* 662; *In the Matter of the Tenure Hearing of Walter Kizer, School District of the Borough of Haledon, Passaic County,* 1974 *S.L.D.* 501

Accordingly, the Board of Education of the Township of Gloucester is hereby ordered to pay to Anthony Grandrino his full salary as of November 12, 1976, pursuant to the terms of *N.J.S.A.* 18A:6-14, mitigated by all earnings from any substituted employment.

IT IS SO ORDERED on this 29th day of December 1976.

COMMISSIONER OF EDUCATION

## DECISION

For the Complainant Board, John D. Wade, Esq.

For the Respondent, Goldberg, Simon & Selikoff (Joel S. Selikoff, Esq., of Counsel)

The Board of Education of the Township of Gloucester, hereinafter ''Board,'' on November 24, 1975, filed a series of eight charges of conduct unbecoming a janitor with the Commissioner of Education, certifying that charges would be sufficient to warrant suspension without pay, pending a final determination by the Commissioner.

A hearing in this matter was conducted on September 22, November 12, 1976 and February 15, 1977 at the office of the Camden County Superintendent of Schools by a hearing examiner appointed by the Commissioner.

Respondent improperly adjourned a hearing originally scheduled for October 25, 1976 through failure to file a request for the postponement as provided in *N.J.A.C* 6:24-1.11(b). The Board took action to discontinue salary payments

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to respondent for all days of delay in the hearing procedure caused by him to be excluded from the 120 day payment provision subsequent to his suspension by the Board. (Tr. II-3-13) the Commissioner concurred with the Board's action and suspended respondent's pay for the period of delay as provided by *N.J.S.A.* 18A:6-14. *In the Matter of the Tenure Hearing of Anthony Grandrino, School District of the Township of Gloucester, Camden County,* (ordered December 29, 1976). The report of the hearing examiner follows.

The following charges against respondent were certified by the Board to the Commissioner and arose as the result of alleged actions by respondent on October 14 and 15, 1975:

1. Insubordination to superiors;

2. Failure to perform assigned duties;

3. Failure to be in assigned area;

4. Taking unauthorized rest period;

5. Physical threat to superior;

6. Threat to do bodily harm;

7. Failure to follow administrative directions; and

8. Lack of cooperation with superiors.

The relevant facts not in dispute are that respondent was a night janitor whose working hours were 3:00 p.m. to 11:30 p.m., Monday through Friday, and that he had volunteered, as a part of his regular assignment, to take charge of the school gymnasium when it was used for after school activities.

A female physical education teacher testified that the Physical Education Department had scheduled the use of the gymnasium, through the school principal, for a Mother-Daughter Night on the evening of October 14, 1975. Subsequent to her arrival and in preparation for the activity she stated that a man and several young boys appeared for a scheduled basketball practice. The man representing the outside group informed her that he had not been notified of a conflict for the use of the facility. She asserted that she was sympathetic with his problem to find ways to get the boys back to their homes; however, she informed him that he would have to forego the use of the gymnasium in favor of the school sponsored program. She testified that the man appeared to be somewhat annoyed and that respondent entered the conversation to suggest that, inasmuch as proper notification had not been afforded the outside group, the doors which divide the room should be closed to permit the basketball team to practice during the Mother-Daughter Night activities. She stated that because of the large number of people expected for the evening, it would have been impossible to give up any section of the facility. She testified further that

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respondent stated that since the outside group had not been notified of the conflict it was only fair that, as an alternative, she send her group home. She stated she was so upset that she almost had a very serious altercation with respondent in front of a community member when respondent asserted his opinion which was neither solicited nor needed. (Tr. I-98-111) The following morning she reported to the school principal that respondent had placed her in a difficult position with the representative of the outside group by offering his opinion when there was nothing that could have been done to accommodate the boys' basketball practice. She stated that she was extremely upset over the incident but did not discuss the matter further with respondent. (Tr. I-113–114)

The head custodian of the school testified that he had set up cafeteria tables in the gymnasium during the day, on October 14, 1975, in preparation for the Mother-Daughter Night and in the afternoon reminded respondent that the program was to take place that evening. He asserted that respondent stated he was aware of the school sponsored activity. (Tr. I-77-78)

The school principal testified that on the morning following the Mother-Daughter Night, the physical education teacher was upset when she reported to him that respondent had overstepped his authority and made a difficult situation more difficult with his intercession on behalf of the outside group on the previous evening. (Tr. I-128) He stated that the teacher had made the appropriate application for the use of the facilities, which he had approved, and further that she had full authority during the course of the evening on October 14, 1975. He indicated that the extent of respondent's responsibilities for the gymnasium was to unlock the facility at the scheduled hour, check the lighting and subsequently lock the doors at the conclusion of the activity. (Tr. I-129-131)

The principal testified that he met with respondent on the afternoon of October 15, 1975 and stated that he was concerned about the situation that had developed the previous night as reported to him. He asserted that respondent became upset, indicating that the teacher had lied, threw his keys on the principal's desk and stated that he would not handle outside groups any longer and stormed out of the office. The principal stated that he contacted respondent's supervisor, the superintendent of buildings and grounds, to report respondent's unacceptable behavior.

Shortly thereafter, the principal testified, he received a telephone call from the Assistant Superintendent in charge of noninstructional personnel, the superintendent of buildings and grounds' superior, who suggested that respondent be suspended from duty until it could be determined whether or not respondent would fulfill his assigned duties. The principal asserted such an action was too hasty and that he believed that he could smooth things over after respondent had had the opportunity to calm down. Subsequently, the principal located respondent and asked him to assume the duty for the night, to which, the principal asserted, respondent agreed. (Tr. I-132-133, 147, 150)

The superintendent of buildings and grounds testified that the school principal had called him on the afternoon of October 15, 1975 to report the incident

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of the previous evening between the physical education teacher and respondent. He read into the record the Board's policy, *inter alia,* with regard to a janitor's responsibility to handle differences or problems which might arise as follows:

> "***Under *no* circumstances shall the custodian discuss any problems or differences with a teacher of staff members of another department. He shall report these problems directly to the Building Principal. If after a reasonable time the condition still exists, report the matter to the Superintendent of Buildings and Grounds. If the Superintendent of Buildings and Grounds cannot resolve the situation with the Building Principal, he will forward it to the Assistant Superintendent of Non-Instructional Personnel for a final decision.***" *(Emphasis in text.)* (Tr. I-165; P-1, at p. 14)

At approximately 10:30 p.m. on October 15, 1975, the superintendent of buildings and grounds testified that he went to respondent's school for the purpose of discussing future intentions with regard to respondent's assigned responsibility for the after school use of the gymnasium. He testified that he went to respondent's assigned work area and found that he was not present, the classrooms were dark and the doors locked. He inquired of the other janitors who were on duty about respondent and they stated that they had not seen him since early in the evening. After approximately thirty-five minutes, he located respondent and a co-worker watching television in a darkened classroom assigned to the co-worker. He testified that both men stood up when he entered the classroom and he advised them that they should not be watching the World Series but, rather, that they should be working in their assigned areas because it was not yet quitting time. He stated that respondent took exception to his remarks, claiming that his work area was finished and that he had a right to watch television, particularly the World Series. He instructed the men to turn off the television set, return it to its proper classroom and return to their assigned work areas until the end of their shift. He stated that respondent's co-worker left the classroom and as he and respondent followed into the corridor, respondent lost control of his emotions and "***stuck his fist up in my face and used some quite vulgar profanity and said he was going to bust my nose.***" (Tr. I-177) After the argument had continued for eight or nine minutes, the co-worker suggested that respondent "***take a walk down the hall and cool off***." The superintendent of buildings and grounds testified that he then discussed his criticism of the men watching television with the co-worker, who, he asserted, was rational and accepted his criticism. He stated that respondent returned to threaten him again and turned to leave the area. (Tr. I-169-180) He testified that on the subsequent day he prepared and submitted a memorandum to the Assistant Superintendent in charge of noninstructional personnel, in regard to respondent's actions on October 14 and 15, 1975. (Tr. I-185-187; P-2)

The Superintendent of Schools testified that he conducted a meeting with respondent and respondent's official representative at approximately 3:30 p.m. on October 16, 1975. He also called to the meeting the Assistant Superintendent in charge of noninstructional personnel, the principal and the head custodian. He asserted that respondent admitted he was watching television as reported;

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however, respondent told him that he was waiting for a classroom floor to dry and that was the reason he was in an area other than his assigned work area. The Superintendent testified that respondent admitted that he used profane language and had threatened the superintendent of buildings and grounds, however, respondent reported that profanity and threats had also been made to him by the superintendent of buildings and grounds. (Tr. I-7-14, 49)

The Superintendent stated that subsequent to the meeting held on October 16 and the reports submitted to him about respondent's actions on October 14 and 15, 1975, he drew up the eight charges and presented them to the Board. (Tr. I-34, 50-58) He testified that the Board notified respondent to appear before it to answer questions with regard to the charges. He stated that respondent appeared before the Board with a representative who would not permit respondent to comment about the charges. The Board discussed respondent's actions of October 14, 15 and 16 with the administrators present and subsequently certified the charges. (Tr. I-62-63)

Respondent testified that he did not receive advanced notice that the Physical Education Department was to use the gymnasium for a Mother-Daughter Night on the evening of October 14, 1975. He testified that he had not been notified in writing, nor did the head custodian tell him about the activity, but he was informed by the physical education teacher in charge of making preparations for the program. He asserted that when the basketball team arrived, he informed the individual in charge that he could not use the facility and that he should make arrangements to return at a subsequent time. There occurred a five minute discussion with the teacher and the man in charge of the basketball team who stated that he had not been notified of the conflict in the schedule. Respondent testified that the man inquired about the use of one half of the gymnasium but the teacher stated that it was necessary to use the whole facility, and the team therefore could not use any portion during the program. The man then asked if the team could practice until the parents and pupils arrived and, he asserted, the teacher agreed. (Tr. II-113-117, 120)

In lieu of testimony, both parties stipulated that the oral deposition of the man in charge of the basketball team would be made a part of the record in the instant matter. (Tr. III-10-13) He stated that he was unaware there was a conflict in the schedule on the evening of October 14, 1975 until the teacher informed him that the team could not engage in their practice because of the scheduled Mother-Daughter Night. It was his suggestion, he contended, to use a corner area of the gymnasium until the participants arrived thus providing him the opportunity to call the boys' parents to return immediately and pick them up. He stated that the teacher and the janitor were polite and he was appreciative for their help under the circumstances. He asserted that there were no disagreements voiced by the teacher or janitor during the conversation but, rather, they tried to be helpful. (PR-4, at pp. 4-10)

With regard to the incident of the evening of October 15, 1975, respondent admitted that he and his co-worker had taken a television set from the audiovisual room and placed it in a classroom between nine and nine-thirty in order to watch

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the World Series. He stated that the television set was placed in a classroom designated as E-2 because it was in proximity to his co-worker's cleaning activities and also because he could observe the gymnasium and the main corridor which were in use during the evening. He asserted that the two of them worked together during the course of the evening and on occasion would go to the classroom to check the score until approximately eleven o'clock when they sat down to watch a disputed play. Respondent testified that he was working with the other janitor because his floor buffing machine was broken and needed repair. He testified that approximately five minutes had passed when the superintendent of buildings and grounds appeared and stated, "I like to watch TV too" whereupon respondent stated, "Go ahead, watch it" and started to leave the classroom. (Tr. II-135) Respondent asserted that the superintendent of buildings and grounds threw his brief case on a desk, ordered respondent to return to the classroom and angrily cursed him. Respondent testified. "***Well, I walked back to him and I told him to get off my back or I'll punch him in the nose or mouth***." (Tr. II-138) Respondent stated that he made the statement only once during the argument with the superintendent of buildings and grounds and subsequently left the school at the completion of his shift. (Tr. II-129-141, 186-191; Tr. III-20-23; R-2)

Respondent's co-worker testified that respondent had assisted him with the scrubbing and waxing of a classroom on the evening of October 15, 1975. He admitted that they had removed a television set from the audiovisual room and placed it in classroom E-2 to watch the World Series. He stated that he and respondent were seated watching television for approximately five minutes when the superintendent of buildings and grounds arrived and an argument ensued between respondent and the supervisor which lasted approximately eight to ten minutes. He testified that the supervisor threw his portfolio on a desk and cursed the man, after which he heard respondent threaten to punch the superintendent of buildings and grounds. He stated that he attempted to avoid involvement in the argument and subsequent to respondent's threat, he suggested that respondent leave the area, which he did. (Tr. II-71-78, 88-95)

The hearing examiner recommends that Charge No. 2, "Failure to perform assigned duties," be dismissed. There was no showing by the Board that respondent had failed to carry out his assigned duties for the gymnasium subsequent to the incidents on the evening of October 14, and the afternoon of October 15, 1975, as alleged. Similarly, the Board failed to carry its burden of proof with regard to Charges Nos. 7 and 8; therefore, the hearing examiner recommends their dismissal.

In final summary, the hearing examiner finds the weight of credible evidence to support the following charges:

1. Insubordination to superiors;

3. Failure to be in assigned area;

(This charge is mitigated only by the fact that respondent was helping a co-

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worker scrub and wax classroom floors. In all other respects, the charge is sustained.)

4. Taking unauthorized rest period;

5. Physical threat to superior; and

6. Threat to do bodily harm.

The hearing examiner, having found that Charges Nos. 1, 3, 4, 5 and 6 are proven to be true in fact, leaves to the Commissioner to determine what penalty may properly be exacted as a result thereof.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions and objections filed thereto by the parties pursuant to *N.J.A.C* 6:24-1.17(b). Respondent urges that the hearing examiner erred with respect to his findings which support the charges, *ante,* by his failure to consider the charges *seriatim,* by his failure to consider all the testimony elicited by respondent in his defense, by finding charges to be true in fact without setting forth a basis for such findings, by attaching credibility to the testimony of the physical education teacher and the superintendent of buildings and grounds, and by his alleged failure to consider mitigating factors with respect to the charges.

The Commissioner has carefully reviewed respondent's general objections and finds no basis in fact to support them. In the instant matter the hearing examiner considered the totality of the charges with regard to respondent's actions on October 14 and 15, 1975. The whole of the charges has been amply considered by the hearing examiner in his report; therefore, the Commissioner has been presented no basis upon which to set aside the findings. The hearing examiner's factual findings are supported by competent evidence. *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13 *(App. Div.* 1974); *In re Hackensack Water Co. Application,* 132 *N.J. Super.* 296 *(App. Div.* 1975)

The Commissioner observes that in his objections, respondent acknowledged that he did indeed threaten to punch the superintendent of buildings and grounds. (Respondent's Exceptions and Objections, at p. 4) The Commissioner observes that the standard used in administrative hearings with respect to the evidence necessary to establish the truth of a charge is the weight of credible evidence. A tenure charge need not be proven beyond a reasonable doubt. *Pilon v. Board of Alcoholic Beverage Control,* 112 *N.J. Super.* 436 *(App. Div.* 1970) The Commissioner agrees with and adopts as his own the hearing examiner's finding of fact that the weight of credible evidence establishes the truth of the charges. The Commissioner so holds.

It remains for the Commissioner to determine whether respondent's conduct

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warrants dismissal from his position of employment with the Board. In *Redcay v. State Board of Education,* 130 *N.J.L.* 369 *(Sup. Ct.* 1943), aff'd 131 *N.J.L.* 326 *(E.&A.* 1944) it was held that:

> "***Unfitness for a task is best shown by numerous incidents. Unfitness for a position under 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.***"
>
> (*Emphasis supplied.*) (130 *N.J.L.* at 371)

Respondent, by his actions on the evening of October 15, 1975, in removing without proper authorization a television set from the audiovisual room and placing it in a classroom outside of his assigned work area for the purpose of watching the World Series during working hours and by his subsequent threat to do bodily harm to his superior, has displayed unfitness for the task of being a member of the custodial staff in the employ of the Board. The Commissioner so finds.

Accordingly, the Commissioner determines that Anthony Grandrino is dismissed from his position as janitor in the employ of the Board of Education of the School District of the Township of Gloucester, Camden County, as of the date of his suspension, November 24, 1975.

COMMISSIONER OF EDUCATION

## STATE BOARD OF EDUCATION

## DECISION

Decided by the Commissioner of Education, January 4, 1978

For the Petitioner-Appellee, John D. Wade, Esq.

For the Respondent-Appellant, Joel S. Selikoff, Esq.

The State Board remands this case to the Commissioner of Education for a finding of facts by the Hearing Examiner as to (a) how many incidents occurred, (b) had the Superintendent threatened petitioner, (c) was work completed while petitioner was out of work area. The State Board does not retain jurisdiction in the matter.

July 6, 1978

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**In the Matter of the Annual School Election Held in the Greater Egg Harbor Regional School District, Constituent District of the Township of Hamilton, Atlantic County.**

## COMMISSIONER OF EDUCATION

## DECISION

The announced results of the balloting for candidates to one three-year term and one unexpired term from the constituent district of the Township of Hamilton on the Board of Education of the Greater Egg Harbor Regional School District at the annual school election held on March 22, 1977 were as follows:

*THREE YEAR TERM*

| | *AT POLLS* | *ABSENTEE* | *TOTAL* |
|---|---|---|---|
| Aline Dix | 321 | 4 | 325 |
| Louis W. Curcio, Jr. | 356 | 7 | 363 |

*UNEXPIRED TERM*

| | *AT POLLS* | *ABSENTEE* | *TOTAL* |
|---|---|---|---|
| Donald Boughton | 257 | 4 | 261 |
| Dean J. Linardo | 240 | 2 | 242 |
| Richard E. Barish | 64 | 2 | 66 |
| James E. Fraleigh | 90 | 3 | 93 |

Pursuant to letter requests dated March 27 and April 1, 1977 from Candidate Dix, a recount of the votes cast for the candidates and an inquiry of alleged irregularities in the conduct of the election were conducted by an authorized representative of the Commissioner of Education at the voting machine warehouse of the Atlantic County Board of Elections on April 7, 1977. Subsequent to an amended complaint filed by Candidate Dix on April 25, 1977, the matter was continued on May 25, 1977 at the office of the Atlantic County Superintendent of Schools, Mays Landing.

The recount of the ballots cast for the candidates on the voting machines confirmed the results previously announced.

Candidate Dix alleges that major election irregularities occurred in regard to the distribution of campaign literature, the comparison of voter signatures and the assignment of voter authority slips, electioneering, tampering with one of the voting machines, and the improper use of school facilities during the election.

In regard to the first major complaint, Candidates Curcio and Boughton testified that they had jointly prepared a flyer (C-11) which endorsed their candidacy and set forth their biographical sketches. *N.J.S.A.* 18A:14-97 requires the following:

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"No person shall print, copy, publish, exhibit, distribute or pay for printing, copying, publishing, exhibiting or distribution or cause to be distributed in any manner or by any means, any circular, handbill, card, pamphlet, statement, advertisement or other printed matter having reference to any election or to any candidate or to the adoption or rejection of any public question at any annual or special school election unless such circular, handbill, card, pamphlet, statement, advertisement or other printed matter shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed, copied or published or of the name and address of the person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published."

The flyer, as originally printed and distributed, carried the legend:

"PAID FOR BY FRIENDS OF THE ABOVE CANDIDATES."

(C-11)

The testimony of Candidates Curcio and Boughton, as well as their campaign manager who is also a teaching staff member in the employ of the Board, and testimony of the Board Secretary established the following facts:

Candidates Curcio and Boughton prepared the contents of the controverted flyer. (Tr. I-13, 16) They gave the flyer to their campaign manager who had his wife type the document in preparation for the printer. (Tr. II-75) The Board Secretary, who supported the candidacies of Curcio and Boughton and contributed financial support to their campaign (Tr. II-109-110), testified that the campaign manager brought the flyer to him and that he, in turn, took the flyer to the Schiff-Charney printing firm in Atlantic City. (Tr. II-111) The Schiff-Charney printing firm billed (C-12) the Board Secretary $63. for 4,000 copies of the flyer.

The campaign manager testified that when he discovered that *N.J.S.A* 18A:14-97 requires the name or names and addresses of the persons causing the flyer to be printed, he had his friend, also a teaching staff member in the employ of the Board, stencil on each of the remaining flyers which had not yet been distributed, the following addition to the original legend (Tr. II-77):

"Carl T. Anderson [here follows his hime address.]" (C-1)

The campaign manager testified that his friend used his own stenciling machine located in his home to perform this task for him. (Tr. II-78) The campaign manager also testified that, in addition to himself, the Board Secretary and the two candidates contributed to the cost of printing the flyers. (C-11)

The hearing examiner finds, witn respect to this precise allegation concerning this flyer (C-11), that it originally violated the provisions of *N.J.S.A.*

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18A:14-97 for failure to state on its face the names and addresses of those who paid for the printing, as well as failure to state the name and address of the printer who printed the flyers. The inclusion of the campaign manager's name and address, albeit belated, did not correct the violation. This is so, for by his own testimony three other persons helped defray the cost and the printer's name was not included.

The hearing examiner finds that while the precise provisions of *N.J.S.A.* 18A:14-97 were not followed with respect to this flyer (C-11) or the attempted correction (C-1), there is no evidence in the record to establish that the distribution of the flyer thwarted the will of the people.

A more serious aspect with respect to the distribution of the flyer (C-11) is the fact that a teaching staff member in the employ of the Board distributed twenty of the flyers to school pupils to take home to their parents. *N.J.S.A.* 18A:42-4 is clear and unambiguous on its face and is reproduced here in full:

> "No literature which in any manner and in any part thereof promotes, favors or opposes the candidacy of any candidate for election at any annual school election, or the adoption of any bond issue, proposal, or any public question submitted at any general, municipal or school election shall be given to any public school pupil in any public school building or on the grounds thereof for the purpose of having such pupil take the same to his home or distribute it to any person outside of said building or grounds, nor shall any pupil be requested or directed by an official or employee of the public schools to engage in any activity which tends to promote, favor or oppose any such candidacy, bond issue, proposal, or public question. The board of education of each school district shall prescribe necessary rules to carry out the purposes of this section."

The teacher testified that she is an aide for a Girl Scout troop which meets in the Shaner School. She testified that a meeting of the troop, composed of girls between the ages of nine and twelve, was held at Shaner School after the regular school day on March 22, 1977, the day of the election. Subsequent to a discussion of the election process, the teacher testified she simply distributed about twenty flyers (C-11) endorsing the candidacies of Curcio and Boughton to the Girl Scouts who requested them. (Tr. II-38-43)

In the hearing examiner's judgment the fact that the regular school day had ended and that the Girl Scouts are comprised of public and private school pupils does not make the teacher's action proper. The flyers were distributed to pupils on school ground in direct contravention of *N.J.S.A.* 18A:42-4.

The campaign manager testified that he is solely responsible for the distribution of another flyer (C-2) supporting Candidates Curcio and Boughton. He testified that the flyer was typed in his home and printed by the friend who had stenciled the correction on the previous flyer (C-11) in his home. (Tr. II-99) The campaign manager testified that his friend donated the paper and ink for the printing of this second flyer (C-2) which carries the legend:

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"Paid for by Carl Anderson [here follows his home address.]"

It is obvious that once again the precise provisions of *N.J.S.A.* 18A:14-97 were not followed for failure of the legend to state the name and address of the printer. There is no evidence in the record to establish that the distribution of this flyer (C-2) thwarted the will of the people.

Candidate Dix complains that another four-page flyer (C-6), endorsing Candidate Barish, violates the provisions of *N.J.S.A.* 18A:14-97. The hearing examiner has reviewed this flyer and finds that the failure of the legend to state the name and address of the printer who printed the flyer does violate the precise provisions of the referenced statute. Candidate Barish testified that he operated the Xerox 9200 machine and paid $74 for 999 copies, presumably for the cost of the machine and paper. (Tr. II-30-31) The legend on the flyer does state:

> "Ordered and paid for by Richard E. Barish [here follows his home address.]" (C-6)

In the hearing examiner's view, the addition of the words "and printed" to that portion of the legend which reads "Ordered and paid" would have corrected the statutory deficiency. No proofs have been submitted which establish that the distribution of this flyer (C-6) has thwarted the will of the people.

Candidate Dix complains of a flyer (C-7) distributed by a citizen in the community which seeks to rally the citizens to protest proposed budget reductions being considered by the Board at the beginning of March 1977. The hearing examiner finds that this flyer is not campaign literature as contemplated in *N.J.S.A.* 18A:14-97. Consequently, the provisions of the statute do not apply and no further discussion of this flyer (C-7) is necessary.

Candidate Dix alleges that another flyer (C-8), which attacks her voting record while a member of the Board, violates the provisions of *N.J.S.A.* 18A:14-97 for failure to include any legend.

A citizen of the community, called as a witness by Candidate Dix, testified that while he used the flyer in the election he has no knowledge of where the flyer was prepared, typed, or printed. The citizen also testified that he does not recall where he obtained the several copies of the flyer he distributed.

The hearing examiner finds this testimony incredible in light of the citizen's further testimony that he discussed the contents of the flyer with Candidate Dix on March 24, 1977 and that he refused to tell her the origin of the flyer because of a personal difference which existed between them. (Tr. II-29-31) Consequently, the hearing examiner is not convinced of the veracity of the testimony of the citizen. *N.J.S.A.* 18A:14-98 provides in full as follows:

> "If a person shall be guilty of willful and corrupt false swearing or affirming, or by any means shall willfully and corruptly suborn or procure a person to swear to affirm falsely, in taking any oath, affirmation or dep-

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osition prescribed or authorized by this law, he shall be deemed guilty of a high misdemeanor, and shall be punished by a fine not exceeding $800.00 or imprisonment at hard labor not exceeding seven years, or both, and be deemed to be an incompetent witness thereafter for any purpose within this state, until such time as he shall have been pardoned.''

Accordingly, the hearing examiner recommends that the Commissioner refer that portion of the transcript and other relevent data, with respect to the sworn testimony of this citizen, to the Atlantic County Prosecutor for whatever action, if any, is warranted.

The hearing examiner observes that Candidate Dix sought to establish that several of the controverted flyers (C-1, 2, 8, 11) were printed at the Greater Egg Harbor Oakcrest or Absegami High School facilities through a comparison of the printing marks left on documents established to have been printed at either high school facility. The hearing examiner finds no basis upon which such a conclusion may be drawn by such a comparison.

Candidate Dix, in regard to the second major area of complaint, asserts that election workers failed to compare voters' signatures with the signature copy register as required by *N.J.S.A.* 18A:14-51, that election workers allowed persons to vote without assigning a voting authority slip number to their signatures on the poll list, that voters were assigned voting authority slip numbers which had already been assigned to other persons who had voted, that voting authority numbers were distributed out of sequence, that persons were authorized to vote without stating their street address or stating incorrect street addresses, that one person was allowed to vote twice, and that an unregistered voter was allowed to cast a ballot.

The testimony of Candidate Dix and the Board Secretary for the Greater Egg Harbor Regional Board of Education plus documentary evidence, which shall be discussed, shows that the election in the constituent district of Hamilton Township was conducted in less than an efficient fashion.

It is initially observed that there are three polling places in Hamilton Township. Two polling places are located at the Hamilton Township Board's Duberson School and are designated as polling places numbers seven and eight, while polling place number nine is located at the Mizpah Fire House, Mizpah.

Polling place number seven contains three municipal election districts, polling place number eight contains four municipal election districts, and polling place nine contains one municipal election district. In each polling place, a poll list was devised for each municipal district and each poll list was further divided into two parts. The first poll list was for voters whose surname began with letters A through K, while the second part of the poll list was for voters whose surnames began with letters L through Z.

The public counter of the machine used at polling place number seven established during the recount that 280 persons cast ballots. The sealed package

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of results forwarded to the Atlantic County Superintendent of Schools by the Board Secretary of the Regional Board pursuant to *N.J.S.A.* 18A:14-62 contains voting authority slips numbered 1-280. The combined poll lists for polling place number seven sets forth 281 persons who claimed their right to vote. Notwithstanding this discrepancy between the public counter which recorded a total vote cast of 280 ballots and the poll lists containing 281 signatures, there is no assignment of voting authority numbers 48, 90, 113, 145, 167, 229 or 230 to any of the signatures. Furthermore, in four instances the same voting authority number was assigned two voters who signed the poll lists: numbers 47, 78, 168 and 227. In one instance, the same voting authority number, 238, was assigned three voters. (C-15) Obviously, one voter was not assigned any voting authority number.

It is noticed that the signature of one of the three persons assigned the voting authority number 238 in polling place number seven, Marcia Fisher, is also registered as the signature of the person who voted in polling place number eight, with voting authority number 307. It appears that the person who registered the name Marcia Fisher may have cast a ballot on two different occasions in the same election. It is recommended that the Commissioner refer this matter to the Atlantic County Prosecutor for action, if any, which may be warranted.

An examination of the poll lists establishes that the election officials for each of the three minicipal election districts in polling place number seven were not assigned sequential voting authority numbers as the voters appeared to cast their ballots. In each instance, voting authority numbers are assigned out of sequential order. It is further established that, instead of the election officials assigning voting authority numbers, the individual voters were allowed to write in what they felt would be their assigned number. Needless to say, this procedure helped create the confusion which now exists.

The same procedure was followed in polling place number eight. The public counter of the voting machine used at this polling place established at the recount that 345 persons cast ballots. There are 345 voting authority slips in the sealed package and 344 signatures on the combined poll lists. An affidavit is also enclosed in the sealed package executed by one Helen Fink attesting to her eligibility to vote and the notations on the affidavit that she was assigned voting authority number 183. There is no voting authority number 183 on the poll list; consequently, this person was allowed to vote without signing the poll list.

The poll lists for polling place number eight has no assignment of voting authority numbers 22, 27, 51, 52, 79, 80, 95, 185, 189, 205, 206, 209, 210, 216, 222, 224, 113, 115, 148, 153, 234, 241, 260 or 280. Furthermore, two signatures have no voting authority numbers to the left of their names and voting authority numbers 25, 49, 50, 111, 203, 208, and 228 were assigned in each case to two voters. In similar fashion to the poll lists in polling place number seven, the election officials failed to assign the voting authority numbers in sequential order. In fact, the voters in polling place number eight also wrote in their presumed voting authority number. (Tr. II-149)

The public counter of the voting machine used at polling place number nine

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established at the recount that 78 persons cast ballots. There are 78 voting authority slips in the sealed envelope and 78 names registered on the poll lists. Here, also, the voting authority numbers, while all 78 are accounted for, were not assigned in sequential order. In many instances the voters failed to report their street address and instead reported their residence as simply Mizpah.

It is noticed that a person who executed the signature of Eugene Blackwell with the reported address of Mizpah is not a registered voter in Atlantic County. The Atlantic County Commissioner of Registration confirmed this as fact by letter dated June 2, 1977. (C-22)

The hearing examiner has reviewed the testimony of the one election official who asserts that she did, in fact, check all signatures with the signature copy register of persons who presented themselves to cast ballots. The hearing examiner finds that while the testimony from this one official is credible, the circumstances herein establish that other election officials could not have been so assiduous. Such irregularities as a person who appears to have voted twice, a person not registered allowed to vote, voting authority numbers not being sequentially assigned while other numbers are assigned to different persons and, on one occasion, to three persons support a finding that the election officials were lax in their duties.

Candidate Dix, with respect to her allegation that electioneering occurred during the election, failed in her proofs to establish the truth of this allegation. No testimony was elicited nor documentation submitted to support her claim in this regard.

In regard to the allegation that a voting machine was tampered with, one voting machine did lose a key over a black-out alongside a candidate's name. A county election worker asserts in his affidavit that he went to the voting machine to fix the automatic curtain and the key. During the time of the machine's malfunction eight ballots were cast which were not counted for any candidate. He asserts that at no time did he tamper with the machine and that the machine trouble had no effect on Candidate Dix's vote tally. (C-23)

The hearing examiner has reviewed the affidavits of Bettie Wenngren (C-17), Anthony Battistelli (C-18), Margaret Battistelli (C-19), and Carolyn Zeitschel (C-21) in support of the allegation of voting machine tampering and finds that the affidavits collectively fail to establish the truth of the allegation.

Candidate Dix complains that the Hamilton Township Board's Duberson School facilities, which housed polling places numbers seven and eight, were improperly used by the Mays Landing Athletic Association, hereinafter "Association," for Little League baseball registration. The facts regarding this allegation are as follows:

Carl Anderson, the campaign manager for Candidates Curcio and Boughton, is a twenty-year member of the Association. He is also, as reported earlier, a teaching staff member in the employ of the Hamilton Township Board as its Athletic Director. Candidate Curcio is the secretary of the Association. The

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campaign manager requested the Board Secretary of the Hamilton Township Board, who himself was actively involved in the campaign for Candidates Curcio and Boughton, if the Association could use the gymnasium for Little League registration on March 22, 1977, the night of the election. The Board Secretary testified that upon his own authority he granted the request and allowed the school facilities to be used. (Tr. I-50) He did not report this action to the Board.

Finally, it should be reported that the Greater Egg Harbor Regional Board appointed the Board Secretary of the Hamilton Township Board to be the Judge of Elections for polling places numbers seven and eight in the Duberson School.

In summary, the hearing examiner recommends to the Commissioner of Education that:

1. The portion of the transcript in regard to the testimony of Melvin Newton and relevant data be referred to the Atlantic County Prosecutor;

2. The matter of the signature of Marcia Fisher being entered in two separate polling places be referred to the Atlantic County Prosecutor;

3. The matter of Eugene Blackwell casting a ballot while not being registered to vote in Atlantic County be referred to the Atlantic County Prosecutor.

It is further recommended that the Commissioner take appropriate action against Orinda Shultz for her violation of *N.J.S.A.* 18A:42-4.

It is recommended that the Commissioner direct the Board Secretary of the Greater Egg Harbor Regional School District to immediately consult with the Atlantic County Superintendent of Schools to adopt a plan by which he, the Board Secretary, would properly instruct the assigned election officials for 1978 in election procedures.

It must be noted that, although the poll lists for the polling places were not completed properly, voting authorization numbers were not properly assigned, and the election workers did not compare signatures as established, Candidate Dix thoroughly researched the validity of each person who cast a a ballot. There is no proof that of the total number of 704 persons who registered their names on the combined poll lists to cast their ballots, with the exception of the two persons whose names are being recommended for referral to the Atlantic County Prosecutor, did so fraudulently or illegally. Consequently, the hearing examiner recommends that Candidates Curcio and Boughton be affirmed as the successful candidates for membership on the Board.

The matter of the Little League registration at the Duberson School and of the Hamilton Township Board Secretary serving as Judge of Elections is referred to the Commissioner for consideration.

This concludes the report of the representative.

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* * * *

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

The Commissioner observes that the Greater Egg Harbor Regional School District is comprised of five constituent districts, one of which is Hamilton Township. Hamilton Township has two seats of membership on the Greater Egg Harbor Regional Board. At the election controverted herein, both seats were subject to the will of the electorate of Hamilton Township. One seat was for a full three year term, while the other seat was for an unexpired term. Petitioner Dix was a candidate for the full three year term.

The Greater Egg Harbor Regional Board is responsible for the conduct of each annual school election in its five constituent districts. The respective electorates decide who shall represent them on the Regional Board. Consequently, it is the Secretary to the Regional Board who must be notified when a challenge is filed against the conduct of the school election it conducts in any of the Regional Board's constituent districts.

In the instant matter, the Secretary to the Regional Board was not notified of the hearing dates scheduled nor of the issuance of the hearing examiner's report until after he himself initiated an inquiry to the State Department of Education. Rather, the Secretary of the Hamilton Township Board was notified of the hearing dates as well as the issuance of the hearing examiner's report. This occurred because of the fact that Petitioner Dix's complaints herein address the conduct of the election conducted in the constituent district of Hamilton Township. The Board Secretary to the Hamilton Township Board was appointed by the Greater Egg Harbor Regional Board to be the Judge of Elections in one of the Hamilton Township polling places and was identified in testimony as the Board Secretary of Hamilton Township as well as the Judge of Elections at two of Hamilton Township's three polling places.

The Board Secretary of Greater Egg Harbor Regional complains that the term "Board Secretary" was used by the hearing examiner in his report to identify the Board Secretary of the Hamilton Township Board of Education who was the Judge of Elections in the Hamilton Township polling place for the Regional Board's annual school elections.

The Commissioner notices that the hearing examiner did use the term "Board Secretary" initially in his report while, in the total context of the report, reference is made to the Judge of Elections of the Hamilton Township constituent district, who is also the Board Secretary of the Hamilton Township Board of Education. The hearing examiner thereafter in his report is more precise in his use of the term "Board Secretary" by defining to whom reference is being made.

Finally, the Commissioner takes cognizance of the fact that the campaign

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manager and the "friend" referred to previously by the hearing examiner in his report are employees of the Hamilton Township Board, not of the Greater Egg Harbor Regional Board.

The Commissioner observes with respect to the Greater Egg Harbor Regional Board appointing the Board Secretary of the Hamilton Township Board of Education as a Judge of Elections in one of three polling places for the Regional Board's election in the constituent District of Hamilton Township that such action is within the scope of the Regional Board's authority at *N.J.S.A.* 18A:14-6. The Hamilton Township Board Secretary is not an employee of the Regional Board; consequently, his appointment as Judge of Elections is proper.

Petitioner objects to the hearing examiner's recommendation that the announced results of the election be affirmed. This objection is based upon the fact that a number of violations of school election laws were found. Petitioner seeks to have the election set aside or, in the alternative, have the term of Louis W. Curcio, Jr., the announced winner of the three-year term, declared vacant for the 1978 annual school election so that a two-year unexpired term would be on the ballot. Petitioner also seeks an order by which the Commissioner would request the Atlantic County Prosecutor to investigate alleged infractions of school election laws by the Greater Egg Hargor Regional Board Secretary and the malfunctioning of the voting machine in polling district number seven.

The Commissioner finds no basis upon which to conclude the will of the electorate in the constituent district of Hamilton Township has been thwarted. It is true that several of the election laws set forth in *N.J.S.A.* 18A:14 *et seq.* are found to have been violated. The violations, however, either individually or collectively do not establish that the announced successful candidates would be other than those declared. It is the clear intent of the law that elections are to be given effect whenever possible. It is well established that gross irregularities, when not amounting to fraud, do not vitiate an election. *Stone et al. v. Wyckoff et al.,* 102 *N.J. Super.* 26 *(App. Div.* 1968) It is only when the deviations from statutory procedure are so gross as to produce illegal votes which would not have been cast or to defeat legal votes which would have been counted, so as to make impossible a determination of the will of the people, that an election will be set aside. *In re Wene,* 26 *N.J. Super.* 363 (*Law Div.* 1953) sets forth the rule as follows:

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

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The Commissioner observes that the appointment of the Board Secretary of the Hamilton Township Board by the Regional Board as Judge of Elections is not illegal. A board secretary who is appointed Judge of Elections must take care that he not use his official position to improperly campaign for the candidates of his choice, nor may the employing board allow him to do so.

The Commissioner views with concern the actions of Orinda Schultz in distributing campaign materials to pupils in direct contravention of *N.J.S.A.* 18A:42-4. The Commissioner may not and will not tolerate such behavior. The Commissioner hereby reprimands Orinda Schultz for her illegal behavior in this matter and further directs the Hamilton Township Board to place a copy of this determination in her personnel file.

The Commissioner agrees with and adopts as his own the remaining recommendations of the hearing examiner. A copy of this determination shall be submitted to the office of the Atlantic County Prosecutor to inquire into the sworn testimony of Melvin Newton, as well as the matter of the signature of Marcia Fisher being entered in two separate polling places and the matter of Eugene Blackwell casting a ballot while not being registered to vote.

Finally, the Commissioner directs the Atlantic County Superintendent of Schools to immediately consult with the Board Secretary of the Greater Egg Harbor Regional Board of Education to review proper procedures to be used for the 1978 annual school election.

The Commissioner, having found no basis upon which to intervene, hereby declares Louis W. Curcio, Jr, to have been elected to a full three year term and Donald Boughton to have been elected to the unexpired term on the Greater Egg Harbor Regional Board of Education from the constituent district of the Township of Hamilton.

COMMISSIONER OF EDUCATION

January 10, 1978

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**In the Matter of the Special School Election Held in the North Hunterdon Regional School District, Hunterdon County.**

## COMMISSIONER OF EDUCATION

## DECISION

A special referendum was held on December 6, 1977 in the North Hunterdon Regional School District on a proposal to issue bonds in the sum of $2,629,000 for an addition to Voorhees High School. The announced results of the ballots cast at this special election follows:

| *Question* | *At Polls* | *Absentee* | *Total* |
|---|---|---|---|
| Yes | 782 | 1 | 783 |
| No | 782 | 2 | 784 |

Pursuant to a letter request by the Superintendent of Schools which enclosed a resolution by the Board of Education of the North Hunterdon Regional School District, the Commissioner of Education directed the Assistant Commissioner of Education in charge of Controversies and Disputes to conduct a recount of the ballots cast. *N.J.S.A.* 18A:14-63.3 The recount was conducted by authorized representatives of the Commissioner in the office of the Hunterdon County Superintendent of Schools, Hunterdon County, on December 29, 1977.

As a result of the recount of the uncontested ballots, with thirteen ballots referred to the Commissioner, the tally stood as follows:

| *Question* | *At Polls* | *Absentee* | *Total* |
|---|---|---|---|
| Yes | 779 | 1 | 780 |
| No | 775 | 2 | 777 |

Ten ballots which were counted for or against the public question by the election workers were marked void by the Commissioner's representatives because they did not meet the statutory requirement of having a cross (X) or plus (+) or check (√) mark in the square at the left or either "Yes" or "No" of the public question or because they contained other unauthorized marks. *N.J.S.A.* 18A:14-55 (Exhibits C-3, 5-13) Additionally, three ballots marked C-1, C-2 and C-4 were referred for adjudication by the Commissioner. For absentee ballot results, see P-1.

The ballot marked C-1 has "No" written in the square to the left of the question "No." Additionally, a cross (X) mark has been superimposed over the written word. To be determined is whether the ballot is distinguishable by these marks, or whether the voter intended to vote "no" then changed his/her mind and attempted to cross out the written word "No."

In the judgment of the Commissioner's representatives, it is impossible to determine the intent of the voter casting such a ballot. Although it may be held

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that the voter intended to emphasize his/her vote, it may be held equally that the voter meant to cross out the word "No" or wrote the word "No" over the cross (X) mark. The statute *R.S.* 19:16-4 provides in part that:

> "***No ballot, which shall have, either on its face or back, any mark, sign, erasure, designation or device whatsoever, other than is permitted by this Title, by which such ballot can be distinguished from another ballot, shall be declared null and void, unless the ***officer conducting the recount thereof, shall be satisfied that the placing of the mark, sign, erasure, designation or device upon the ballot was intended to identify or distinguish the ballot.***"

Although the Commissioner's representatives do not conclude that any attempt was made to distinguish this ballot, there is sufficient doubt about its two marks to recommend to the Commissioner that ballot C-1 be delcared null and void.

Ballot C-2 has a cross (X) in the square to the left of the question "Yes" and a check (√) in the square to the left of the question "No."

It appears that the voter placed a cross (X) in the appropriate square to vote "yes" then attempted to erase it. Likewise the check (√) mark in the square opposite the question "No" is slightly erased. A close inspection of these marks reveals that an eraser was applied to both marks by the voter and apparently was applied more heavily to the mark opposite "Yes" than the mark opposite "No." In any event the Commissioner's representatives cannot determine the intent of the voter and recommend to the Commissioner that ballot C-2 be declared null and void.

Ballot C-4 has a cross (X) and a check (√), one superimposed over the other in the proper square opposite the question "No."

In the judgment of the Commissioner's representatives no attempt was made to distinguish this ballot; rather, the voter attempted to emphasize his "No" vote. It is recommended that the Commissioner count this ballot. See *In the Matter of the Annual School Election Held in the Township of Randolph,* 1965 *S.L.D.* 66.

* * * *

The Commissioner has reviewed the report of his representatives and has examined the exhibits marked C-1 through C-13. The Commissioner concurs with the determinations made by his representatives regarding these thirteen exhibits.

The Commissioner directs the Board Secretary to instruct the judge of elections and the election workers in any future election, if paper ballots are to be used, to advise each voter to follow the precise directions of the statutes when marking his/her ballot so that there may be no question about the way the ballot is counted. It is noticed that the great majority of the voters did so. Nevertheless,

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in a close referendum, such as this, a very few ballots can determine the result one way or the other.

The Commissioner determines that one "No" vote (C-4) be added to the total of the uncontested ballots at the recount. The final results are as follows:

| *Question* | *At Polls* | *Absentee* | *Total* |
|---|---|---|---|
| Yes | 779 | 1 | 780 |
| No | 776 | 2 | 778 |

The Commissioner further determines that the announced results of the special referendum are in error and that the public question was approved by a plurality of the votes cast.

COMMISSIONER OF EDUCATION

January 10, 1978

**Grace Macaulay,**

***Petitioner,***

***v.***

**Board of Education of the Scotch Plains-Fanwood Regional School District, Union County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Ruhlman & Butrym (Edward J. Butrym, Esq., of Counsel)

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

Petitioner, a secretary employed by the Board of Education of the Scotch Plains-Fanwood Regional School District, hereinafter "Board," alleges that on August 6, 1973, she suffered injuries arising out of and in the course of her employment which resulted in her incapacity and absence from duties until January 7, 1974, and that the Board charged her absence against sick leave and refused to pay her full salary during the period of such disability and absence

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in violation of *N.J.S.A.* 18A:30-2.1. The Board holds that petitioner failed to supply adequate proof that her absence was due to an injury suffered during the course of her employment and that she has no entitlement to the compensation she seeks for the months of her absence.

In its Answer to the Petition of Appeal and its Second Separate Defense, the Board asserts that petitioner's prayer for relief was filed before the Commissioner of Education in an untimely fashion and, therefore, must be dismissed on the grounds of the equitable doctrine of laches. Although the Petition of Appeal was filed more than two years subsequent to the alleged injury, it was determined at a conference of counsel conducted on February 11, 1976, that petitioner's delay in filing her claim had not worked any detriment to the Board. Thus, it was agreed to move forward with a plenary hearing which was conducted on June 17, 1976 at the office of the Union County Superintendent of Schools, Westfield, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

During the early days of August 1973, the northeastern portion of the State of New Jersey experienced torrential rains which resulted in unusual flooding conditions of some magnitude. Petitioner testified that on August 6, 1973, subsequent to the flood, she reported to her assigned work station as a secretary in the Scotch Plains-Fanwood High School Media Center. There was a heavy odor in the Media Center, which she characterized as a stench due to the flood waters retained in the carpet floor covering. She testified that she consulted with a librarian and a custodian about a means to dry out the carpet, which she presumed caused the unpleasant odor. She asserted that there was no ventilation in the room nor were there windows that could be opened to rid the room of the odor and also aid in drying out the carpet. Subsequently, a custodian provided petitioner with a can of spray deodorizer which was used to reduce the effects of the odor in the room. (Tr. 18-20)

At approximately 10 a.m. on the morning of August 6, 1973, subsequent to the use of the spray deodorizer, petitioner testified that she and a teacher who was an employee of the Board retired to a storage area in the Media Center for a coffee break. She stated that she recalled sitting at a table in the storage room and that the next thing she recalled was that she woke up in the hospital emergency room screaming and yelling. (Tr. 20) Petitioner testified that she could not recall the events from the time she lost consciousness in the storage area of the Media Center until waking in the hospital. It was orally reported to her that the following occurred:

> "I was told [by the teacher with whom petitioner was having coffee] that 'You began to talk very peculiarly.' She said, 'Don't you remember, I went outside, I said I'm going to see Mr. Tuttle?'
>
> "She said she went out to get him because I began to act so peculiar and by the time *** they got back in the room, I was slumped over the table and, of course, I guess, by then, was in shock and then went into convulsions

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and [a teacher] said, by the time he got in there, I was foaming at the mouth and could see I was starting to swell on my tongue***." (Tr. 56)

Petitioner stated that she was told that someone called the local rescue squad, and that she recalled seeing Mr. Tuttle in the ambulance which took her to the hospital. She also recalled that her husband appeared at the hospital to sign her in. She testified that she signed herself out and was discharged from the hospital the same day. (Tr. 42, 59)

The Emergency Service Record of the Muhlenberg Hospital of Plainfield dated August 6, 1973, indicates that petitioner did, indeed, refuse admission as follows:

"***TREATMENT AND ORDERS:

"Revoke admission — patient refused admission even after [convulsing ] signed Release against med advice Dr. Greenberg notified" (PR-1)

The Emergency Service Record also indicates that petitioner reported the following:

"***CIRCUMSTANCES pt [patient] states she fainted while spraying ozium-los[s] of memory." (PR-1)

Subsequent to the incident on August 6, 1973, petitioner stated that she returned to work for a day or two in the latter part of August after an absence of approximately two weeks. She testified that her tongue had healed sufficiently from the biting and chewing she had experienced from the convulsions of the day of the incident to permit her to return to her duties. She testified as follows: "***I really wasn't coherent, completely coherent.***" (Tr. 23) Following this brief return to work, petitioner testified that she took vacation time and did not return to the school until January 7, 1974. (Tr. 23-27, 44) Petitioner's testimony conflicts with the Board's records in this regard wherein it was reported that she appeared for duty from September 15 through 27 for nine working days. (R-6) Petitioner did not dispute the Board's record; however, she had no recollection of returning to work during that period of time. (Tr. 45-46, 60)

On September 6, 1973, petitioner was examined by a neurosurgeon who reported the following to her personal physician:

"Mrs. Grace Macaulay, a 50 year old High School Secretary, was seen for neurological evaluation on 6 September 1973. She described an isolated apparent major motor seizure which occured (sic) one month ago on 6 August 1973.

"On that occasion she had reported to work on Monday morning and was apparently in her usual state of health. Several hours later at approximately 11:30 that same morning she appeared confused and disoriented to one of

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her [colleagues] in conversation. When her supervisor arrived on the scene she had apparently fainted at her desk and was assisted to the floor. Moments later a clonic-clonic apparent major motor seizure transpired. The patient's limbs displayed convulsive activity, there was foaming at the mouth, there was also apparently trauma to her tongue bitten in the seizure. There was no focal features to this seizure, apparent further aura or urinary incontinence.

"The patient was then taken by ambulance to the Emergency Room where evaluation at that time revealed a patient who was somewhat disoriented and belligerent for 30-60 minutes later before she fully recovered her sensorium. Skull series, routine laboratory studies performed at that time were unremarkable. She was offered the opportunity to be hospitalized for full neuro-diagnostic evaluation, but refused this admission to the hospital and subsequently signed out against medical advice.

"In the past month she has returned to her usual state of health and has certainly experienced no further seizures or other neurological symptoms.

"Her background medical history was reviewed and found to be essentially non-contributory of the respect to her seizure. She has been under treatment for hypertension for many years and takes anti-hypertensive medication. She also takes medication for allergy, nervousness, and occasional sinusitis. She did inform me that a malignant skin tumor [p]resumably a malignant melanoma was removed by Doctor Warsau last year. This lesion was apparently on the right side of the patient's neck.

"Of possible related significance is the fact that 'Ozium Spray' was used in the patient's office at school that same morning to remove the odor provided by the flood that had occured (sic) four days earlier. The patient recalls the exposure to this spray and experiencing some nasal irritation from the spray. The ingredience (sic) of this spray includes Osopropyl alcohol 22%, Triethylene Glycol 5%, Propylene Glycol 5%, Essential oils 4%, inertent ingredience (sic) (dichlorodifluormenthane) 65%. The ingredience (sic) of this spray do not appear to be substances which would be epileptogenic.

"Neurological examination performed today was entirely unremarkable. The patient's mental status was normal and appropriate in every respect. She demonstrated no clinical features compatible with depression, anxiety, or tension. Her neck was supple with full range of motion in all directions. Carotid pulsation was bilaterally equal and there was no bruits illicited over neck vessel, cranial, or orbital distribution. Temporal arteries were symmetrical non tender. Her blood pressure was 150/86 on this occasion.

"Visual acuity and visual fields were normal on gross confrontation testing. Optic fundoscopic examination revealed no disc changes or retinovascular irregularities. Extraocular movements were full with no nystagmus or opthalmoplegia. There were no pupillary irregularities noted. Corneal reflexes

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and facial sensation were intact bilaterally. There was no facial asymmetry or weakness. Hearing and vestibular function were normal. The remainder of cranial nerve examination was normal.

"An EEG performed in this office on the same occasion was an entirely normal EEG. There was no paroxysmal changes or seizure activity evident on this tracing. Only normal background alpha rhythm at 12-13 cycles/second frequency was seen in all derivations bilaterally throughout the record.

"*Impression:* Isolated seizure, undetermined etiology, possibly related to exposure to Ozium Spray for the patient particularly sensitive [and] allergic to one of the components of this spray.

"There is certainly no clinical evidence to suggest further primary underlying neurological lesion such as cerebral neoplasm or cerebral vascular disease to account for the patient's seizure. It is unlikely that there is a relationship between this isolated seizure one month ago and the removal of a skin tumor 1 year ago.

"*Recommendations:* Since skull series and EEG were both normal and there is no apparent underlying metabolic basis for the patient's seizure-then only a brain scan will be scheduled in the near future to complete the patient's neuro-diagnostic evaluation. If the brain scan is normal-no future specific neuro-diagnostic studies are indicated. So long as her EEG is normal and she remains free of seizures, she will require no anticonvulsive medication. However, in the event that she should experience a recurrence of seizure at any time in the future-then anticonvulsive therapy with Dilatin 100 mg. T.I.D. and Phenobarbital 32mg. hs should be initiated. I have no further specific recommendations." (P-1)

Petitioner stated that during her absence she was paid her accumulated sick leave which amounted to 37½ or 38 days. She stated that thereafter she did not receive pay until her return to work subsequent to January 7, 1974. (Tr. 34)

The sole issue, asserts petitioner, is whether her absence from duty during the period September 1973 to January 7, 1974 arose out of or was the result of injuries sustained in the course of her employment. If so, she avers that she would be entitled to reimbursement for her full salary and all sick leave days charged against her during that period as provided by *N.J.S.A.* 18A:30-2.1 as follows:

"Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in sections 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period

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the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.''

The Board asserts that the cause of petitioner's illness on August 6, 1973 has not been established. It notes a contradiction in petitioner's testimony and a report from her personal physician filed with her attorney dated March 17, 1976. Petitioner's testimony was as follows:

***

Q. ''This spray that you're talking about, do you recall that bothering you before you lost consciousness?

A. ''I had absolutely no inclination of anything that was going to happen.

***

Q. ''It didn't irritate you or anything of that sort?

A. ''No, the only thing that irritated me was the stench.***''

(Tr. 51)

The physician's report of March 17, 1976 states, *inter alia,* as follows:

''***As relates to events of August 1973, I saw the patient on August 30, 1973 with the history of having fainted at school with the observation of convulsions by one co-worker. The patient related, later on, that a spray used in the school (*Ozium spray*?) *had a strong odor and bothered her to the extent of causing her to faint.****'' *(Emphasis supplied.)* (P-2)

The Board also relied upon the evaluation of the ''Ozium Spray'' made by the neurosurgeon who examined petitioner on September 6, 1973, wherein he stated, *inter alia*:

''***The ingredience (sic) of this spray do not appear to be substances which would be epileptogenic.***'' (P-1)

It was the Board's contention that petitioner introduced the effects of the Ozium spray as the cause of her illness with her statement to the attending physician who reported on the Emergency Service Record at the time of her appearance in the Emergency Room of the hospital on August 6, 1973 (PR-1), and the information for the subsequent reports submitted by the neurosurgeon (P-1) and petitioner's personal physician. (P-2)

The Board also looked at petitioner's past medical history. Petitioner testified that she was under the care of a gynecologist who had prescribed medication

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with regard to hormone, water elimination and tranquilizer pills. She stated, however, that, of the medication prescribed, she might have taken the hormone pill the morning of August 6, 1973. (Tr. 29-32) She testified that she had not taken any medication for a hypertensive condition nor for a sinusitis condition and, further, that before the occurrence she was in excellent health. (Tr. 33) The Board referred to the report of petitioner's personal physician which stated that she had been under his care since March 1972 and that he had treated her for hypertension and, in addition, that she was taking medication for tension and sinusitis. The physician's report continued to state that he had seen petitioner on August 30, 1973 and that his examination included blood pressure and a neurological examination which were essentially normal, and he advised her to continue to take Valium (sedative) when needed. (P-2) The physician's report further stated that he continued to see petitioner until October 11, 1973 when he observed that she was tense, tired and exhibited a general feeling of malaise. The report stated that she was placed and continued on Thorazine as suggested by the neurosurgeon. (P-2)

The Board submitted its medical evaluation of the occurrence on August 6, 1973 through a physician who reviewed the records included in PR-1, P-1 and P-2 as follows:

> "In reviewing the case of Mrs. Grace Macaulay, a 50 year old High School Secretary vs. The Scotch Plains-Fanwood Public Schools and the letter of John P. Greenberg, M.D., P.A., to Carlo Pallini, M.D. — Dr. Greenberg is classifying an episode of some type by hearsay as he was not a direct witness of this episode.
>
> "The patient is also a known hypertensive of many years and is supposedly [o]n anti-hypertensive medication. She is also on medication for allergy, nervousness and sinusitis.
>
> "This episode occurred on a Monday. The possibilities of the cause are: 1. Hypertension and the patient's not taking her anti-hypertensive medication. Hypertension can cause the type of episode described by Dr. Greenberg. 2. Also, since the patient is taking (a) anti-hypertensive medication, (b) allergy medication, (c) nervousness medication and (d) sinusitis medication [t]here is also the possibility of adverse drug reaction caused by the multitude of medications being taken. 3. With the exception of a post-irratative (sic) neuroma on the right side of the patient's neck, all of the medical work-up has been negative including EEGs. 4. The reports from the Emergency Room of Muhlenberg Hospital were negative for any definite pathology.
>
> "The contents of Ozium are: Isopropyl alcohol 22.7%, Triethylene Glycol 4.4%, Propylene Glycol 4.4%, Essential oils 3.5%, except for the Essential oils, the basic ingredients are alcohols which not not trigger any type of convulsive disorders. The inert ingredient Dichlorodifluoromethane, being inert, also would not trigger this type of episode." (R-1)

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"I think they are going to try to equate Ozium from the Department of Health, Education and Welfare which shows how Ozone is produced. Ozone and Ozium are not even closely related." (R-1A)

"This letter will confirm our recent telephone conversation in which I assured you that there was no relationship between ozone, referred to in the article in the DOH Activities Report of September 1964, and your commercial aerosol spray, Ozium.

"The article in the DOH Activities Report referred to the chemical substance ozone, $O_3$, a triatomic molecule of oxygen. Ozone may be produced by electric arc or a corona discharge. It is also produced by the passage of certain wavelengths of untraviolet light through air. Ozone would not be produced by any of the materials listed in your product, Ozium.

"You are quite safe in assuring your customers that there is no relationship." (R-1B)

In summation of the total findings herein, the hearing examiner finds it is true in fact that:

1. On August 6, 1973 petitioner reported to her duty station as a secretary assigned to the Scotch Plains-Fanwood High School Media Center subsequent to a flood which had inundated that room of the school.

2. A school custodian supplied petitioner with a container of a spray deodorizer which she used to reduce the unpleasant odor in the room caused by the flood.

3. Subsequently, during the morning of the same day, petitioner became ill in the presence of a teaching staff member, lost consciousness and was transported to a local hospital in a rescue squad ambulance.

4. Petitioner refused admittance to the hospital against medical advice, signed herself out and was discharged the same day of the incident. (Tr. 42, 59; PR-1)

5. The Board's record reveals, and it was not disputed, that petitioner was absent from duty from the afternoon of August 6 until September 15, 1973, at which time she returned to work until September 27, 1973 for nine working days. Petitioner, however, had no recollection of returning to duty during such period of time. (Tr. 45-46, 60)

6. Petitioner was absent from her assigned duties from September 28, 1973 until January 7, 1974. (R-6)

7. The Board compensated petitioner her full pay for 37½ accumulated sick leave days; thereafter she received no payment of compensation until her return to duty on January 7, 1974.

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8. Prior to her illness on August 6, 1973, petitioner was under a physician's care with prescribed anti-hypertensive medication and medication for allergy, nervousness and sinusitis. (P-1; P-2)

In summary, the hearing examiner finds no merit in petitioner's claim that the incident of her illness on August 6, 1973 was caused by, or attributed to, the use of a deodorizing spray compound subsequent to a flood in the High School Media Center. Absent such proofs in the instant matter, the hearing examiner recommends to the Commissioner that the instant Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and observes that the parties filed no written exceptions or objections thereto.

The Commissioner, having carefully examined the record, adopts as his own the findings, conclusions and recommendations of the hearing examiner. The Commissioner determines that petitioner herein has failed to establish her case by a preponderance of credible evidence that her illness was work related or that the Board has acted in any way that was unreasonable, arbitrary, capricious or otherwise improper. Absent a showing of abuse of its discretionary powers, the Board's determination is entitled to a presumption of correctness. *Boult & Harris v. Passaic,* 1939-49 *S.L.D.* 7, 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.* 1948) In such matters the Commissioner will not substitute his discretion for that of a local board of education, nor does he find reason to do so in this instance. Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

January 11, 1978

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**In the Matter of the Petition of the Township of Mt. Olive for Withdrawal from the West Morris Regional School District, Morris County.**

## COMMISSIONER OF EDUCATION

## ORDER

This matter having been the subject of a decision of the Board of Review issued on November 1, 1977, pursuant to *N.J.S.A.* 18A:13-51 *et seq.* and incorporated herein by reference; and

That decision having authorized a referendum affording opportunity to the voters of the West Morris Regional School District, hereinafter "Regional District," to determine whether the proposed withdrawal of Mt. Olive Township from the Regional District should be effected pursuant to law; and

The Commissioner of Education, in an opinion dated November 1, 1977, incorporated herein by reference, having determined that in the event of a successful referendum the effective date of withdrawal of Mt. Olive Township from the Regional District would be July 1, 1978; and

The voters of both Mt. Olive Township and of the remaining municipalities of the Regional District having held a special school election on December 6, 1977 and cast a majority of votes in favor of withdrawal of Mt. Olive from the Regional District; and

There being scheduled on February 7, 1978 an annual school election in the Regional District; and

There being seated on the Regional District Board of Education from Mt. Olive Township two members whose terms will expire at the reorganization meeting of the Regional District Board following the annual school election on February 7, 1978; and

The Commissioner having considered the questions of whether the voters of Mt. Olive Township should vote at the February 7, 1978 election for candidates to fill the aforesaid two vacancies or on the Regional District's proposed 1978-79 school budget; and

The Commissioner finding even in these special circumstances no authority to set aside the statutory requirement that voters be provided opportunity to elect those who shall represent them on said boards; and

The Commissioner having determined that since the voters of Mt. Olive will have opportunity to vote on budgetary matters affecting Mr. Olive's secondary pupils at the February 14, 1978 election conducted by the Mt. Olive

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Board of Education and since Mt. Olive pupils will no longer be affected by the Regional District's budget after July 1, 1978, there remains no valid reason why the voters of Mt. Olive Township should be allowed to cast votes for or against the Regional District's proposed 1978-79 school budget on February 7, 1978; now therefore

IT IS ORDERED that the Regional District provide at its annual school election on February 7, 1978 that voters of Mt. Olive Township shall have opportunity to vote for two qualified persons to represent them on the Regional District Board of Education from the date of the Board's organization meeting until June 30, 1978, after which date all terms of Mt. Olive members of the Regional District Board shall expire pursuant to *N.J.S.A.* 18A:13-60; and

IT IS FURTHER ORDERED that no provision be made at the February 7, 1978 election for the voters of Mt. Olive Township to cast votes for or against the Regional District's budget for the fiscal year 1978-79.

ORDERED this 12th day of January 1978.

COMMISSIONER OF EDUCATION

**Board of Education of the Borough of Verona,**

***Petitioner,***

*v.*

**Mayor and Council of the Borough of Verona, Essex County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Booth, Bate, Hagoort, Keith & Harris (George H. Buermann, Esq., of Counsel)

For the Respondent, Robert J. Sussman, Esq., of Counsel

Petitioner, the Board of Education of the Borough of Verona, hereinafter "Board," appeals an action of the Mayor and Council of the Borough of Verona, hereinafter "Council," certifying to the Essex County Board of Taxation a lesser amount of appropriation for current expenses than the amount proposed by the Board for the 1977-78 school year in its budget which was defeated by the voters.

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The matter has been submitted directly to the Commissioner of Education for adjudication on the pleadings, exhibits and documents of the parties in support of their respective positions.

The Commissioner has reviewed the record and the facts of the matter are as follows:

At the annual school election held March 29, 1977 the voters rejected the Board's proposal to raise $4,352,788 in current expenses and $67,350 in capital outlay for the Verona School System in the 1977-78 school year. This budget was sent to Council on March 30, 1977 for its determination of the amount of local taxes to be raised to provide a thorough and efficient system of education, pursuant to *N.J.S.A.* 18A:22-37.

After a review of the budget in consultation with the Board, Council made its determination and certified the sums of $4,306,788 in current expenses and $67,350 in capital outlay to the Essex County Board of Taxation. Such certification constituted a reduction of $46,000 in current expenses from the amount originally proposed by the Board in its budget and may be shown as follows:

| | |
|---|---|
| Board's Proposal | $4,352,788 |
| Council's Proposal | 4,306,788 |
| Reduction | $46,000 |

The following line items in the current expense account were subject to the recommended reductions imposed by Council:

CHART I

| Account Number | Item | Board's Proposal | Council's Proposal | Amount Reduced |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J110B | Sal., Bd. Secy. Off. | $ 32,000 | $ 30,000 | $ 2,200 |
| J120D | Oth. Contr. Servs. Adm. | 20,300 | 17,800 | 2,500 |
| J130A | Exps., Bd. of Ed. | 7,000 | 6,000 | 1,000 |
| J130F | Oth. Exps., Supt. Off. | 6,900 | 6,400 | 500 |
| J211 | Sal., Prins. | 260,575 | 235,575 | 25,000 |
| J213 | Sal., Tchrs. | 42,500 | 40,000 | 2,500 |
| J215A | Sal., Secys., Prin. Off. | 124,800 | 120,000 | 4,800 |
| J215C | Sal., Secy. Servs. | 12,700 | 10,700 | 2,000 |
| J250A | Misc. Exp. Instr. | 13,765 | 12,765 | 1,000 |
| J250B | Travel Exp. Instr. | 3,050 | 2,050 | 1,000 |
| J650A | Cust. Supls. | 17,000 | 16,000 | 1,000 |
| J650D | Oth. Supls.-Oper. of Plant | 3,000 | 2,500 | 500 |
| J710A | Sal., Upkeep of Grnds. | 25,000 | 23,100 | 2,000 |
| | Total | | | $46,000 |

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The Commissioner observes that the Board initially anticipated an unexpended appropriation balance in current expenses for the 1976-77 school year in the amount of $83,755.41 of which $50,000 the Board indicated was committed to the 1977-78 school budget to offset the amount of taxes to be raised at the local level. Subsequently, on September 9, 1977 (C-1), the Board reported its balance as of June 30, 1977 to be in the amount of $145,413.46, of which $50,000 was allocated to be provided in its 1977-78 current expense budget to reduce local taxes. The net result of this allocation left the Board with an unexpended free appropriation balance in its current expenses of $95,413.46 to be carried forward to the 1977-78 school year. The Commissioner observes that the aforementioned amounts reported by the Board in free balances is confirmed by its final audit report for the 1976-77 school year on file in the State Department of Education.

The Commissioner has reviewed the respective arguments of the parties together with the pertinent documentation on file regarding the matter controverted herein. The Commissioner finds no necessity to deal with all of the suggested line economies made by Council in expanded narrative. In this regard, the Commissioner has set forth his determination with respect to certain specific suggested line item reductions in chart form below:

| Account Number | Item | Council's Reduction | Amount Restored | Amount Not Restored |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J110B | Sal., Bd. Secy. Off. | $2,200 | $2,200 | $ -0- |
| J120D | Oth. Contr. Servs. Adm. | 2,500 | 2,500 | -0- |
| J130A | Exps., Bd. of Ed. | 1,000 | -0- | 1,000 |
| J130F | Oth. Exps., Supt. Off. | 500 | -0- | 500 |
| J213 | Sal., Tchrs. | 2,500 | 1,500 | 1,000 |
| J215C | Sal., Secy. Servs. | 2,000 | -0- | 2,000 |
| J250A | Misc. Exp. Instr. | 1,000 | -0- | 1,000 |
| J250B | Travel Exp. Instr. | 1,000 | -0- | 1,000 |
| J650A | Cust. Supls. | 1,000 | 1,000 | -0- |
| J650D | Oth. Supls.-Oper. of Plant | 500 | -0- | 500 |
| J710A | Sal., Upkeep of Grnds. | 2,000 | 2,000 | -0- |
| | Subtotals | | $9,200 | $7,000 |

The two remaining line item economies suggested by Council occur in the J211 Salaries, Principals and J215A Salaries, Secretaries line items. The recommended reductions in these line items are $25,000 and $4,800 respectively. In the Commissioner's judgment the Board has demonstrated the need to support the administrative and clerical positions budgeted in these line items. The Commissioner is aware of the Board's need to honor salary commitments for the persons employed in these positions.

Accordingly, the Commissioner restores the funds originally recommended by Council for reduction in each of the aforementioned line items.

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The Commissioner hereby finds and determines that the certification of appropriations necessary for school purposes for the 1977-78 school year made by Council is insufficient by an amount of $39,000 for the maintenance of a thorough and efficient system of public schools. He hereby certifies to the Essex County Board of Taxation an additional sum of $39,000 so that the total amount of the local tax levy of the Borough of Verona for current expenses of the Verona School District for the 1977-78 school year shall be $4,345,788. This determination will increase the 1977-78 current expense budget to $5,156,642, and revises the net current expense budget for 1977-78 to $4,765,177.

COMMISSIONER OF EDUCATION

January 13, 1978

**Board of Education of the Town of Nutley,**

***Petitioner,***

*v.*

**Mayor and Commissioners of the Town of Nutley, Essex County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

### DECISION

For the Petitioner, Smith, Kramer & Morrison (C. Russell Kramer, Esq., of Counsel)

For the Respondent, Anthony T. Drollas, Esq.

Petitioner, the Board of Education of the Town of Nutley, hereinafter "Board," appeals from an action of the Mayor and Commissioners of the Town of Nutley, hereinafter "Commissioners," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Essex County Board of Taxation a lesser amount of appropriations for school purposes for the 1977-78 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter are not in dispute. Briefs were filed by the litigants.

At the annual school election held March 29, 1977, the Board submitted to the electorate a proposal to raise $7,244,206 by local taxation for current expense costs of the school district. This item was rejected by the voters and,

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subsequent to the rejection, the Board submitted its budget to the Commissioners for their determination of the amounts necessary for the operation of a thorough and efficient school system in the Town of Nutley for the 1977-78 school year, pursuant to the mandatory obligation imposed on the Commissioners by *N.J.S.A* 18A:22-37.

After consultation with the Board, the Commissioners made their determination and certified to the Essex County Board of Taxation an amount of $6,999,206 for current expenses. The pertinent amount in dispute is shown as follows:

| | CURRENT EXPENSE |
|---|---|
| Board's Proposal | $7,244,206 |
| Commissioners' Proposal | 6,999,206 |
| Amount Reduced | $ 245,000 |

The Board contends that it has been directed by the Commissioners to make the $245,000 reduction in its current expense free appropriations balance. Such a reduction would leave an insufficient surplus with which to operate a thorough and efficient system of schools, according to the Board. The Board prays for restoration of the entire reduction.

Department of Education records on file in the Division of Administration and Finance disclose that the Board's current expense free appropriations balance was $505,465.38 on July 1, 1977. The Board contends that its free balances are committed or are unbudgeted planned expenditures as follows:

| | |
|---|---|
| Balance July 1, 1977 | $505,465.38 |
| Unbudgeted Expenditures | 33,169 |
| | 472,296.38 |
| Budgeted Surplus | 13,000 |
| | 459,296.38 |
| Insurance Recommendations (Unbudgeted) | 64,000.00 |
| | 395,296.38 |
| Asbestos Ceiling Replacement | 125,000 |
| Available Free Balance | $270,296.38 |

(Exhibit A, attached to Board's Brief)

The Board asserts that its free balance of $270,296.38 after the proposed expenditures is not excessive according to previous guidelines set forth in decisions of the Commissioner of Education.

The Commissioners assert that the Board's budget is adequate after its reduction and contend that the proposed expenditures should have been budgeted and presented to the voters for their consideration.

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The Commissioner agrees with the determination of the governing body except that he will allow the proposed expenditure of the Board for the replacement of asbestos ceilings in the amount of $125,000. This item represents a unique situation arising from a determination by divisions of State government that asbestos ceilings in schools presented a hazard to the health of pupils and teachers. The State Board of Education no longer permits asbestos materials to be utilized in school construction. *N.J.A.C.* 6:22-13.13 Except for this allowance of $125,000 the remainder of the $245,000, or a reduction of $120,000, will be sustained.

The New Jersey Supreme Court commented in *East Brunswick Board of Education v. East Brunswick Township Council,* 48 *N.J.* 94 (1966) as follows:

> ''***As in *Booker,* [45 *N.J.* 161 (1965] the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. *On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under R.S. 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness.****'' (*Emphasis supplied.*) (at 107)

Also, in *Board of Education of the Borough of Fair Lawn v. Mayor and Council of the Borough of Fair Lawn,* 143 *N.J. Super.* 259 *(Law Div.* 1976) the Court stated as follows:

> ''***Patently, the whole purpose of the Board's maintenance of a surplus would be defeated if it were required to be expended for regularly budgeted and appropriated purposes. It is thus clear that surplus funds, not being legally available for regular budgeted expenses, could hardly be compelled by the municipality to be used to offset anticipated regular expenditures for purposes of the *N.J.S.A.* 54:4-75 requisition.***'' (at 273)

The Commissioners assert that the Board's actions in the instant matter contravene this principle set forth in *Fair Lawn, supra.* The Commissioner agrees.

The Board presents no reasons why items classified as ''unbudgeted expenditures'' or ''budgeted surplus'' should not be treated as regular budget expenses. No authority exists for routine expenditures from surplus funds. In fact, no authority exists for any free balances except that the Commissioner has determined on several occasions that good business practice demands that some

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contingency funds be available. *Penns Grove-Upper Penns Neck Regional School District Board of Education v. Mayor and Council of the Borough of Penns Grove and Township Committee of the Township of Upper Penns Neck,* 1971 *S.L.D.* 372, 374 For these reasons the Commissioner restores $125,000 to the Board's budget to be spent for the replacement of asbestos ceilings in the district's schools.

The amount of $125,000 restored to the 1977-78 current expense budget will have no effect on the calculation of state equalization aid for the 1978-79 school year. The aforementioned restoration will affect the computation of the "cap" which will increase the 1978-79 net current expense budget from $8,403,528 to $8,521,184.

The Commissioner finds and determines that the certification of the appropriations necessary for school purposes for 1977-78 made by the Commissioners is insufficient by an amount of $125,000 for the maintenance of a thorough and efficient system of public schools in the district. He hereby certifies to the Essex County Board of Taxation an additional sum of $125,000 so that the total amount of the local tax levy of the Town of Nutley for the current expenses of the school district for the 1977-78 school year shall be $7,124,206.

COMMISSIONER OF EDUCATION

January 13, 1978

**In the Matter of the Petition of the Township of Lacey for Withdrawal from the Central Regional School District, Ocean County.**

**COMMISSIONER OF EDUCATION**

**ORDER**

This matter having been the subject of a decision of the Board of Review issued on May 20, 1977 pursuant to *N.J.S.A.* 18A:13-51 *et seq.* and incorporated herein by reference; and

That decision having authorized a referendum affording opportunity to the voters of the Central Regional School District, hereinafter "Regional District," to determine whether the proposed withdrawal of Lacey Township from the Regional District should be effected pursuant to law; and

The Commissioner of Education, in an opinion dated November 1, 1977, incorporated herein by reference, having determined that in the event of a

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successful referendum the effective date of withdrawal of Lacey Township from the Regional District would be July 1, 1978; and

The voters of both Lacey Township and of the remaining municipalities of the Regional District having held a special school election on December 14, 1977 and cast a majority of votes in favor of withdrawal of Lacey Township from the Regional District; and

There being scheduled on February 7, 1978 an annual school election in the Regional District; and

The Commissioner having determined that since the voters of Lacey Township will have opportunity to vote on budgetary matters affecting Lacey Township's secondary pupils at the February 14, 1978 election conducted by the Lacey Township Board of Education and since Lacey Township's pupils will no longer be affected by the Regional District's budget after July 1, 1978, there remains no valid reason why the voters of Lacey Township should be allowed to cast votes for or against the Regional District's proposed 1978-79 school budget on February 7, 1978; now therefore

IT IS ORDERED that no provision be made at the February 7, 1978 election for the voters of Lacey Township to cast votes for or against the Regional District's budget for the fiscal year 1978-79.

IT IS FURTHER ORDERED that no provision be made for the voters of Lacey Township to cast votes for or against any building referendum which may be presented for approval by the Regional District Board prior to July 1, 1978.

ORDERED this 13th day of January 1978.

COMMISSIONER OF EDUCATION

**In the Matter of the Annual School Election to be Held in the School District of the Township of West Deptford, Gloucester County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

This matter having originally been opened before the Commissioner of Education (Daniel B. McKeown, Assistant Director) through the filing of a letter complaint dated January 20, 1978 by Conrad E. Stipp, a citizen and resident of the Township of West Deptford, Gloucester County, who alleges that the

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Secretary to the Board of Education of the Township of West Deptford, hereinafter "Board," refused to accept his properly completed nominating petition for election to the Board at the annual school election to be held on February 14, 1978; and

It appearing that the testimony of petitioner and of the Board Secretary heard by a representative of the Commissioner on January 25, 1978 at the office of the Gloucester County Superintendent of Schools establishes that the sole reason the Board Secretary refused to accept his nominating petition is that the petition was filed at 4:02 p.m. on January 5, 1978, the fortieth day before the scheduled election pursuant to *N.J.S.A.* 18A:14-9, instead of by 4:00 p.m. as stated in the referenced statute; and

It appearing the courts of this State in *Pritel v. Burris,* 94 *N.J. Super.* 485 (*App. Div.* 1967) held that election laws are to be liberally construed so as to effectuate their purpose and that the filing of nominating petitions a few minutes after the statutory 4:00 p.m. deadline is no basis upon which an otherwise valid nominating petition should be rejected; NOW THERFORE

The Commissioner of Education hereby directs the Secretary of the Board of Education of the Township of West Deptford to accept the nominating petition of Conrad E. Stipp as having been properly filed so that the name of Conrad E. Stipp be included in the official ballot for the election to be held on February 14, 1978.

The Commissioner observes that by virtue of the improper rejection of Candidate Stipp's nominating petition, he was excluded from having his name drawn for position on the ballot. Thus, petitioner's exclusion from the official drawing for position on the ballot renders that initial drawing a nullity. (See *In the Matter of the Election Inquiry in the School District of Edgewater Park,* 1976 *S.L.D.* 123.)

The Commissioner directs the Board Secretary to forthwith notify all candidates of this decision who have filed proper nominating petitions for the three three-year terms and to immediately schedule another drawing for position on the ballot for use in the February 14, 1978 annual school election.

It is so Ordered on this 27th day of January 1978.

COMMISSIONER OF EDUCATION

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**Julia R. Given,**

***Petitioner,***

*v.*

**Board of Education of the East Windsor Regional School District, Mercer County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Ruhlman & Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

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

Petitioner, a clerk in the employ of the Board of Education of the East Windsor Regional School District, hereinafter "Board," alleges to be a tenured secretary within the district. She contends that the Board's determination to pay her in accordance with the salary guide established for clerks in the district is improper. She prays for a determination by the Commissioner of Education that she is a tenured secretary in the district and pleads for retroactive compensation at the appropriate step of the secretaries' salary guide from the date of her reduction in compensation, June 15, 1976. (Petition of Appeal, at pp. 2-3)

The Board concedes that petitioner acquired a tenure status as a clerk in the district on June 4, 1974 but denies her claim to tenure as a secretary and any entitlement to compensation as a secretary. (Board's Answer, at p. 2)

A conference of counsel was held in the office of the Assistant Commissioner of Education in charge of Controversies and Disputes, Trenton, on January 5, 1977 at which time it was agreed to submit the matter for adjudication by the Commissioner based on the pleadings, affidavits and Briefs as submitted.

Petitioner was initially employed by the Board on December 6, 1970 as a substitute clerical employee. On January 4, 1971, petitioner was employed as a twelve month senior clerk and continued in this position until August 27, 1974, being paid for this period in accordance with the salary guide for clerks in the district. On August 27, 1974, petitioner was appointed secretary to the Assistant Superintendent of Schools, served in that capacity through June 15, 1976, and was paid for this period in accordance with the salary guide for secretaries in Central Administration.

Subsequent to June 15, 1976, petitioner was, by Board action, reassigned

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to a twelve month clerk's position in the Ethel McKnight School at a salary adjusted according to the salary guide for clerks in the district. Petitioner alleges that this transfer violated the tenure rights she had acquired as a matter of law, contending that she immediately acquired tenure as a secretary in 1974 when she commenced this employment. Petitioner avers that her reduction in compensation as a result of the transfer to a clerical position was improper. She argues further that there is no additional probationary period needed or required to obtain tenure upon promotion or transfer and that her compensation may not be reduced except upon charges certified to the Commissioner or upon a bona fide reduction in force. (Petitioner's Brief, at p. 4)

The Board declares that petitioner achieved tenure as a clerk in the district but denies that she acquired tenure as a secretary as she "***did not serve as a secretary for a period of three consecutive calendar years, or for three consecutive academic years, together with employment in the beginning of the next succeeding academic year.***" (Board's Brief, at p. 4)

The tenure statute for secretaries and clerical employees of a board of education, *N.J.S.A.* 18A:17-2(b) and (c), reads in pertinent part as follows:

* * *

"b. Any person holding any secretarial or clerical position or employment under a board of education of any school district or under any officer thereof, after

1. The expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the board or officer employing him, or

2. Employment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year, an academic year being the period between the time when school opens in the district after the general summer vacation and the beginning of the next succeeding summer vacation, and

"c. Any person, who has acquired, or shall hereafter acquire, tenure in any secretarial or clerical office, position or employment under the board of education of a school district and has been appointed district clerk or secretary, or shall hereafter be appointed secretary of said district, as such secretary, shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title."

The Commissioner observes that petitioner concedes that "***[t]he right of a Board to transfer a secretarial employee from one position to another cannot be questioned***" citing *Mary A. Fegen v. Board of Education of the Borough of Fair Lawn et al.*, 1966 *S.L.D.* 167. (Petitioner's Brief, at p. 4) Petitioner contends that her teunure rights are statutory and are not dependent on the Board.

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She contends further that *N.J.S.A.* 18A:17-2(b) and (c) must be interpreted as the Commissioner interpreted *N.J.S.A.* 18:13-17, the predecessor statute providing tenure of teacher, principal or supervising principal, prior to what is now *N.J.S.A.* 18A:28-5. In this argument petitioner relies on *Emma A. MacNeal v. Board of Education of Ocean City,* 1938 *S.L.D.* 374 (1926), aff'd State Board of Education 377, aff'd New Jersey Supreme Court January 18, 1928. Petitioner also asserts that the Legislature, recognizing the legitimate interest of a board of education in having a probationary period for a person promoted to a higher level of employment, enacted what is now *N.J.S.A.* 18A:28-6.

The Commissioner agrees that there exists a legitimate interest for a local board to have a probationary period for clerical and secretarial employees in its employ who receive a promotion. The Commissioner opines that to hold otherwise would work hardship on both the board and the employee if instant tenure were to accrue to a promotional position made in good faith by the board. A clerk or secretary so promoted would likely be required to demonstrate greater technical skills in order to properly discharge more complex responsibilities and must have a probationary period in which to adequately adjust to the new position. The fact that the Legislature has not established a specific statutory probationary period for clerks and secretaries who have been promoted, such as exists in *N.J.S.A.* 18A:28-6 for certificated personnel, does not obviate the need for such a probationary period. The Commissioner holds that a tenured clerk or secretary, upon promotion to another position within the school district, must satisfy the precise conditions enunciated in *N.J.S.A.* 18A:17-2(b) and (c) to achieve a tenure status in the new position. The Commissioner further holds that tenure rights accrued in a school system in any clerical or secretarial position prior to promotion shall not be negated by such promotion and shall remain as a continuing entitlement to such employee.

For the aforestated reasons the Commissioner holds that the action of the Board in reassigning petitioner to a clerical position in which she had previously acquired a tenure status was legal and proper and, accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

January 30, 1978

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## STATE BOARD OF EDUCATION

### DECISION

Decided by the Commissioner of Education, January 30, 1978

For the Petitioner-Appellant, McLaughlin & Cooper (William F. Hartigan, Jr., Esq., of Counsel)

For the Respondent-Appellee, Turp, Coates, Essl and Driggers (Henry G. P. Coates, Esq., of Counsel)

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

June 7, 1978

Pending New Jersey Superior Court

**In the Matter of the Board of Education of the Borough of Paulsboro, Gloucester County.**

## COMMISSIONER OF EDUCATION

### ORDER

This matter is opened before the Commissioner of Education as the result of a review of the efforts of the State Department of Education to secure compliance by the Board of Education of the Borough of Paulsboro with the policy to eliminate racial imbalance established by the State Board of Education; and

It appearing that a Decision of the Commissioner of Education in *Paulsboro Community Action Committee v. Board of Education of the Borough of Paulsboro, Gloucester County,* 1969 *S.L.D.* 51, issued on April 22, 1969, directed the Paulsboro Board

> "***to formulate a plan to achieve a more equitable racial balance in its elementary schools and to submit its plan to the Commissioner for approval for implementation at the beginning of the 1969-70 school year."

(1969 *S.L.D.* at 56)

It appearing that the Office of Equal Educational Opportunity has been

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involved since December 1, 1969 in efforts to assist the Paulsboro Board in the preparation and implementation of a feasible plan to eliminate racial imbalance of pupil enrollment in the several elementary schools of the district; and

It appearing that, as a result of communications and conferences between the Office of Equal Educational Opportunity and the Paulsboro Board, the Commissioner by letter under date of August 13, 1976 did accept a voluntary transfer plan on an interim basis in order to review the impact of such plan on correcting racial imbalance; and

It appearing that, following a review of the effect of the interim voluntary plan, the Commissioner found the results of such plan unacceptable and directed the Paulsboro Board to file an acceptable plan with 60 days; and

It appearing that the Paulsboro Board has failed as of this date to submit an acceptable plan to end pupil racial imbalance within its several schools; therefore

IT IS ORDERED ON this 12th day of May 1977 that the Board ofEducation of the Borough of Paulsboro appear before the Commissioner of Education on the 22nd day of June 1977 to Show Cause why the Commissioner should not take appropriate action to correct pupil racial imbalance within its several schools as a result of the Paulsboro Board's failure to comply with the aforementioned State policy, in accordance with *N.J.S.A.* 18A:58-16 and *N.J.S.A.* 18A:33-2.

COMMISSIONER OF EDUCATION

**In the Matter of the Board of Education of the Borough of Paulsboro, Gloucester County.**

**COMMISSIONER OF EDUCATION**

**ORDER**

For the State Department of Education, William F. Hyland, Attorney General of New Jersey (Mark Schorr, Deputy Attorney General, of Counsel)

For the Respondent, Eugene P. Chell

The Board of Education of Paulsboro, hereinafter "Board," having been directed by the Commissioner of Education in *Paulsboro Community Action Committee v. Board of Education of the Borough of Paulsboro, Gloucester County,* 1969 *S.L.D.* 51, to adopt and implement an appropriate plan of pupil

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integration in its public schools, which matter and the interim plans resulting therefrom have been the subject of discussions between the Board and the Commissioner and his representatives since 1969; and

The latest plan of integration having failed to achieve the Board's announced goals of pupil integration at the time of the Board's interim report of December 14, 1976; and

The Board having formulated or adopted to date no subsequent revised plan for pupil integration; and

The Commissioner having by letter of May 12, 1977, ordered the Board to "***Show cause why the Commissioner of Education should not take appropriate action to correct pupil racial imbalance within the school district***"; and

The Board having by letter of June 15, 1977 and through its attorney of record at proceedings held at the State Department of Education on June 22, 1977 advised the Commissioner that 17.2 percent minority enrollment as compared to the goal of 18.1 percent had in fact been achieved it its Billingsport School, which is in a district with 27 percent enrollment of minority pupils; and

The Board having further represented that minority enrollment had been reduced from 63.4 percent to 60.8 percent at its Loudenslager School; and

The Board having requested opportunity to present in writing to the Commissioner detailed data in support of the aforementioned representations; and

The Commissioner's representative having recommended that thirty days be granted for the Board to present such data for the Commissioner's consideration; and

The Commissioner having considered that recommendation and concluded that such delay as has been recommended is in the public interest; now therefore

IT IS ORDERED that, together with copies of Board minutes authorizing such release, such data be forwarded no later than August 20, 1977 to the Commissioner with plans whereby the Board expects to achieve its announced 1977-78 goals for pupil integration; and

IT IS FURTHER ORDERED that the scheduled oral argument on the Order to Show Cause be adjourned until such time as may be determined by the Commissioner after consideration of the aforementioned submissions.

Entered this 26th day of July 1977.

COMMISSIONER OF EDUCATION

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**In the Matter of the Board of Education of the Borough of Paulsboro, Gloucester County.**

## COMMISSIONER OF EDUCATION

## ORDER

For the State Department of Education, William F. Hyland, Attorney General of New Jersey (Mark Schorr, Deputy Attorney General, of Counsel)

For the Respondent, Chell and Camp (Eugene P. Chell, Esq., of Counsel)

The Board of Education of Paulsboro, hereinafter "Board," having been directed by the Commissioner of Education in *Paulsboro Community Action Committee v. Board of Education of the Borough of Paulsboro,* 1969 *S.L.D.* 51 to adopt and implement an appropriate plan of pupil integration in its public schools, which matter and the interim plans resulting therefrom have been the subject of discussions between the Board and the Commissioner and his representatives since 1969; and

The latest plan of integration having failed to achieve the Board's announced goals of pupil integration at the time of the Board's interim report of December 14, 1976; and

The Commissioner having, on May 12, 1977, ordered the Board to "***Show Cause why the Commissioner of Education should not take appropriate action to correct pupil racial imbalance within its several schools***"; and

The Board having by letter of June 15, 1977 and through its attorney of record at proceedings held at the State Department of Education on June 22, 1977 advised the Commissioner that 17.2 percent minority enrollment as compared to the goal of 18.1 percent had in fact been achieved in its Billingsport School, which is in a district with 27 percent enrollment of minority pupils; and

The Commissioner's interlocutory Order dated July 26, 1977 having directed that documentation verifying the aforementioned representation be forwarded no later than August 20, 1977 to the Commissioner with plans whereby the Board expects to achieve its announced 1977-78 goals for pupil integration; and

The Board having, thereafter, through affidavit of its Superintendent, both validated the aforementioned representation and verified that minority enrollment has been reduced from 63.4 percent to 60.8 percent at its Loudenslager School; and

The Board, in compliance with the Commissioner's Order having, through

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affidavit of its Superintendent, detailed procedures to achieve its announced 1977-78 goals for further improved racial balance within its schools; and

The Commissioner having reviewed those procedures which embrace, *inter alia,* both voluntary transfer and administrative assignment of pupils to further improve desirable racial balances in both its elementary schools; and

The Commissioner having determined that such procedures to improve racial balance in the Board's schools obviate the necessity of requiring that oral argument be conducted on the aforementioned Order to Show Cause; now therefore

IT IS ORDERED that the aforementioned Order to Show Cause be dismissed without prejudice; and

IT IS FURTHER ORDERED that the Director of the Office of Equal Education Opportunity proceed both to monitor achieved levels of racial balance which exist in the Board's schools in 1977-78 and, together with the Board and its administrative staff, to establish such additional revised goals of racial balance as may be appropriate in both of the Board's elementary schools for the ensuing years.

Entered this 31st day of January 1978.

COMMISSIONER OF EDUCATION

**Louise T. Brewington,**

***Petitioner,***

***v.***

**Board of Education of the City of East Orange, Essex County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Shepard, Cooper, Dickson, Merkelbach and Camp (Barry A. Aisenstock, Esq., of Counsel)

For the Respondent, Love and Randall (Melvin Randall, Esq., of Counsel)

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Petitioner, who has been continuously employed as a teacher since September 1964 by the East Orange Board of Education, hereinafter "Board," alleges that the Board has wrongfully denied her credit for one year of prior teaching experience in another district to which she claims entitlement on the teachers' salary guide. The Board holds that by reason of petitioner's failure to comply with requirements in negotiated policies she is barred from the relief she seeks by the equitable doctrine of laches.

The controversy comes before the Commissioner of Education for Summary Judgment in the form of pleadings, stipulation of facts (J-1), petitioner's affidavit (P-1), and Briefs of counsel. The factual context of the dispute is succinctly set forth as follows:

Petitioner was completing a two-year maternity leave of absence when the Board and the East Orange Education Association, hereinafter "Association," incorporated the following provisions under Article XVIII (B) of the 1970-71 negotiated salary policy:

> "***1. Full credit shall be given to teachers on the Teacher Salary Guide for all verified contracted previous satisfactory teaching experience in a duly accredited public and/or private school. Such credit shall be given through double increment salary adjustments until such time that a teacher reaches his proper step on the Teacher Salary Guide.
>
> "2. Documentation of prior satisfactory teaching experience for salary adjustments for full credit on the Teacher Salary Guide shall be the responsibility of each teacher claiming such adjustments. All validations of prior teaching experience shall be prepared on the official stationary (sic) of the previous employing school(s) or school district(s), and forwarded by them directly to the Superintendent of Schools.
>
> "3. All verifications for salary adjustments for present employees for previous satisfactory teaching experience shall be received on or before July 31, 1970, for implementation beginning September 1, 1970.***" (R-1)

The Superintendent in June 1970 caused to be placed in teachers' mailboxes a notice that they bore responsibility to submit documentation by July 31, 1970 verifying prior service in other districts. (P-1, Exhibit A) No such notice was mailed to petitioner. Petitioner returned from maternity leave in September 1970 but first became aware of the provisions of Article XVIII(B), *ante,* in September 1972, whereupon she applied forthwith for advanced standing on the salary guide by reason of her prior teaching experience outside the district. Since six of her seven years of prior experience were credited by the Board when she was employed in 1964, it is a single year of prior credit that is the basis of the controversy. Petitioner sought relief by appealing to the Board and its administrative officers until her plea was categorically denied on April 3, 1974 on the basis that she had not complied with the deadline of July 31, 1970 set forth in the negotiated salary policy. (P-1, Exhibits B through E; J-1 (4)) On June 17, 1976, the Petition of Appeal was filed before the Commissioner.

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Petitioner argues that the Board discriminated against her by reason of sex in violation of her constitutional rights when it failed in its obligation to inform her, as it did other teachers while she was on maternity leave, of the impending deadline of July 31, 1970. She contends that, since only females qualify for maternity leave, males could not be similarly situated and thus deprived of a benefit by reason of the same factual circumstances. *N.J.S.A.* 18A:29-2 (Petitioner's Brief, at pp. 1-3; Petitioner's Letter Memorandum, at p. 3)

Petitioner contends that the Board's refusal to place her on the salary guide in similar fashion as those who did validate their prior service by July 31, 1970 is contrary to the statutory provision in *N.J.S.A.* 18A:29-4.1, which states:

> "A board of education of any district may adopt a salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law.***"

Petitioner avers that the statute contemplates the same uniformity of treatment of all teachers in salary matters as was expounded by the Commissioner in sick leave policy application in *Woodbridge Township Federation of Teachers Local No. 882, AFL-CIO v. Board of Education of the Township of Woodbridge: Woodbridge Township School Administrators' Association v. Board of Education of the Township of Woodbridge,* 1974 *S.L.D.* 1201. (Petitioner's Brief, at pp. 3-4)

Petitioner, arguing that the Board denied her due process by failing to give her timely notice of its negotiated salary policy provision, states that she may not legally be disadvantaged by failure to comply with that of which she was not apprised. In this regard, she rejects the Board's contention that the Association was responsible for providing her notice, since she is not a member of the Association. (*Id.*, at pp. 5-7; Petitioner's Letter Memorandum, at p. 3)

Finally, petitioner, contending that application of the doctrine of laches would be inappropriate, argues that the mere passage of time has in no way been prejudicial to the Board or placed it under financial obligation other than that which it would have sustained had the Petitioner of Appeal been filed at an earlier date. (*Id.*, at pp. 2-3)

For these reasons, petitioner prays for an order of the Commissioner directing the Board to compensate her for an additional step on the Board's salary guide for each year that has elapsed since she returned from her maternity leave in September 1970.

The Board argues, conversely, that the Association, as petitioner's negotiating unit, had an affirmative duty to notify her of her responsibility to comply with the July 31, 1970 deadline and that its failure to do so may not be interpreted as laxity or error on the part of the Board.

It is also argued that petitioner's delay in filing her appeal before the Commissioner was not only violative of *N.J.A.C.* 6:24-1.2 but unduly prejudicial

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causing the Board "***to respond to allegations of the petition and prepare to meet them so long after the fact.***" (Respondent's Brief, at p. 3)

The Board asserts that petitioner's sex was but a coincidental factor in the stream of events and played no part in its decision to deny her claim. The Board, contending that relief in such matters should be through the grievance procedure which provides for binding arbitration, submits the text of an arbitrator's award. (R-1) This 1973 award denied advanced salary scale placement to two teachers, neither of whom had been on maternity leave as was petitioner, who had failed to meet the July 31, 1970 deadline for verifying prior experience outside the district. The Board avers that petitioner, having failed to pursue the avenues for relief open to her under the terms of the negotiated agreement, should be barred from pursuing that relief before the Commissioner. Accordingly, the Board requests dismissal of the Petition of Appeal.

The Commissioner, having carefully reviewed the record and weighed the legal arguments of the parties in the light of applicable statutory and decisional law, determines that he holds jurisdiction.

Without question, the Board neglected its responsibility to notify petitioner while on maternity leave of the impending July 31, 1970 deadline. In this regard the Commissioner issues a caveat to this Board and all other local boards of education in this State that, once such negotiated provisions become part of their salary policies, they bear responsibility to notify all their employees, including those on temporary leaves of absence, of such important changes as the one herein controverted. Nevertheless, the matter of petitioner's delay in protesting her treatment under the Board's salary policy must be considered.

Petitioner seeks to excuse her delay in filing a complaint from September 1970 until 1972 on grounds that she was unaware of the provisions of Article XVIII(B) of the negotiated agreement. The Commissioner cannot accept this posture as valid. Any member of a teaching staff, whether or not a member of the Association or union which negotiates as the majority representative with a board, has access to and may reasonably be expected to know the contents of the existing negotiated agreement. That petitioner did not acquaint herself with the provisions of the agreement from September 1970 until September 1972 is evident. Her resulting delay of two years in contesting her placement on the salary scale may not be excused on grounds of unawareness. Nor does she offer any excuse whatsoever for her inaction from April 3, 1974 until she filed the instant Petition of Appeal more than two years later on June 17, 1976. The cumulative period of delay during which she was not actively seeking administrative redress from either the Board or the Commissioner exceeded four years. This extensive delay amply warrants consideration of the equitable doctrine of laches.

In *Barbara Witchel v. Peter Cannici and Board of Education of the City of Passaic,* 1967 *S.L.D.* 1, aff'd State Board of Education 3, the Commissioner commented as follows:

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> "***The Commissioner has consistently held that where the doctrine of laches as an equitable defense has been raised, he will consider all the circumstances to determine whether there has been unreasonable and inexcusable delay which would bar action.***" (at 3)

In *Flammia v. Maller*, 66 *N.J. Super.* 440 (*App. Div.* 1961), the Court said:

> "***The rationale of the doctrine of laches is said to be the policy which requires, for the peace of society, the discouragement of stale demands. 19 *Am. Jur., Equity*, § 492, p. 340 (1939). It is the equitable counterpart of statutes of limitation. 'The adjudicated cases proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and that,, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them.' *Galliher v. Cadwell*, 145 *U.S.* 368, 372, 12 *S.Ct.* 873, 36 *L.Ed.* 738 (1891).***" (at 453)

The Commissioner, in the instant matter, determines that petitioner's inexcusable delay for a period in excess of four years is sufficient reason to invoke the bar of laches. This determination is in no way predicated upon the ninety day period for filing a petition prescribed in the State Board of Education's rules adopted on October 6, 1976. *N.J.A.C.* 6:24-1.2 That rule, absent a directive of the issuing body, may not reasonably be applied retrospectively. Nevertheless, petitioner's apparent acquiescence to the Board's application of its salary policy during her four years and two months of inactivity operates as an estoppel against her assertion of entitlement. The Commissioner so holds.

In view of this determination, no treatise of the remaining arguments of law of the litigants is required. Petitioner is barred from the relief which she seeks. *Marjon, supra; Witchel, supra; Flammia, supra*

The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

Jaunary 31, 1978

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**Janet Conover and Barbara S. Priggemeier,**

***Petitioners,***

*v.*

**Board of Education of the Township of West Deptford, Gloucester County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioners, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

For the Respondent, Holston and Holston (Arthur J. MacDonald, Jr., Esq., of Counsel)

Petitioners are teachers who were employed by the Board of Education of the Township of West Deptford, hereinafter "Board," for nearly three academic years and were not reemployed for a fourth year. Petitioners aver that the reasons given for their non-reemployment are constitutionally invalid in that they are now deprived of a property interest and expectancy of continued employment. Petitioners aver that the Board's reasons are an attempt to circumvent the protections afforded them by the tenure statute. *N.J.S.A.* 18A:28-5 The Board denies petitioners' allegations and asserts that it acted within its statutory and discretionary authority when it determined not to offer reemployment.

The essential facts in this matter are not in dispute. It is ripe, therefore, for Summary Judgment by the Commissioner of Education. The litigants have submitted Briefs and several other documents in support of their respective positions. Letters, in lieu of Reply Briefs, were filed thereafter. A history follows:

Petitioners were initially employed by the Board for the 1973-74 academic year as reading teachers in a Board program funded by an entitlement under Title I of the Elementary and Secondary Education Act. Petitioners were reemployed for the 1974-75 academic year "[c]ontingent upon the extension of Title I funds***." (Petitioners' Contracts, Exhibits C, D) The funds were thereafter made available to the Board and petitioners were reemployed. On October 14, 1975, petitioners were employed for the 1975-76 academic year. (Exhibit B) Prior to the award of this contract, petitioners were notified by letter from the Superintendent of Schools on April 2, 1975 that they would be reemployed for the 1975-76 academic year "contingent upon" receipt of federal funds. (Exhibit I)

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In April 1976, the Board notified petitioners that they would not be reemployed for the 1976-77 academic year. Petitioners demanded reasons pursuant to *N.J.S.A.* 18A:27-3.3. The Board's reasons set forth fully the essence of the dispute herein as follows:

> "This communication is in response to your request for a statement from the Board of Education identifying the reasons you were not offered a contract for the 1976-77 School Year.
>
> "The offer of a contract for the 1976-77 School Year would result in granting you tenure in the District's federally funded Title I program which is a temporary program. In addition to recognizing the precarious nature of federally funded programs such as Title I and the inherent financial problems which could be caused by its cancellation if staffed by personnel with tenure status, the Board of Education also recognizes a blatant inequity that would affect certain classroom teachers upon cessation of Title I support. At that point in time, tenure regulations would entitle you to replace any teacher whose classroom competency had been proven but who might have less experience in the district than you possess. A valued classroom teacher, therefore, would be replaced by a member of the staff whose ability has not been assessed in a regular recurring elementary classroom situation.
>
> "In light of the above reasons, the Board of Education has concluded that it would be derelict in its duty to the children, the taxpayers of West Deptford Township and to certain classroom teachers if it were to offer a tenure contract to any potential classroom teacher who has not proven his or her capability in that capacity in this District. It, therefore, moved at its Public Board meeting, April 20, 1976, not to offer you reemployment for the 1976-77 School Year." (Exhibits A,E)

The litigants stipulate that the teachers are fully certified and possess adequate background, training and experience and have had three years' satisfactory service in the school district as reading teachers in the Title I, ESEA program. The litigants stipulate further that petitioners' evaluations were satisfactory and did not form a basis for their non-reemployment and that the positions were not abolished but were filled by other personnel in the 1976-77 academic year. (Petitioners' Brief, at p. 2, Appendices C and D attached)

The question submitted initially for the Commissioner's determination is: may a board of education refuse to offer reemployment to otherwise eligible teachers on the grounds set forth in the Superintendent's letter. (Exhibits A, E)

The Commissioner has ruled previously that tenure accrues whenever the precise conditions of the statutes are met, irrespective of the source of funds obtained by a board of education. *Jack Noorigian v. Board of Education of Jersey City,* 1972 *S.L.D.* 266, aff'd State Board of Education 1973 *S.L.D.* 777; *Ruth Nearier et al. v. Board of Education of the City of Passaic,* 1975 *S.L.D.* 604 Petitioners have not met the precise conditions set forth in *N.J.S.A.* 18A:28-5 since they had not served the equivalent of more than three academic years

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within a period of four consecutive academic years. Had the Board offered reemployment, petitioners would have acquired a tenure status and seniority within the scope of the certificates held when they were initially employed. Petitioners hold standard certificates as teachers. (Exhibits C, G) Under these circumstances, had they acquired tenure, petitioners would be able to displace teachers with similar certificates but less seniority if a reduction of force were necessary. *N.J.S.A.* 18A:28-9 *et seq.*

The result of such a reduction might be that the Board would have to release teachers who have successfully served probationary periods as regular elementary classroom teachers instructing all phases of pupil education by teachers who have taught reading only. Pursuant to *N.J.S.A.* 18A:28-13, categories of teaching services have been established and codified in *N.J.A.C.* 6:3-1.10(k). A category exists for elementary teachers; however, no category has been established for reading teachers which means that petitioners would acquire seniority as elementary teachers if they were reemployed.

The Commissioner concludes that the Board acted properly and within its discretion when it decided not to reemploy petitioners. In this regard *N.J.S.A.* 18A:11-1 reads as follows:

> "The board shall——
>
> ***
>
> "c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the *** *employment, regulation of conduct and discharge of its employees* ***; 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."
>
> (*Emphasis supplied.*)

Petitioners complain further that the Board has violated their constitutional right to continued employment. The Court commented on a similar claim in *Marilyn Winston et al. v. Board of Education of South Plainfield,* 1972 *S.L.D.* 323, aff'd State Board of Education 327, rev'd and rem. 125 *N.J. Super.* 131 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974), when it stated that:

> "***It may be acknowledged that the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions. *Cf. Trap Rock Industries, Inc. v. Kohl,* 63 *N.J.* 1 (1973).***"
>
> (125 *N.J. Super.* at 144)

Petitioners' claims of a denial of their rights to property interest are not supported by the evidence. *Board of Regents v. Roth,* 408 *U.S.* 564, 92 *S.Ct.*

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2701 (1972) Petitioners submitted an affidavit by the former Superintendent of Schools who recommended their initial employment. That affidavit states in part that all full-time teachers would be eligible for tenure. Although accurate, it cannot be held as a promise of future employment. Neither can a superintendent nor a board of education bind a succeeding board in ways other than are provided for by statute. *Skladzien v. Bayonne Board of Education,* 12 *N.J. Misc.* 602 *(Sup. Ct.* 1934), aff'd 115 *N.J.L.* 203 *(E. & A.* 1935)

The Commissioner finds herein no abuse of the Board's discretionary authority. Its concerns are clearly both educational and economic and they have not been shown to be arbitrary, capricious, unreasonable, or discriminatory. In *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974), the Court stated that:

> "***The Legislature has established a tenure system which contemplates that the local board shall have broad discretionary authority in the granting of tenure and that once tenure is granted there shall be no dismissal except for inefficiency, incapacity, unbecoming conduct or 'other just cause.' *N.J.S.A.* 18A:28-5 *The Board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board *** may conclude that tenure should not be granted.***"
>
> (*Emphasis supplied.*) (65 *N.J.* at 240-241)

It is clear that the Board's exercise of its discretionary authority in this matter did not impair any specific statutory provision dealing with tenure. There is no requirement that one whose classroom or professional performance is satisfactory must have his or her contract renewed. *Donaldson, supra; Association of New Jersey State College Faculties, Inc. v. Ralph A. Dungan et al.* and *Association of New Jersey County Faculties, Inc., et al. v. New Jersey Board of Higher Education et al.,* 64 *N.J.* 388 (1974) See *Zimmerman v. Board of Education of Newark,* 38 *N.J.* 65 (1062), *cert.* denied 371 *U.S.* 956, 9 *L.Ed.2d* 502 (1963) and *Katz v. Board of Trustees of Gloucester County College,* 188 *N.J. Super.* 398 *(App. Div.* 1972).

The Court held further in *Association of New Jersey State College Faculties, supra,* that "***the educational priorities and institutional needs may properly be considered, along with the pertinent individual factors, in deciding whether to grant tenure.***" (at 352) While the above quoted language and citation dealt only with college faculties and their eligibility for tenure, the same discretion must be afforded a local board of education, absent any showing of a lack of procedural due process or denial of any constitutional right. There is no such showing herein. The reasons given petitioners on request are clear, unambiguous and valid.

For all of the above reasons, the Commissioner determines that the Petition of Appeal be dismissed.

COMMISSIONER OF EDUCATION

February 8, 1978

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**Gloria A. Mason,**

***Petitioner,***

*v.*

**Board of Education of the Township of Howell and Dr. Sidney Zaslavsky, Superintendent of Schools, Monmouth County,**

***Respondents.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Gloria A. Mason, *Pro Se*

For the Respondents, Bathgate & Wegener (Jan L. Wouters, Esq., of Counsel)

Petitioner, a resident of the Township of Howell, alleges that she was denied the opportunity to submit an application for positions of employment with the Board of Education of the Township of Howell, hereinafter "Board," and that such denial and the Board's employment practices constitute a violation of the law against discrimination. She requests the Commissioner of Education to direct the Board to immediately cease all discriminatory practices and award her a sum of money deemed equitable for loss of income. The Board moves for dismissal of the Petition on the grounds that jurisdiction to hear such a dispute resides with the Division on Civil Rights and not with the Commissioner. The Motion to Dismiss was advanced at a hearing conducted on April 25, 1977 at the offices of the Middlesex County Superintendent of Schools, New Brunswick, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

The instant Petition alleges a "violation of New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-12, Unlawful Employment Practices," but the Board's Answer thereto does not question the jurisdiction of the Commissioner. The Motion, with respect to jurisdiction, was not raised until the time of hearing and was held in abeyance for future consideration by the hearing examiner at that juncture and the hearing on the merits went forward. The Board's principal citation with respect to jurisdiction is *Clarence Edmond v. Board of Education of the Shore Regional High School District,* 1969 *S.L.D.* 14, wherein the Commissioner was also concerned with an alleged action of racial discrimination. Although in *Edmond* the matter for consideration involved the failure of a local board of education to renew a contract, the determination of the Commissioner would appear to be equally applicable herein. The Commissioner said:

> "***With respect to the second charge of improper termination of employment based upon race, the Commissioner finds that petitioner is not

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> without remedy but that his recourse is to be found in another agency. The question of unlawful discrimination in employment practices because of race *properly lies within the function of the Division of Civil Rights*. The Courts have made it clear that the Commissioner's jurisdiction to hear and decide controversies is restricted to those arising under the school law. *N.J.S.A.* 18A:6-9; *Reilly v. Camden Board of Education,* 127 *N.J.L.* 490 (*Sup. Ct.* 1941); *Fox v. Newark Board of Education,* 129 *N.J.L* 349 (*Sup. Ct.* 1943) Discrimination in employment on the basis of race is declared an unlawful practice in *R.S.* 10:5-12. A person claiming to be aggrieved by such practice by an employer may file a complaint with the Attorney General. *R.S.* 10:5-13 The Attorney General may then proceed in a variety of ways, including a hearing, to resolve the problem. *R.S.* 10:5-8h, 10:5-15 The Commissioner holds, therefore, that petitioner's allegation that respondent terminated his employment because he is a Negro raises an issue not governed by Title 18A-Education, but under the provisions of Title 10-Civil Rights. Inquiries to the Division of Civil Rights have disclosed that a complaint filed by petitioner with that agency is being held in abeyance pending disposition of the instant appeal before the Commissioner. The Commissioner, therefore, declines jurisdiction and leaves petitioner to his remedies before the Division of Civil Rights in the Department of the Attorney General.***'' (*Emphasis supplied.*) (at 17)

Thereafter, the Commissioner found that there was no other cause of action before him and dismissed the petition. The dividing line with respect to questions of jurisdiction is not, however, always apparent or sharply defined and in this instance the hearing examiner deemed it advisable to proceed on the merits and withhold judgment on the Motion. (See *Board of Education of the Township of Cinnaminson v. Laurie Silver,* 1976 *S.L.D.* 738; Tr. 13.) The allegations advanced by petitioner and the proofs in support thereof will now be examined. There are essentially two complaints which involve petitioner's own experiences as an applicant for the two positions of curriculum coordinator and assistant principal. On the basis of such experience, petitioner alleges that there is a pattern of discrimination against racial minorities.

Petitioner testified that she first learned of a possible vacancy in a position of curriculum coordinator as a result of her work with an affirmative action citizens' group. (Tr. 19-20) She testified that she then inquired about it and was told by the Superintendent that the Board was ''***going to look to employees in the district and see if they could find someone qualified because they would have a better knowledge of what was going on in the area of curriculum***.'' (Tr. 20) Petitioner alleges that such a policy of promotion from within the district is contrary to the Board's affirmative action plan (PR-1) designed to insure employment of persons from minority groups. She finds confirmation that such a policy exists from reading the job description which was intended to be applicable to the position. (Tr. 22) She testified that she had submitted two applications for the position which were never acknowledged. (Tr. 23; P-2, 3) She also testified that the position was never advertised in local papers. (Tr. 39)

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The Superintendent testified that the school district was planning, in June 1976, to employ a curriculum coordinator and that it was planning to hire "from within the district." (Tr. 51) He further testified that such plans were aborted when it was necessary, subsequent to defeat of the Board's budget at the annual referendum, to reduce expenditures. (Tr. 53) He said that the position has never been created, in fact, and that no one has been employed to fill it. (Tr. 51, 54) He testified that the Board has now adopted a policy to advertise position vacancies both within the school district and by outside advertisement. (Tr. 59)

Petitioner further testified with respect to her efforts to be employed by the Board as an assistant principal. She said she first discussed the position with the Superintendent in February 1977 but was told that an experience resume she had previously submitted to the Board would suffice as an application and that no other application was necessary. (Tr. 42) She testified that she had not requested or been given a job description but that she had all the professional qualifications which were required. (Tr. 48) She further testified that she had no reason to believe "***that the Board of Education was looking for a disciplinarian or a Guidance Counselor***" although in fact these were responsibilities of the position. (Tr. 43) She testified that she was interviewed for the position as one of six final candidates but was never formally apprised of the results.

The Superintendent testified that he had told petitioner her resume would serve as an application and that those who requested job descriptions were given them. (Tr. 66, 68) He further testified that each of the final candidates for the position had been asked similar questions and, in effect, that the decision had been based on a subjective judgment of merit. (Tr. 70) The Superintendent testified that the Board had employed approximately nine persons from minority groups for work in the school system.

The hearing examiner has considered all such testimony and recommends that the Commissioner assume jurisdiction herein and decide the dispute on its merits. The hearing examiner sets forth the following findings of fact:

1. Petitioner's complaint with respect to the position of curriculum coordinator is moot in all respects. The position was never created and does not exist. There is no proof that consideration of petitioner's letter of application for the position was treated differently from any similar letter. The Board has now in fact adopted petitioner's view that position vacancies should be advertised both within and without the immediate school community.

2. Petitioner's resume of experience did constitute an application for employment as assistant principal and resulted in an interview with school administrators. While she was not employed for such position, there is no evidence sufficient to justify a finding that the decision involved was racially motivated or illegally based.

Accordingly, the hearing examiner recommends that the Petition be dis-

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missed on its merits if it is determined that the Commissioner does have jurisdiction.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the recommendations contained therein. It is observed that no exceptions to the report have been filed.

The instant Petition is one wherein it is alleged that the Board discriminated in its employment practices against petitioner. Such an allegation could be filed with the Civil Rights Division pursuant to the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq*. It might also properly be filed before the Commissioner as a controversy under the school law (*N.J.S.A.* 18A:6-9) and pursuant to *N.J.S.A.* 18A:6-6 which specifically bars discrimination based on sex in the employment of teachers. The Commissioner so holds. The statute provides:

*N.J.S.A.* 18A:6-6

> "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 matter 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."

The Commissioner further holds that the Board's Motion with respect to jurisdiction was inordinately delayed beyond the time of a conference of the parties and would, if granted at this juncture, be deleterious to petitioner. Accordingly, the Motion is dismissed.

There remains a question concerned with the merits of petitioner's claim and in this respect the Commissioner finds that the proofs fail to provide a cause of action. Petitioner's primary allegation with respect to the position of curriculum coordinator is clearly moot. Her allegations concerned with the appointment of an assistant principal are not sufficiently supported in the record to justify a determination that the Board's actions were improperly motivated. The Commissioner so holds.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

February 8, 1978

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**In the Matter of the Tenure Hearing of John Birch, School District of the Borough of West Long Branch, Monmouth County.**

## COMMISSIONER OF EDUCATION

## DECISION

For the Complainant Board, Mirne, Nowels, Tumen, Magee & Kirschner (Michael B. Kirschner, Esq., of Counsel)

For the Respondent, Goldberg, Simon & Selikoff (Theodore M. Simon, Esq., of Counsel)

The Board of Education of the Borough of West Long Branch, hereinafter "Board," certified a series of seventeen charges to the Commissioner of Education on August 29, 1975 against respondent, a tenured teaching staff member in its employ, pursuant to the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 *et seq*. By resolution of the Board dated August 26, 1975, respondent was suspended without pay pending a determination of the charges which the Board avers will be sufficient, if true in fact, to warrant dismissal or reduction in salary. Respondent denies all charges against him.

A hearing in this matter was conducted by a hearing examiner appointed by the Commissioner at the office of the Monmouth County Superintendent of Schools, Freehold, on May 25, 26, June 22 and 23, 1976; at the office of the Middlesex County Superintendent of Schools, New Brunswick, on May 27, 1976; and at the office of the Ocean County Superintendent of Schools, Toms River, on August 26, 1976. The report of the hearing examiner is as follows:

The Board acknowledged, and respondent concurred, that Charges 1, 2, 3, 5, 10, 11 and 17 were abandoned either for lack of proofs or for procedural defects. Therefore, those charges will not be considered in this report. The remaining charges were categorized at the conferences conducted on December 18, 1975, as follows:

1. Conduct unbecoming a teacher: Charges Nos. 6, 7, 8, 9, 12, 14 and 15;

2. Insubordination: Charges Nos. 4 and 13;

3. Inefficiency: Charge No. 16. (Tr. I-4-8)

The charges by the Board arise as a result of alleged incidents between respondent and his sixth grade pupils, their parents and resultant confrontations with his supervisor during the 1974-75 academic year and are enumerated, *post*.

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CHARGE NO. 4

"Although previously directed not to do so, Mr. Birch did, on March 21, 1975, detain ten pupils after school in violation of a standing prohibition against detention prior to an extended school vacation."

The Board asserts that the school has a standing policy that pupils are not to be detained prior to an extended school vacation period. (P-2) It further asserts, and respondent admits, that respondent planned to detain several pupils on March 21, 1975, the day immediately prior to spring vacation period and used the excuse that he had forgotten about the school policy. (Tr. IV-116-117) Both the principal and respondent testified that, after the principal reminded respondent of the policy, the pupils were not detained. (Tr. IV-28, 117)

The hearing examiner finds that the credible testimony supports the charge to the limited degree that respondent intended to detain the pupils in violation of the school policy and that it was only the action of the principal that prevented him from doing so.

CHARGE NO. 6

"On April 9, 1975, Mr. Birch failed to attend a scheduled teachers' meeting; he claimed he did not know about it."

The Board contends that respondent failed to meet his professional obligation because of his failure to attend a scheduled teachers' meeting called by the principal. The principal testified that notice of the teachers' meeting was communicated through a memorandum distributed to all staff members, dated April 3, 1975. (Tr. III-35) He testified further that he was aware that respondent was in school on April 9, 1975, and observed that respondent was not in attendance at the meeting; however, he did not attempt to inquire about respondent's absence nor did he send anyone to call respondent to the meeting. (Tr. IV-35-36)

Respondent testified, and the principal concurred, that he was absent on April 3, 1975, the day the notice of the teachers' meeting was distributed to the teaching staff. Respondent asserted that he had been absent from school for approximately ten days and found, when he returned to school, that the substitute assigned to his classroom had piled the pupils' papers on the top of his desk; therefore he had not seen the notice of the meeting. He stated that he learned of the scheduled meeting the following day through a memorandum (P-10) sent to him by the principal which requested that he state the reasons, in writing, for his absence. Respondent replied as follows:

"I was absent on April 3 and never saw the memo. Why didn't someone call me. This is what I mean by unfair procedures." (P-10A)

Respondent testified that he would have attended the teachers' meeting had he been called. (Tr. IV-123-125) Respondent and a teaching colleague contra-

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dicted the principal's testimony with regard to his failure to call respondent to the scheduled meeting. The teacher testified that it was the regular practice of the principal to call a teacher who is in school but not present at a scheduled teachers' meeting. (Tr. V-102-103)

The proofs with respect to his charge, in oral testimony and in written form, sustain the charge. The hearing examiner finds respondent's answer to the charge is without merit. He further finds it incredible that he did not know about the teachers' meeting when indeed, it is the teacher's responsibility to know about and to attend such activities subsequent to the appropriate notification.

CHARGE NO. 7

"On April 18, 1975, it was ascertained that Mr. Birch was informing his classes that he would be teaching 7th grade next year although that was totally untrue."

The Board contends that respondent erroneously informed his sixth grade class that he would be assigned to teach in the seventh grade for the 1975-76 academic year and that his actions caused rumors to spread among the pupils and parents of the school community. The principal testified that respondent acknowledged that he had, in fact, so informed his sixth grade class, but "***he was only kidding with the children." (Tr. III-38-40) Three of respondent's pupils testified that he had informed the class that he would (or might) teach in the seventh grade for the 1975-76 school year. (Tr. I-140-141; Tr. II-2, 4; Tr. II-135-137)

Respondent testified that his reason for stating that he might teach seventh grade social studies for the 1975-76 school year was based upon an evaluation conference he had with the principal. The principal's evaluation of respondent, dated April 2, 1975, stated, *inter alia*, as follows:

"Evaluation comments:

"Due to many inadequacies I cannot recommend increment. I further strongly believe our district could benefit with this teacher's transfer to departmental, specifically, social studies.***" (P-1, at p. 6)

Respondent stated that he was aware that a seventh grade social studies position was available because a teacher who held such a position did not have his contract renewed for the 1975-76 school year. (Tr. IV-127)

The hearing examiner recommends that this charge be dismissed.

CHARGE NO. 8

"On April 22, 1975, Mr. Birch criticized the school nurse's treatment of an injury and had the ice bag she had supplied returned to her office."

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''T.R.,'' a pupil in respondent's classroom with a history of stomach ailments, testified that on April 22, 1975, respondent granted him permission to visit the school nurse for attention for a stomachache. He stated that when he returned to the classroom from the nurse's office with an ice bag, respondent told him that the ice bag was ''not good enough'' and sent the pupil back to the nurse. T.R. stated the school nurse telephoned his father who subsequently arrived at school and took him home. (Tr. I-56-62, 70-79)

Two pupils testified that they recalled the incident of April 22, 1975. Although their testimony was contradictory with regard to some specifics; i.e., the amount of time T.R. spent in the classroom after he returned with the ice bag, they corroborated T.R.'s testimony that respondent directed that the ice bag be returned to the nurse. (Tr. I-132, 134; Tr. II-6)

The principal testified that, although he had no personal knowledge of the incident involving T.R., the criticism of the school nurse by respondent had come to his attention. The principal stated that he had subsequently informed respondent not to question the administrations of a professional nurse. He could not recall whether or not respondent had reported his version of the incident. (Tr. III-41)

Respondent testified that it was necessary for T.R. to report to the school nurse on an almost daily basis until February 1975 in order to receive medication. Respondent stated that on April 22, 1975 he followed this established procedure and permitted T.R. to visit the school nurse. Subsequent to T.R.'s return to his classroom, another pupil in the classroom informed respondent that T.R. was crying, whereupon respondent sent him back to the nurse's office for further observation. (Tr. IV-131-134)

The hearing examiner finds that much of the testimony with respect to this charge was uncertain and contradictory and that the Board has not proved the charge. He therefore recommends that Charge No. 8 be dismissed.

CHARGE NO. 9

> ''On April 24, 1975, Mr. Birch again appeared late for an assembly with his class and in so doing disturbed the program already in progress.''

The principal testified that on April 24, 1975, respondent and his class arrived late for a scheduled class meeting for all pupils and teachers in grades six, seven and eight. On the same day he executed a memorandum in which he requested an explanation in writing of respondent's tardiness to the meeting. (Tr. III-42-43; P-9)

Respondent admitted that he was late for the scheduled class meeting and responded to the principal's request as follows:

> ''I had to settle two fights and a personal problem. The bulletin said 8:35 and I was in there at 8:35. I cannot meet this rigid of a requirement because

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of the class condition. These things could not wait. I suspect that the problem was caused on purpose to delay me." (P-9)

The principal could not recall any further discussions with respondent with regard to this incident. (Tr. III-43) Respondent testified that he had to regain class control before taking his pupils to the scheduled assembly. The hearing examiner finds that respondent's assertion mitigates against sustaining the charge; therefore, he recommends that Charge No. 9 be dismissed.

CHARGE NO. 12

"On May 14, 1975, Mr. Birch used physical force to settle a minor incident between two students and in so doing seized and twisted the arm of a female student so as to injure her."

"K.D." a female pupil in respondent's classroom during the 1974-75 school year, testified to an incident that took place on May 14, 1975, which involved a male pupil, "T.I.," and respondent. She stated that her desk was located next to respondent's desk toward the front of the classroom. As a result of her good behavior, she was permitted to move her desk toward the rear of the classroom and near T.I.'s desk. She stated that T.I. was making fun of her as he was leaning back in his chair and that the chair slipped from beneath him and he fell to the floor. She testified that respondent blamed her for pushing T.I. over in the chair and ordered her to return her desk to the front of the classroom. K.D. asserted that she was angry because of the incident. At the close of the school day respondent moved toward the rear of the classroom, where the pupil's coats were located, to prepare the pupils for dismissal. K.D. stated that she ran after T.I. because "I was mad at him." T.I., however, moved in the direction of respondent and was laughing, asserted K.D. She testified that she put her hands on T.I.'s shoulders and at that moment, respondent took hold of her left arm and placed it behind her back while he placed his other hand on the back of her neck and directed her in this fashion to the front of the classroom and sat her in her chair. She stated that after respondent dismissed the class several pupils stayed with her because she was crying. Respondent did not dismiss K.D. but directed her to go to the principal's office.

K.D. testified that she did not go to the principal's office but instead went to the office of the Superintendent of Schools, which was located in the same building. Although she was accompanied by approximately eight pupils, she alone reported the incident to the Superintendent. (Tr. I-100-107)

The Superintendent testified that K.D. appeared at his office accompanied by the Board Secretary and several pupils. He stated that the pupils were highly excited and that K.D. was crying and holding her arm. He observed that K.D.'s upper arm was red and had a severe welt or bruise. (Tr. I-12-14) Subsequently, respondent appeared in the Superintendent's office and objected to the fact that the pupils were in the office and insisted that they should be sent away. Inasmuch as the principal was not in the building at the time, the Superintendent asserted that he could not turn the pupils away and, further, that he would listen to them

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and also respondent with regard to the incident. (Tr. I-14-16) The Superintendent testified as follows:

> "***I asked Mr. Birch, as I recall, for his version of the incident and Mr. Birch was also quite excited about the whole situation and felt that it was not proper for me to listen to these children, but I did ask him anyway for his version of it and he did tell me that at that time he felt it was sort of a minor incident and I really, as superintendent, should not get involved.***" (Tr. I-17)

The Superintendent continued to question respondent about the use of physical force and he testified that respondent informed him that there had been a disturbance in the classroom and in order to separate the pupils he had grabbed K.D. He believed that she was really hurting T.I. (Tr. I-18) The Superintendent testified that on the day following the incident respondent admitted that perhaps he had used excessive force. (Tr. I-27)

Subsequent to the incident, the Superintendent stated that the parents of K.D. called him and requested that she be removed from respondent's classroom. He denied the request due to the time of the school year but assured the parents that respondent would not "physically handle the child." (Tr. I-17-19)

Respondent asserted that he had had difficulty with several female pupils in his classroom during the course of the 1974-75 school year, particularly with K.D. whom he classified as "the class antagonist." (Tr. IV-144) He testified that at approximately 2:40 p.m. on May 14, 1975, he noticed that T.I's chair was tipped over with T.I. lying on the classroom floor. He stated that he did see the pupil or the chair fall; however, T.I. reported that K.D. had knocked his desk over, whereupon respondent directed K.D. to move her desk and chair from the rear of the classroom to the front. Respondent stated that he subsequently moved to the rear of the classroom in preparation for the class dismissal. As the pupils were in the process of leaving the classroom, respondent testified K.D. ran from the front of the classroom to the rear toward T.I. shouting, "I will kill you." He stated that a male pupil grabbed T.I., while he took K.D. by the arm and shoulder and moved K.D. to the front of the classroom and seated her at her desk. He asserted that it was not his intention to hurt K.D. but, rather, to control the situation. (Tr. IV-139-144)

Respondent testified that following the incident he had not detained nor talked with T.I. Respondent's testimony was contradictory with regard to the events immediately following his taking hold of K.D. and directing her to her desk. On direct examination he stated that when he sat her down at her desk she started to cry. (Tr. IV-143) On cross-examination, however, respondent stated:

> A. "***When I sat K. in her chair I left her alone to where she could calm down. I wasn't aware of any crying on her part.***
>
> Q. "You did not see her cry?

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A. "No, I did not.***" (Tr. VI-43-44)

Respondent later stated that he did not remember whether or not K.D. was crying when he seated her at her desk. (Tr. VI-45-47)

The hearing examiner notes that the testimony throughout the hearings revealed a high degree of animosity between certain pupils and respondent. K.D. testified that some of the girls in the classroom did not like respondent and that she wanted to get him into trouble with the school administration. (Tr. I-154-155) Respondent characterized K.D. as the classroom antagonist and very uncooperative. (Tr. IV-144, 151)

Respondent argues that, under the circumstances of the incident of May 14, 1975, he had the right to exercise reasonable force to quell a disturbance and that he had the right to grab K.D. by the arm when she threatened another pupil. (Tr. I-76)

The hearing examiner finds it necessary to cite the applicable statute with regard to corporal punishment of pupils as follows:

*N.J.S.A.* 18A:6-1

"No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amount of force as is reasonable and necessary:

(1) to quell a disturbance, threatening physical injury to others;

***

(4) for the protection of persons or property; and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section. Every resolution, by law, rule, ordinance, or other act or authority permitting or authorizing corporal punishment to be inflicted upon a pupil attending a school or educational institution shall be void."

The hearing examiner observes that respondent used physical force upon K.D. because she had created a disturbance and had threatened physical injury upon another pupil, within the scope of the statute. The hearing examiner further observes the Superintendent's testimony that respondent had perhaps used excessive force to quell the disturbance. (Tr. I-27)

The Commissioner addressed the issue of excessive use of physical force upon pupils *In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland,* 1969 *S.L.D.* 159, aff'd State Board of Education 1970

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*S.L.D.* 488, aff'd Docket No. A-53-70 New Jersey Superior Court, Appellate Division, March 14, 1972 (1972 *S.L.D.* 662) as follows:

> "***Thus, when teachers resort 'to unnecessary and inappropriate physical contact with those in their charge (they) must expect to face dismissal or other severe penalty.' *In the Matter of the Tenure Hearing of Frederick L. Ostergren,* [1966 *S.L.D.* 185, 187]***" (at 173)

The hearing examiner recommends that respondent not be charged with inflicting corporal punishment upon a pupil and recommends that the Commissioner sustain the charge as conduct unbecoming a teacher.

CHARGE NO. 13

> "During the 1974-75 school year, Mr. Birch gave detention on numerous occasions, despite being advised that his methods were counterproductive and detrimental to the students."

The Board asserted that respondent administered approximately 1100 incidents of detention in his class of thirty pupils during the course of the 1974-75 academic year. It alleged that respondent detained pupils on 123 different days of the total 182 school days in session and that no pupil had less than five days' detention. It further asserted that eight pupils were each detained in excess of fifty times. (P-17A)

The Board acknowledged respondent's testimony that more than 500 of the detentions were for extra help with studies, make-up work and homework rather than for disciplinary purposes. (Tr. IV-8; Tr. V-15) The Board states that it was respondent's determination when pupils would be detained for the extra help, make-up work or homework assignments and that he testified that on some occasions when the pupils were detained for such purposes, he was unable to help them. (Tr. VI-63)

The Board contends that respondent's assertion that 500 incidents of detention for the benefit of the pupils was meaningless and counterproductive and that it considered such actions by respondent to be punitive in effect, if not by design. It alleged that respondent perpetuated the unhealthy atmosphere in the classroom by his abuse of detentions. (Board's Brief, at pp. 10-11)

Respondent asserted that the Board's policy with regard to discipline placed the responsibility upon the individual teacher. (PR-2) This was corroborated by the testimony of the Superintendent and the school principal. (Tr. I-37-38; Tr. IV-20-21) Respondent testified that he read the Board's rules concerning discipline to the pupils at the beginning of each school year. He stated that he used detention after school as a disciplinary measure for pupils who annoyed other class members, disturbed the classroom, used profanity or neglected to bring a note to school for an excused absence or tardiness. (Tr. IV-145-146, 154-155; Tr. V-17-18)

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Respondent testified that pupils were detained to complete homework assignments when the pupil had failed to submit the work on time and also to assist pupils who needed his help to complete assignments. He stated that those pupils detained for make-up work were required to complete classroom assignments or tests which were given when the pupil was absent from school. (Tr. IV-7-8, 156; Tr. V-16) Respondent avers that he complied with the policies and the administrative directives with regard to his use of detention.

The hearing examiner observes that an examination of the Board's policies did not specify the limitations with regard to the teacher's use of detention of pupils but, rather, such determination was left to the sound judgment of the individual teacher. The hearing examiner finds that respondent's use of this disciplinary device was excessive and that sound teaching practice would not encompass such excesses. Further, it is difficult to understand why the principal permitted respondent to continue to discipline pupils in such a manner when sound administrative practice dictates that he investigate, discuss and recommend corrective action. The hearing examiner finds, therefore, that respondent is guilty as charged, mitigated only by the principal's testimony that he failed to warn respondent of his excessive use of pupil detention.

CHARGE NO. 14

> "On several occasions Mr. Birch had engaged in harrassment (sic) and embarrassment of various students including calling them names, taunting and teasing them in class and meting out detentions; such actions have been detrimental to the students."

The Board asserted that in addition to his use of excessive detention practices, respondent engaged in other forms of antagonism and harassment upon the pupils which resulted in a tense and hostile classroom atmosphere. The principal characterized the atmosphere in respondent's classroom as one which exhibited a fear syndrome. He testified that he had received numerous complaints from pupils and their parents with regard to respondent's detention methods and classroom atmosphere. The principal testified that he did not recall the specific allegations or complaints which were not recorded in memoranda. (Tr. III-60-70; Tr. IV-45)

Pupils testified that respondent would "trick" them into detention, that he resorted to calling one pupil "jerk" or "weirdo," and that he punished pupils by making them stand in a corner of the classroom which was characterized by the pupils as the "clown corner." (Tr. I-67-68, 113, 115, 126, 159; Tr. II-13-14, 151) The pupils stated further that respondent imposed a strict dress code upon the members of his classroom and insisted that all shirttails be tucked in and that girls should not wear scarves in school. (Tr. I-114-116)

Respondent contends that Charge No. 14 as set forth by the Board was too general and vague in its terms and that he had not been afforded due notice of the alleged incidents that related to the charge. Respondent cited *In the Matter*

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*of the Tenure Hearing of Robert Steffy, School District of the Passaic County Regional High School, Passaic County,* decision on Motion, April 29, 1976 wherein the Commissioner held that charges not sufficiently specific cannot be considered in a tenure hearing, Notwithstanding respondent's objections, the hearing examiner permitted the Board to set forth its proofs with respect to the allegations contained in Charge No. 14. (Tr. I-118-122)

Respondent denied tricking pupils into detention. He asserted that when he informed a pupil during the course of the school day that the pupil would have to remain after school for detention and the pupil asked for a reason for the detention, he stated that he did not discuss it in front of the class. He testified, "***I shut them up and I talk to them after school when we have time.***" (Tr. V-22)

Respondent denied calling a pupil a "jerk" or a "weirdo." He stated that the allegation arose out of an incident when he attempted to correct the posture of a pupil in his classroom. He testified that he ordered a special chair from the school custodian and

> "***"I said, all right [B], this is your chair. Well, [B] was determined that she wasn't going to sit up properly in the chair and she slouched in the chair. Her chair was not underneath her desk and I came over and I said, all right, now [B] sit correctly on your chair and sit underneath your desk the way you are supposed to sit; and I took my hands on both the armrests of the chair and I moved the chair around, well, at the same time [B] held onto her desk and her chair moved and her desk moved at the same time. That was the incident that she was referring to that went around and around. Well, she did not go around and around, the class thought this was very funny. I realized that I had no leg to stand on—that the—situation was [untenable] for me. So I said, okay, [B], I was almost—I guess I was surrending to the situation because I had completely lost the—not lost but used up all the possibilities of what I could do to try to get her to sit properly in her chair.***" (Tr. V-29-30)

Respondent testified that two days subsequent to the incident, *ante,* the pupil informed him that he had called her a weirdo. He stated further that four or five days later he apologized to the pupil; however, he could not recall that he had made such a remark. (Tr. V-31)

Respondent also testified that when he used the term "big mouth" rather than "talking in the classroom" for the reason he detained a pupil on February 14, 1975, was that the pupil's mother was more accustomed to such a reference. (Tr. V-20-21; P-17)

"T.B." testified that there was a corner in the front of the classroom next to respondent's filing cabinet that was identified by two female pupils as the "clown corner." T.B. stated that respondent also referred to the location as the clown corner. (Tr. II-13-14)

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Respondent testified with regard to the location as follows:

Q. ''How about [M.K.D.]?''

A. ''Oh, yes, [M], I forgot her. She was a[n] extreme problem in the classroom. My working with psychology, the best disciplinary procedure that you can do with a child that has the problems that [M] had was to—if you could possibly—put her in a quiet area where she can not disturb other children, where she has time to quietly reflect. Now, in a close room this is almost impossible. But I had an area up near my desk where my filing cabinet was and whenever (M) got out of hand, where she was a little bit unstable, I would put her up in the corner between the filing cabinet. She could not disturb other children, where she could quietly be at ease and nobody would threaten her and there she would calm down and I would give her a chance—I would say, [M], are you ready to come out or do you want to come out. Many times she said, no, Mr. Birch, I like it in here, I want to be quiet—she would not say I like to be quiet but I might be reading it into her thoughts—I like it in here, other children don't disturb her and she doesn't disturb other children. She could see me though. She could see me at all times—out of the side of her head or if she had to turn her head a little bit to view me.'' Tr.IV-152-153

Subsequently, respondent testified that he had never heard the term ''clown corner'' used in connection with anything dealing with his class nor did he remember the pupils using such a term. (Tr. V-20)

Respondent denied that he had a dress code for the members of his classroom; however, he testified that he imposed regulations with regard to dress if he considered the pupil's attire dangerous or if it caused a disturbance. He stated that shirttails should be tucked in otherwise he considered the pupil's dress to be sloppy. With regard to girls wearing scarves around their necks, he stated that he considered such attire dangerous because of the chance that it might get caught on one of the coat hooks that protruded from the rear of the classroom. Respondent testified that he ''***Got tired of fighting with the kids about this shirttail business, ***I decided the best thing to do was let [the principal] handle it.***''Upon receipt of a memorandum from the principal that there was no dress code in the West Long Branch School District, respondent stated that he no longer enforced his regulations for pupil dress. (Tr. V-23-27)

The hearing examiner finds that the repetitious testimony of the pupils and the testimony of respondent supports the charge. The hearing examiner recommends that the Commissioner find respondent did, in fact, engage in harassment and embarrassment of various pupils as related in Charge No. 14.

CHARGE NO. 15

''On several occasions when parents have come in for conferences or oth-

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erwise sought information or assistance, Mr. Birch has been wholly unresponsive to questions and has indicated an unwillingness to attempt to resolve problems.''

Two parents testified that subsequent to receipt of their children's report cards they each requested a parent-teacher conference by a notation above their signature on the document entitled ''Parents' or Teacher's Comments.'' Both parents testified that respondent failed to communicate with them. T.B.'s mother asserted that on the report card respondent had requested a conference for the third marking period and that she had immediately signed the card and included the notation that ''My husband and I would appreciate a conference.'' She stated that after waiting for a week and a half for a reply from respondent she sent a note via her daughter. Following a period of approximately one month, T.B.'s mother testified that she went to the school to talk with respondent who was absent on that particular day so she discussed with the principal respondent's lack of response to her requests for a conference. She stated that respondent subsequently telephoned her to discuss T.B.'s problems and at the conclusion of the telephone conversation she asked respondent if he wanted a parent-teacher conference and he ''***said that there was no need for a conference, that we had covered everything over the telephone.***'' (Tr. I-192-195; Tr. II-76-79; P-13)

K.D.'s mother testified that she was concerned about a report that her daughter had submitted to respondent and which had not been graded nor returned. She stated that she and her husband arranged a conference with respondent to discuss the report and how they might help their daughter with her other school work. She stated that respondent was not responsive to the questions about their daughter's school work but, rather, he told them about things that were going on in the classroom which were unrelated to the purpose of the parent-teacher conference. She testified that respondent avoided all questions about K.D.'s work. (Tr. I-183-188, 197)

B.P.'s mother testified that she had three conferences with respondent during the course of the 1974-75 school year. The first occurred in October 1974 which, she stated, was called by respondent and included B.P. for approximately half of the conference. She asserted that respondent had called for the conference because he did not believe that B.P. was working to her full abilities. Subsequently B.P. was excused and her mother and respondent continued the conference. B.P.'s mother testified that her daughter was not happy in school and did not like respondent as a teacher. She stated that up to this time B.P. had been a good student, was not a behavior problem and enjoyed school. She stated that she asked respondent about a variety of classroom practices and his use of detention which had been reported to her by her daughter. She testified:

> ''***I mentioned the fact that there was this fear of belittling or degrading in front of peers, embarrassing a child in front of their peers, which was an objection***.'' (Tr. II-176)

She testified further that B.P. wanted to be transferred out of respondent's

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classroom at which point she stated that respondent informed her that he would not permit a transfer and that he would fight it to the Board. She said that the conference ended on a hopeful note. (Tr. II-170-180)

The second conference was called by respondent and with regard to that particular conference, B.P.'s mother testified as follows:

> ''***Mr. Birch informed me he was absent from school and that there was a substitute, and that the class was—classroom was in a shambles when he got back, and supplies were missing, and a shelf broken, and a pointer broken, which he all pointed out to me, and that there was an episode with a roll of scotch tape. The children had been—he claimed—doing something with scotch tape. His was missing from his dispenser. [B] had a roll of scotch tape, and Mr. Birch said to her it was his. Mr. Birch said it was his and [B] said it was hers, and she was rude about the answer she gave and was sent to the office for it. Again, he asked me if my husband could get him a piece for the dispenser, and I really didn't know what he was getting at, because my husband was not in that business. Mr. Birch said, 'Well, [B] said that she could get all the scotch tape she wanted,' and I said, 'That's right. My husband has his own business and he brings scotch tape home.' I didn't understand what Mr. Birch was implying, and I finally said to him, 'Are you implying that she stole this scotch tape?' and he said, 'Absolutely not,' and that the reason for sending her to the office was that she was rude when he questioned her about it, and she evidently would not pass this scotch tape over to him. That was that.***'' (Tr. II-183-184)

She stated that the sole issue of the conference was that B.P. was still unhappy and wanted to be transferred.

The third conference took place in May 1975 and B.P.'s mother testified that it was the result of B.P.'s emotional condition when she arrived home from school. She stated that her daughter was hysterical, crying, stuttering and completely incoherent as the result of respondent detaining B.P. when she was to audition for a school variety show. B.P.'s mother stated that on the following day she went to the school at the close of the school day and met with respondent. She asserted that she told respondent that she had sent a happy little girl to school and that he had sent her an hysterical incoherent child and she wanted to know why. She testified that respondent did not answer her, but rather talked about his authority in the classroom. The discussion turned to the subject of B.P. not completing an assignment for social studies in December 1974. She produced a photostatic copy of B.P.'s report card and questioned respondent with regard to a grade of ''imcomplete'' for social studies for the third marking period; however, under the section of the report card entitled ''Study & Work Experience,'' respondent had indicated ''satisfactory'' for the subsection identified as ''Completes assignments.'' (P-15) B.P.'s mother asked respondent why he had reported such grades and that she was not informed until five months later that the social studies assignment had not been completed. She stated that respondent replied that he had made a mistake. (Tr. II-184-187)

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Subsequently, she testified, she left respondent's classroom in order to get a witness for the remainder of the conference and asked the principal and the President of the Teachers Association to sit in on the conference with respondent, at which time she reviewed the incidents which involved her daughter. She stated that the President of the Teachers Association conducted the major portion of the conference. She testified that she informed respondent that she and her husband were both upset over their daughter's emotional state, that it was affecting their home life and that they wanted respondent to stop harassing B.P. The President of the Teachers Association suggested to the principal that B.P. be transferred from respondent's classroom and, she testified, the transfer took place the next school day. (Tr. II-187-191)

Respondent asserted that whenever he placed a notation on a pupil's report card that he wished to have a parent-teacher conference about a critical problem, he would follow up with a telephone call to make the necessary arrangements. When he indicated on a report card the need for a conference at the parent's convenience, he stated that parents would make the appointment with him. He testified that he had not received a reply from the parents to whom he had indicated that he wished to have a conference. (Tr. II-53-55)

Respondent testified that he recalled the circumstances of B.P.'s mother's arrival at school in May 1975 for her third, and unannounced, conference. He stated that on the previous day he had assigned detention to B.P. and another female pupil. When the girls informed respondent that they were scheduled to audition for the school variety show he told them that he would not detain them if they promised to cooperate with him in the classroom. He stated that he crossed out the name of K.D. from the detention list but retained that of B.P. who refused to cooperate. (Tr. V-63-64; P-17)

Respondent testified that on the following day B.P.'s mother appeared in his room at the close of the school day. He stated that he opened the discussion with the matter of B.P.'s low mark in social studies because that was what he was interested in discussing, whereupon she became angry and stated that she was going to get a witness for the remainder of the conference. Subsequently, B.P.'s mother, the building principal and the President of the Teachers Association arrived. Respondent testified that B.P.'s mother was visibly upset and he recalled that she stated that she had an hysterical child on her hands. Respondent testified, however, that he could not recall any discussion which concerned B.P.'s detention of the previous day. (Tr. V-66–73)

Respondent denied the allegations as set forth in the charge and characterized the testimony of the parents as unreliable. It is indicated in respondent's Brief that the parents' memories were faulty with regard to specifics of the teacher-parent conferences and therefore lacked credibility. (at pp. 28-30)

The hearing examiner cannot agree with respondent's assertion. Indeed some of the testimony, *ante*, indicates additional support for Charge No. 14, particularly that of B.P.'s mother. Additionally, the hearing examiner finds respondent's lack of memory and recall of the May 1975 conference with B.P.'s

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mother incredible, particularly in view of the fact that the pupil was removed from his classroom and transferred to another teacher.

The hearing examiner finds that the credible testimony supports the charge. He finds Charge No. 15 to be true as set forth by the Board.

CHARGE NO. 16

> "Mr. Birch's grading of pupils' conduct is totally inconsistent with his detention reports and his discussions with parents and the administration as to those pupils."

In support of this charge, the Board relied upon a memorandum dated June 19, 1975, addressed to respondent wherein the principal questioned respondent's awarding "O" (outstanding) on four pupil report cards in the areas of "Study & Work Experiences" and "Social Attitudes." The Board asserted that these pupils were disciplined by respondent and given detention for such offenses as talking, talking back, disrupting class, and not paying attention, and therefore, the award of "outstanding" behavior was inconsistent with the purposes of the pupil evaluation program. (P-18)

Respondent contends that he replied to the principal's memorandum (P-19) and the principal testified that there was no further discussion with regard to the matter. (Tr. III-61)

Respondent's rationalization of this charge does not satisfy an affirmative defense. To conclude on the one hand that a pupil has demonstrated outstanding work study habits and social attitudes while on the other hand administering detention for violations of the same attributes is contradictory as well as confusing to the pupil and parents. This charge is not, as respondent argues, one of inefficiency, but rather, a lack of sound professional judgment. The hearing examiner finds, therefore, that the charge is true in fact and recommends that the charge be sustained.

In summary, the hearing examiner finds and recommends that:

1. Charges Nos. 1, 2, 3, 5, 10, 11, and 17 were abandoned for either lack of proofs or for procedural defects.

2. Charges Nos. 7, 8, 9, be dismissed.

3. Charges Nos. 4, 6, 12, 13, 14, 15 and 16 are sustained and he leaves to the Commissioner's determination what penalty, if any, to impose upon respondent.

The hearing examiner recommends that respondent not be dismissed, but rather that some lesser penalty be invoked.

This concludes the report of the hearing examiner.

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* * * *

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter and has also reviewed the exceptions to the hearing examiner's report filed by counsel for both parties.

The Commissioner determines that Charges Nos. 1, 2, 3, 5, 10, 11 and 17 are dismissed on the ground that the Board abandoned the charges because of procedural defect. Additionally, Charges Nos. 7, 8 and 9 are dismissed on the basis of the report and recommendations of the hearing examiner.

The Commissioner takes notice of respondent's objections to the hearing examiner's report. Respondent argues that the hearing examiner erred with respect to his findings which support the charges, *ante*, by his failure to consider all the testimony elicited in respondent's defense, by finding charges to be true in fact without setting forth a basis for such findings and by attaching credibility to the testimony of pupils, parents, the principal and the Superintendent.

Respondent objects to the hearing examiner's finding with respect to Charge No. 4 which was grounded on respondent's intention to detain pupils in violation of a prohibition of such detentions. Respondent contends that a tenured teacher cannot be disciplined for his intentions, but only for his conduct. (Respondent's Exceptions, at p. 1)

The Commissioner has reviewed the evidence and transcript of the testimony and finds that respondent did indeed process after school detentions for ten pupils prior to an extended school vacation period in violation of a standing school policy. It was the intervention of the principal which prevented the detentions. The Commissioner agrees with and adopts as his own the hearing examiner's finding with respect to the support for Charge No. 4.

With regard to respondent's failure to attend a scheduled teacher's meeting, as set forth in Charge No. 6, respondent asserts that he was absent on the day the notice of the meeting was transmitted to the teaching staff members but would have attended the meeting had he been called by the principal. Respondent objects to the hearing examiner's finding it incredible that respondent did not know of the meeting and the hearing examiner's observation that it is the teacher's responsibility to know about and to attend such activities subsequent to appropriate notification. (Respondent's Exceptions, at pp. 1-2)

The Commissioner has considered respondent's objections and cannot agree. Teaching staff members do not operate in isolation. To the contrary, they are members of an enterprise which promotes and fosters professional and social intercourse for the exchange and communication of ideas and information. It is therefore incumbent upon the teaching staff member to communicate with colleagues when returning from an absence to ascertain what had occurred during the absence and what, if any, further plans were announced. The Commissioner determines that the weight of credible evidence supports the truth of Charge No. 6.

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The Commissioner has also reviewed respondent's objections to Charges Nos. 12 and 14 wherein the Board charged respectively that respondent used physical force to settle a minor incident between two pupils and engaged in harassment and embarrassment of pupils. Respondent complains that the hearing examiner relied upon the testimony of pupils, one of whom evidenced extreme bias against respondent. The Commissioner has stated in previous determinations that the testimony of school pupils must be used with great caution. *In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick,* 1971 *S.L.D.* 566, aff'd State Board of Education 1973 *S.L.D.* 733, aff'd Docket No. A-1680-72 New Jersey Superior Court, Appellate Division, November 28, 1973 (1973 *S.L.D.* 733); *In the Matter of the Tenure Hearing of Mary Louise Connolly, School District of the Borough of Glen Rock,* 1971 *S.L.D.* 305; *In the Matter of the Tenure Hearing of Sally Williams, School District of Union Township* 1973 *S.L.D.* 464, aff'd State Board of Education 1974 *S.L.D.* 1437, aff'd as *Sally Williams v. Board of Education of Union Township,* Docket No. A-1789-73 New Jersey Superior Court, Appellate Division, March 11, 1975 (1975 *S.L.D.* 1162), *cert.* den. Docket No. 74-1534 Supreme Court of the United States, October 6, 1975. The issue of credibility with respect to the testimony of pupil witnesses is the responsibility of the trier of fact, in this instance, the hearing examiner. *In re Tenure Hearing of Grossman,* 127 *N.J. Super.* 13 (*App. Div.* 1974); *In re Hackensack Water Co. Application,* 132 *N.J. Super.* 296 (*App. Div.* 1975) The Commissioner has been presented no basis upon which to set aside these determinations by the hearing examiner. The whole of the charges have been amply considered by the hearing examiner in his report including the testimony of the Superintendent, respondent and former pupils assigned to respondent.

Respondent submits that the hearing examiner erred by not concluding that Charges Nos. 13 and 16 were related to inefficiency and, as such, that the Board failed to comply with the ninety-day notice of such inefficiency pursuant to *N.J.S.A.* 18A:6-11. The Commissioner disagrees that such charges constitute inefficiency. With regard to respondent's excessive use of detention as found in Charge No. 13, the Commissioner observes that the wholesale use of such a method of punishment is usually ineffective in producing the desired results and is educationally not defensible. The Commissioner stated in *Gustave M. Wermuth et al. v. Julius C. Bernstein, Principal of Livingston High School, and Board of Education of the Township of Livingston,* 1965 *S.L.D.* 121 as follows:

> "***Unacceptable behavior must be restrained and discouraged and when necessary appropriate deterrents and punishments must be employed for purposes of correction and to insure conformity with desirable standards of conduct. Such results are attained, to the Commissioner's knowledge, by the great majority of school staffs *through use of a variety of techniques adapted to the particular pupil and problem*****."
>
> (*Emphasis supplied.*) (at 129)

The Commissioner agrees with and adopts as his own the hearing examiner's finding with respect to Charge No. 13 that respondent's use of detention was excessive.

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Similarly, the Commissioner agrees with the hearing examiner's finding that respondent demonstrated a lack of sound professional judgment with regard to his grading of pupils, as found in Charge No. 16.

The Commissioner has reviewed respondent's objections with respect to Charge No. 15, that he was unresponsive and unwilling to resolve problems when parents sought information and assistance. Respondent complains that the hearing examiner believed the testimony of the parents of the pupils and thus found respondent guilty of the charge. The Commissioner cannot agree, because the hearing examiner's findings were grounded on both the testimony of parents and of respondent. The Commissioner specifically notices the hearing examiner's finding that respondent could not recall a conference with one parent when the pupil was subsequently removed from respondent's classroom and transferred to another teacher. The Commissioner, therefore, accepts the findings of the hearing examiner with regard to Charge No. 15.

The Commissioner, after a thorough review of the record and respondent's objections, finds and determines that the weight of credible evidence establishes the truth of the charges as found by the hearing examiner. Accordingly, the Commissioner adopts as his own the findings of the hearing examiner that Charges Nos. 4, 6, 12, 13, 14, 15 and 16 are true.

The Commissioner holds that the record herein discloses a pattern of conduct by respondent which demonstrates ineffective performance and constitutes unbecoming conduct for a teacher. Such a conclusion is consistent with many previous decisions of the Commissioner. In one such case *In the Matter of the Tenure Hearing of Francis Bacon, School District of the Township of Monroe*, 1971 *S.L.D.* 387, aff'd State Board of Education 1972 *S.L.D.* 663 the Commissioner found that even one incident of unprofessional conduct might be sufficient to warrant a judgment that the teachers had demonstrated unfitness for the positions they held. In *Bacon* the Commissioner quoted *Redcay v. State Board of Education,* 130 *N.J.L.* 369, 371 (*Sup. Ct.* 1943), aff'd 131 *N.J.L.* 326 (*E.&A.* 1944) to buttress this position. The Court in that decision said:

> "***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.***" (at 371)

In the proven charges herein, in the Commissioner's judgment, are "the series of incidents" referred to in *Redcay, supra,* which are the best evidence that respondent should be dismissed.

Accordingly, the Commissioner determines that John Birch is dismissed from his teaching staff position in the employ of the Board of Education of the School District of the Borough of West Long Branch.

COMMISSIONER OF EDUCATION

February 9, 1978

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**In the Matter of the Annual School Election Held in the School District of the Borough of Carteret, Middlesex County.**

## COMMISSIONER OF EDUCATION

## DECISION

Petitioner Louis Mangieri was an unsuccessful candidate for membership of the Board of Education of the Borough of Carteret, Middlesex County, hereinafter "Board," at the annual school election held March 29, 1977. Subsequent to the election, petitioner filed a letter of complaint with the Commissioner of Education in which he alleges that a voting machine jammed during the election, and that an election card which endorsed the candicacy of four other candidates was printed and circulated contrary to the provisions of *N.J.S.A.* 18A:14-97.2.

An inquiry was conducted in the matter of April 20, 1977 at the voting machine warehouse, Edison, by an authorized representative of the Commissioner. The report of the inquiry follows:

Petitioner testified that he was not present at the polls at the time the voting machine was alleged to have been inoperable. Petitioner testified that he was told by another person whom he refused to identify that the voting machine was inoperable.

The representative finds that petitioner failed to prove that a voting machine was inoperable during the conduct of the election. It is recommended that this allegation be dismissed.

Petitioner testified that the declaration on the face of the election card is incorrect with respect to the requirements of *N.J.S.A.* 18A:14-97.2. The legend on the election card states:

> "Paid for and distributed by the Better Schools Association, P.O. Box 278 Carteret, N.J. Harold Maddow Printed by Hoffman Printing Corp." (C-1)

*N.J.S.A.* 18A:14-97.2 provides in full as follows:

> "In event that any such circular, handbill, card, pamphlet, statement, advertisement or other printed matter of the nature referred to in section 18A:14-97 is to be printed, copied, published, exhibited, or distributed or the cost therof is to be defrayed by an association, organization or committee, the name and address of the association, organization or committee may be used in compliance with the provisions of this article if there is used therewith the name of at least one person by whose authority, acting for such association, organization or committee, such action is taken."

Petitioner argues that Harold Maddow is not the President of the Better

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Schools Organization, nor was he authorized by the Organization to have the controverted cards printed and/or circulated.

Harold Maddow testified that while he is a member of the Better Schools Organization, which is a group of concerned citizens formed eighteen years ago to help improve the Carteret schools, he is not its President. He testified that his name was probably used on the face of the card only because it was used on prior occasions with respect to the Organization.

The Board Secretary, a member of the Better Schools Organization, testified that the Hoffman Printing Corporation submitted the bill (C-3) for the printing of 8,000 of the election cards to him at the Board office. The bill is addressed to the Better Schools Organization in care of Harold Maddow.

Petitioner asserts that the Better Schools Organization is a phantom organization which really does not exist. Petitioner failed to establish the truth of this claim in view of the testimony of the Board Secretary and of Harold Maddow that they are members of the Organization.

This concludes the report of the representative.

* * * *

The Commissioner has reviewed the record in the instant matter including the report of the hearing examiner to which no objections or exceptions were filed.

The Commissioner adopts as his own the finding of the hearing examiner that petitioner failed in his proofs that a voting machine was inoperable during the conduct of the election. Accordingly, that precise complaint is dismissed.

The Commissioner observes that the controverted election card (C-1) sets forth the name of the organization causing the cards to be printed, the name of the printer who printed the cards, and the name of Harold Maddow, a member of the organization which caused the cards to be printed. The statute, *N.J.S.A.* 18A:14-97.2, requires, however, that the person whose name appears on such election cards shall have been authorized by such organization to have the cards printed. Harold Maddow's testimony establishes that the organization used his name without his knowledge.

School elections are no less important than other elections and they are to be conducted with careful regard and strict compliance with every requirement of law. *In re Annual School Election in the Borough of Palisades Park,* 1963 *S.L.D.* 99; *In re Annual School Election in the Township of Pittsgrove,* 1970 *S.L.D. 126*

The record of the instant matter establishes that the distribution of the

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election cards had no effect upon the outcome of the Carteret school election. This being so, there is no reason for intervention by the Commissioner.

Petitioner's complaints herein are dismissed.

COMMISSIONER OF EDUCATION

February 9, 1978

**In the Matter of the Tenure Hearing of**

**James V. Kochman,**

**School District of the Borough of Keansburg, Monmouth County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Complainant Board, Healy and Falk (Patrick D. Healy, Esq., of Counsel)

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

The Board of Education of the Borough of Keansburg, hereinafter "Board," requested in February 1976 that respondent, a tenured teaching staff member in its employ, submit to a psychiatric evaluation. Subsequently, the Board afforded respondent a statement of reasons in support of its request and a hearing pertinent thereto on April 29, 1976. Thereafter the Board reiterated its request but maintains that respondent has not complied with it by submitting to such examination by a physician approved by the Board. It requests the Commissioner of Education to direct respondent to submit to the examination by one of three physicians whom it approves. Respondent maintains that he has completed thorough psychiatric and neurological examinations and that reports of such examinations have been submitted to the Board. He moves for dismissal of the Petition of Appeal in this respect and by way of counterclaim alleges that the Board's actions against him constitute illegal harassment. He demands judgment to this effect, reinstatement in his position and an Order directing the Board to be permanently enjoined from future interference with his performance of duties as a tenured teaching staff member in the employ of the Board.

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A hearing was conducted on April 27, 1977 at the office of the Middlesex County Superintendent of Schools, New Brunswick, by a hearing examiner appointed by the Commissioner. It was agreed that respondent's Motion to Dismiss could be submitted directly to the Commissioner for summary judgment on the record of the brief oral argument at the hearing, sixteen exhibits in evidence and Briefs. Brief submission was delayed but was completed on September 23, 1977.

It has been stipulated that the only issue for immediate consideration herein is whether the Board, pursuant to the statutory mandate of *N.J.S.A.* 18A:16-2 and 3 has the authority and right to demand prior approval of a psychiatric examiner to conduct an examination the Board deemed to be necessary and, if it does, whether respondent's actions herein constitute compliance. The record of the sequence of pertinent actions is clear and must be considered in the context of the applicable statutes which provide:

*N.J.S.A.* 18A:16-2

"Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination, the scope whereof shall be determined under rules of the state board, at least once in every year and may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence from normal physical or mental health.

"Any such examination may, if the board so requires, include laboratory tests of fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data."

*N.J.S.A.* 18A:16-3

"Any such examination may be made by a physician or institution designated by the board, in which case the cost thereof and of all laboratory tests and fluoroscopic or X-ray procedures shall be borne by the board or, at the option of the employee, they made be made by a physician or institution of his own choosing, *approved by the board,* in which case said examination shall be made at the employee's expense." (*Emphasis supplied.*)

It is observed that the statute, *N.J.S.A.* 18A:16-2, has been adjudged constitutional in *Kochman v. Keansburg Board of Education,* 124 *N.J. Super.* 203 (*Chan. Div.* 1973) and *Hoffman v. Jannarone,* 401 *F. Supp.* 1095, aff'd in part/rev'd in part and rem. on seventh court 532 *F.2d* (3rd Cir. 1976) (appearing on table of unpublished opinions) and that respondent does not now contest the right of the Board to direct that a phychiatric examination be administered. He avers that, in fact, he has submitted to such an examination and that it must be adjudged as in compliance with the statutory prescription. The sequence of events pertinent to such avowal will now be examined.

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The Board met in a caucus meeting on February 10, 1976 and resolved therein to require respondent to submit to what was stated to be a "***necessary psychiatric examination.***" (P-1) The Board, in a letter to respondent on February 17, 1976, listed a total of twelve reasons in support of its determination that the examination was necessary and gave indication that the determination was based on a written opinion of its own physician. (P-1) This written opinion (P-1A) was grounded in a verbal account of respondent's actions given to the physician from school administrators and on a dossier of records pertaining to respondent. (P-1a) (See also P-16.) The recommendation of the physician was that respondent "***be given a psychologic assessment, a psychiatric examination and a neurological examination.***" (P-1A)

On March 1, 1976 counsel for respondent addressed a letter to the Board which requested a hearing and stated that respondent had been advised not to submit to the examination "***unless and until***" a hearing was provided. (P-2) The letter also requested more specificity with respect to the allegations.

The hearing was held on April 29, 1976 and a record of it is a part of the total documentation herein. Subsequent thereto the Board reaffirmed its determination that the examinations were required and on June 2, 1976 addressed a letter to respondent wherein it was said:

> "***Would you please advise us if [respondent] wishes to be examined by his own psychiatrist and submit us the reports, or if he wishes the Board to obtain a psychiatrist." (P-5)

Thereafter, under cover letter of June 11, 1976, respondent forwarded to the Board's counsel two written evaluations by a psychiatrist and a neurologist. (P-6, 7, 8) These evaluations had been made even prior to the Board's hearing of April 29, 1976 and were dated April 6 and April 22. There is no question herein concerned with the professional qualifications of the men who performed such evaluations. The evaluation of the psychiatrist states the opinion that respondent had not "***shown any evidence of psychiatric disorder***" and at that present time suffered from none. (P-7) The neurologist's report indicated there was no abnormality of a neurological nature. (P-8) Such reports, while received by counsel for the Board, were not transmitted to the Board by him but held in escrow at respondent's request pending possible settlement of other outstanding issues between the parties, pursuant to what was in effect an attempt at settlement. (See P-11.) On June 28, 1976 the Board again addressed a letter to respondent which requested and which named three physicians whom the Board had chosen to give the examinations. (P-9) This letter also stated that respondent had ten days to make his intentions known "***or to supply the Board with the names***" of three persons he chose in accordance with the statute. (P-9)

Subsequently, respondent authorized release to the Board of the two reports he had forwarded in escrow on June 11, 1976 and requested consideration of a payment by the Board of $320 for costs of the examinations. (P-12) The Board thereafter refused to accept the reports respondent had submitted as reports in compliance with its original request of February 17, 1976 and on August 5,

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1976 resolved to suspend respondent without pay and refer the matter to the Commissioner. Subsequently the suspension was altered to include full compensation but respondent has performed no service for the Board since September 1976. In April 1977 the Board further resolved to deny a salary increment to respondent for the 1977 academic year because services were not rendered in 1976-77. Such denial has, by amendment, also been made the subject of the appeal herein.

Respondent avers that the Board gave him a choice in its letter of June 2, 1976 (P-5, *ante*) of choosing his own physicians and submitting the reports and that the reports he did submit are sufficient compliance. In effect, he avers that this letter (P-5) constitutes a waiver of the Board's right pursuant to the statute *N.J.S.A.* 18A:16-2 to insist on a physician of the Board's choosing and that the present demands are unreasonable. (Tr. 33) He maintains further that there is no question of the competence or professional status of the physician he chose and that a refusal of their reports constitutes arbitrary action by the Board. (Tr. 32)

The Board avers the statute *N.J.S.A.* 18A:16-3, *ante*, is clear and unambiguous and that it mandates that in instances wherein a teaching staff member is given the opportunity to have his/her own physician perform an examination which is requested by a local board of education, such physician must be approved prior to the examination. It maintains the Commissioner has previously approved such interpretation. It cites *Edward C. Crews v. Board of Education of the Township of Bernards,* 1975 *S.L.D.* 382. The Board further maintains that respondent has clearly not complied with this basic statutory requirement and that its own procedures with respect to respondent have been procedurally and legally correct.

The Commissioner has considered all such facts and arguments and it is observed that there is no contention herein by respondent that he was not required to submit to the examinations which the Board directed be made. He was examined by two reputable physicians at his own expense subsequent to the Board's request in February 1976 but prior to the hearing which respondent requested. His agreement in this regard was cast in the context of an attempt to conciliate other outstanding disputes but the attempt at conciliation failed. The dispute remains.

The fact is, however, that the Board's original notice of February 17, 1976 to respondent (P-1) indicated that there was to be a "***prescribed examination by Dr. DeRobbio***," the Board's physician. Such notice was the exercise of an option available to the Board offering its own examination at Board expense. Respondent did not comply with this directive. He submitted instead, without notice to the Board, to an examination by physicians of his own choosing. These physicians were never, as the statute *N.J.S.A.* 18A:16-3 requires they must be, "***approved by the Board***" prior to the time when respondent underwent the examinations. Their examinations may not, in the context of the Board's rejection, be considered as valid compliance with the statutory mandate. The Commissioner so holds.

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Such holding does not impinge or derogate in any matter the professional standing of those physicians who performed the examinations here in question. It simply assigns the control of all such examinations to the Board wherein the Legislature clearly stated it must reside.

Accordingly, the Commissioner directs that respondent submit himself forthwith to the aforementioned examinations by a physician or physicians appointed by the Board or, at the Board's discretion, to physicians approved by the Board from a list proposed by respondent. In the tangled web of circumstances from which such determination emerges, the Commissioner finds no reason to determine that respondent's actions herein constitute insubordination or unbecoming conduct. The Board's letter of June 2, 1976 (P-5) and its interpretation is in itself a mitigating factor and the evidence indicates that respondent's actions were taken in good faith.

There remains the matter of the withholding of the salary increment. In this respect the Board's reason for its action was the fact that petitioner rendered no services to the Board in 1976-77. In the context of the determinations set forth, *ante*, the Commissioner does not deem the Board's action inappropriate. The Board has sole discretion to withhold a salary increment of a teaching staff member for inefficiency or other just cause. *Westwood Education Association v. Board of Education of the Westwood Regional School District*, Docket No. A-261-73 New Jersey Superior Court, Appellate Division, June 21, 1974, *cert.* den. 66 *N.J.* 313 (1974) 1974 *S.L.D.* 1436); *Clifton Teachers Association v. Clifton Board of Education*, 136 *N.J. Super.* 366 (*App. Div.* 1975)

Finally, the Commissioner directs the Board to restore respondent to a position deemed appropriate by the Board until the examinations directed, *ante*, have been administered and the reports received.

COMMISSIONER OF EDUCATION

February 15, 1978

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**In the Matter of the Petitions of the Boards of Education of the Boroughs of Runnemede and Bellmawr for Withdrawal from the Black Horse Pike Regional School District, Camden County.**

## DECISION OF THE

## BOARD OF REVIEW

For the Petitioners, M. Donald Forman, Esq.

For the Respondent Gloucester Township Council, Kmiec & Palumbo (Charles G. Palumbo, Esq., of Counsel)

For the Respondent Gloucester Township Board of Education, Maressa and Wade (John D. Wade, Esq., of Counsel)

For the Respondent Borough of Runnemede, James T. Maloney, Esq.

The Boards of Education of the Boroughs of Bellmawr and Runnemede, hereinafter "petitioning Boards," have filed application, pursuant to *N.J.S.A.* 18A:13-51 *et seq.*, with the Commissioner of Education and the Board of Review for permission to submit to the voters of the constituent districts comprising the Black Horse Pike School District, hereinafter "Regional District," the question of whether the school districts of the Boroughs of Bellmawr and Runnemede shall be permitted to withdraw from the Regional District. The petitioning Boards further propose to take with them the Triton High School located in the Runnemede School District which they would thereafter operate as a new limited purpose regional high school district. They also propose that pupils who are attending Triton High School from Gloucester Township, the remaining constituent of the present regional district, should be permitted to continue such enrollment until the Gloucester Township District could make provision to house all of its pupils. (Tr. 22-23) The Board of Education of the Regional District opposes the proposed withdrawal of Bellmawr and Runnemede from the Regional District "***unless Gloucester Township were simultaneously required to have a bond issue so that adequate classroom space would be able to be provided to all students of the regional district.***" (Regional Board Resolution dated September 21, 1977) Similar reservations were entered into the record by the Gloucester Township Board of Education which agrees to submission of the deregionalization question to the voters only upon provision of additional State funding for school construction and a plan which would provide opportunity for "***[a]ll students of Gloucester Township to be established on a full day session equal to that requested by the other two districts.***" (GT-1)

The Petitions for Withdrawal from the limited purpose Regional School District were filed before the Board of Review consisting of the Commissioner, the State Treasurer and the Director of the Division of Local Government Services as required by *N.J.S.A.* 18A:13-56. The record considered by the Board of Review consists of the pleadings, the report of the Camden County Super-

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intendent of Schools (CSR), the transcript of a hearing conducted on October 4, 1977 at the Bellmawr Municipal Building by the respective representatives of the tripartite Board of Review and documentary submissions thereafter received in accord with directives iterated at the hearing.

The findings and determinations of the Board of Review are set forth in accord with the legislative mandate of *N.J.S.A.* 18A:13-56 which directs that:

> "***The board of review shall consider the effect of the proposed withdrawal upon the educational and financial condition of the withdrawing and the remaining districts and shall schedule and hold a public hearing on the petition upon the application of any interested party. In considering the effect of the proposed withdrawal upon the educational and financial condition of the withdrawing and remainig districts the board of review shall:
>
> a. Consent to the granting of the application; or
>
> b. Oppose the same because, if the same be granted—
>
> 1. An excessive debt burden will be imposed upon the remaining districts, or the withdrawing district;
>
> 2. An efficient school system cannot be maintained in the remaining districts or the withdrawing district without excessive costs;
>
> 3. Insufficient pupils will be left in the remaining districts to maintain a properly graded school system; or
>
> 4. Any other reason, which it may deem to be sufficient; or
>
> c. Request that if the petition be granted, the amount of debt which the remaining districts would be required to assume, calculated as hereinbefore provided, be reduced for the reason that—
>
> 1. Such amount of indebtedness, together with all other indebtedness of the municipalities or school district would be excessive;
>
> 2. The amount of expenditure for debt service which would be required would be so great that sufficient funds would not be available for current expenses without excessive taxation; or
>
> 3. Such amount of indebtedness is inequitable in relation to the value of the property to be acquired by the remaining districts and would materially impair the credit of the municipalities or such districts and the ability to pay punctually the principal and interest of their debt and to supply such essential educational facilities and public improvements and services as might reasonably be anticipated would be required of them.

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"The board of reveiw shall make its findings and determination, by the recorded vote of at least two of the three members of the board, within 60 days of the receipt of the petition and answers."

The Black Horse Pike Regional District, hereinafter "Regional District," is comprised of three contiguous municipalities: the Boroughs of Bellmawr and Runnemede and the Township of Gloucester. Organized as a limited purpose comprehensive regional high school district to educate pupils in grades nine through twelve, the Regional Board operates Triton High School situated in Runnemede Borough and Highland High School in Gloucester Township. Land utilization in the geographic area served is as follows:

| *Municipality* | *Square Miles* | *Vacant, Undeveloped Land* |
|---|---|---|
| Bellmawr | 3.12 | 6.35% |
| Runnemede | 2.10 | 4.39% |
| Gloucester Twp. | 23.25 | 21.44% |

Most of the available land in Bellmawr and Runnemede has been utilized for home building, businesses and industry. By contrast, it is readily apparent that the aggregate amount of undeveloped land in Gloucester Township exceeds the total of all land within the borders of either Bellmawr or Runnemede. A comparison of recent population growth of the constituent municipalities of the Regional District follows:

| | *1960* | *1970* | *1975* | *1976* | *Percentage of Growth 1960-1976* |
|---|---|---|---|---|---|
| Bellmawr | 11,853 | 15,618 | 16,295 | 16,365 | 38% |
| Gloucester Twp. | 17,591 | 26,511 | 35,930 | 36,395 | 107% |
| Runnemede | 8,396 | 10,475 | 10,835 | 10,870 | 29% |

A summarization of the statistics relevant to the two existing high schools is set forth in the following tables:

| *High School* | *Year Built* | *Site Size* | *Square Feet* |
|---|---|---|---|
| Triton | 1957 | 34.62 acres | 158,000 |
| Highland | 1967 | 33.5 acres | 159,000 |

*ENROLLMENTS BY HIGH SCHOOL*

| | *1974-75* | | | *1975-76* | | | *1976-77* | | |
|---|---|---|---|---|---|---|---|---|---|
| | Total | Triton | Highland | Total | Triton | Highland | Total | Triton | Highland |
| Bellmawr | 854 | 826 | 28 | 839 | 818 | 21 | 818 | 789 | 29 |
| Gloucester Twp. | 2300 | 446 | 1854 | 2443 | 469 | 1974 | 2458 | 446 | 2012 |
| Runnemede | 664 | 654 | 10 | 634 | 624 | 10 | 633 | 619 | 14 |
| Total | 3818 | 1926 | 1892 | 3916 | 1911 | 2005 | 3909 | 1854 | 2055 |

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*PROJECTED ENROLLMENTS**

| | *1977-78* | *1978-79* | *1979-80* | *1980-81* | *1981-82* |
|---|---|---|---|---|---|
| Triton | 1399 | 1376 | 1350 | 1295 | 1283 |
| Highland | 2489 | 2481 | 2437 | 2427 | 2395 |

*Compiled by the Regional District, based on exclusive use of Highland by Gloucester Township and exclusive use of Triton by Runnemede and Bellmawr. (CSR-7)

Straight line enrollment projections based on actual 1976 enrollment were submitted by the elementary districts. These do not reflected the effect of either attrition or new home construction projects anticipated in Gloucester Township (Tr. 118) They project that over a five year period the number of high school pupils would remain stable in Bellmawr, decrease by approximately 100 in Runnemede and increase by 84 in Gloucester Township. Racial composition of school enrollments is as follows:

*RACIAL COMPOSITION OCTOBER 1, 1976*

| | *White* | *Non-White* | *Percent Non-White* |
|---|---|---|---|
| Triton | 1863 | 3 | .2% |
| Highland | 1962 | 93 | 4.5% |
| Bellmawr K-8 | 1746 | 25 | 1.4% |
| Runnemede K-8 | 1124 | 13 | 1.1% |
| Gloucester Twp. K-8 | 5431 | 290 | 4.1% |

The foregoing statistical table indicates that should deregionalization occur as proposed by the petitioning Boards, the racial balance in the existing high school will improve on an area-wide basis as the somewhat larger number of non-white elementary pupils in elementary grades of Runnemede and Bellmawr move into Triton High School. Such improvement would occur, of course, regardless of deregionalization.

Both Triton High School, currently housing 446 pupils from the Glendora section of Gloucester Township, and Highland High School, a designated area vocational school accommodating 43 vocational and special education pupils from Runnemede and Bellmawr, operate on the following daily schedule:

| | | | | |
|---|---|---|---|---|
| Grades 11 and 12 | — | 7:30 a.m. | — | 12:15 p.m. |
| Grade 10 | — | 7:30 a.m. | — | 2:30 p.m. |
| Grade 9 | — | 12:20 p.m. | — | 5:15 p.m. |

A careful review of the pleadings, documentary evidence and testimony at the hearing supports the conclusion that the Boards and a large proportion of the populace in each constituent municipality are desirous of effecting a reasonably

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economic plan to eliminate these multisession school days. It is clearly apparent, since current enrollment exceeds functional capacity of the two high schools by more than 1000 pupils, that the only way to eliminate multisessions is to provide a third high school. In consideration of the facts that 62.88 percent of the pupils reside in Gloucester Township and that Triton High School with a capacity of 1540 pupils can accommodate all of the pupils from Bellmawr and Runnemede, it is also apparent that economical operation requires the location of any additional high school in Gloucester Township. This conclusion is further supported by the fact that Gloucester Township is the municipality with greatest residential growth potential. There appears no foreseeable need for either a new school or addition to Triton to accommodate pupils from Bellmawr or Runnemede.

Operating expenses borne by the constituent municipalities through local tax levies in 1976-77 were as follows:

| | *Amount* | *Apportionment— %* |
|---|---|---|
| Bellmawr | $ 416,305 | 22.3494482 |
| Gloucester Tosnship | 1,136,912 | 61.0354120 |
| Runnemede | 309,492 | 16.6151398 |
| Total Regional District | $1,862,709 | 100.0000000 |

The Board of Review finds no cause for concerns raised at the hearing over possible loss of designation of Highland High School as an area vocational school with corresponding loss of state school aid. The forthright written opinion of the Assistant Commissioner in Charge of Vocational Education states, "***Withdrawal from the Regional leaving Gloucester Township as a single school district would not, in my judgment, result in discontinuance of Highland High School as an Area Vocational-Technical School.***" (C-1)

*N.J.S.A.* 18A:13-53 directs that, in the event of deregionalization, existing indebtedness to be assumed shall be calculated "***on the basis of the proportion which the replacement cost of buildings, grounds, furnishings, equipment, and additions thereto of the regional district situated in the withdrawing district bears to the replacement cost of buildings, grounds, furnishings, equipment and additions situated in the entire regional district.***" Inasmuch as the withdrawing districts propose to take ownership of Triton High School, the proportionate share would be calculated as follows:

| | |
|---|---|
| Replacement cost of Triton H.S. | $ 8,672,527 |
| Replacement cost of Triton and Highland H.S. | $17,546,426 |
| Share of indebtedness—Bellmawr & Runnemede | — 49.42617% |
| Share of indebtedness—Gloucester Township | — 50.57383% |

Indebtedness as of June 30, 1977 for the Regional District was $2,890,000.

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Assuming deregionalization, the Gloucester Township Board of Education would have the borrowing capacity to assume its proportion of existing debt and construct a new $9,000,000 high school by infringing on the borrowing capacity of the municipal governing body without exceeding the 3½ percent limitation, as shown by the following calculation by the Department of Community Affairs:

ASSUMPTION THAT WITHDRAWAL IS APPROVED
SCHOOL AND MUNICIPAL DEBT AS OF JANUARY 1, 1978

| | | |
|---|---|---|
| Average Equalized Valuations 1975-76-77 | | $344,386,873.33 |
| *Gross School Debt* | | |
| Gloucester Township Share of Black Horse Pike Regional School District | | |
| $2,890,000 x 50.5738% = | $1,461,583.68 | |
| Local District School Debt | 6,877,000.00 | |
| | | $ 8,338,583.68 |
| Debt Deduction for School Purposes | | |
| $334,386,873.33 x 4% | | 13,775,474.93 |
| Available School Borrowing Capacity | | 5,436,891.25 |
| Cost of Proposed New High School | | 9,000,000,00 |
| Excess Over Available Borrowing Capacity | | $ 3,563,109.75 |
| Municipal Debt Limit | | |
| $344,386,873.33 x 3½% | | $12,053,540.57 |
| Municipal Net Debt | | 2,348,100.00 |
| Available Municipal Borrowing Capacity | | 9,705,440.57 |
| Less: School Borrowing Capacity Excess | | 3,563,109.75 |
| Available Municipal Borrowing Capacity After Proposed School Authorization | | $ 6,142,330.82 |

The advantages and disadvantages of the proposed withdrawal in the County Superintendent's report were reviewed and it was found that the advantages for both the withdrawing districts and Gloucester Township far exceeded the disadvantages. Annual debt service for the Regional District is $418,140 which would be borne by constituent municipalities in their proportionate share under the proposed deregionalization is shown below:

| | *Current* | *Percent* | *Deregionalization* | *Percent* |
|---|---|---|---|---|
| Runnemede & Bellmawr | $169,138 | 40.45 | $206,670 | 49.42617 |
| Gloucester Township | 249,002 | 59.55 | 211,470 | 50.57383 |

Assuming deregionalization and temporary continuation of tuition pupils at Triton High School, pending a successful referendum and building of a new high school in Gloucester Township, the effect of local tax rates of deregionalization, as estimated by the Office of the State Treasurer, would be:

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| | *Current Levy* | *Rate* | *Deregionalization Levy* | *Rate* |
|---|---|---|---|---|
| Runnemede | $ 503,243 | .545% | $ 541,385 | .58% |
| Bellmawr | 700,581 | 1.028% | 753,794 | 1.106% |
| Gloucester Twp. | 1,623,380 | .395% | 1,626,623 | .396% |

Assuming deregionalization and the erection of a new $9,000,000 high school in Gloucester Township and no tuition pupils at Triton, the impact on tax rates as estimated would be as follows:

| | *Current Levy* | *Rate* | *Deregionalization Levy* | *Rate* |
|---|---|---|---|---|
| Bellmawr | $ 700,581 | 1.020% | $ 835,751 | 1.23% |
| Runnemede | 503,243 | .545% | 600,248 | .65% |
| Gloucester Twp. | 1,623,380 | .395% | 2,385,761 | .58% |

*N.J.S.A.* 18A:8-24 provides, in part, that the division of assets

> "***except school buildings, grounds, furnishings and equipment, and of the liabilities, other than the bonded indebtedness of the original district, between the new district and the remaining district on the basis of the amount of ratables in the respective districts on which the last school tax was levied, and in determining the amount of assets to be divided, he shall take into account the present value of the school books, supplies, fuel, motor vehicles and all personal property other than furnishings and equipment.***"

The present apportionment, 1976-1977, would call for the division of such assets of liabilities.

| | *Percent* |
|---|---|
| Bellmawr | 22.3494482 |
| Runnemede | 16.6151398 |
| | 38.9645880 |
| Gloucester Twp. | 61.0354120 |

Therefore, the distribution of such assets and liabilities would be accomplished by applying these percentages.

| | *Percent* |
|---|---|
| Bellmawr and Runnemede | 38.9645880 |
| Gloucester Township | 61.0354120 |

The basic educational organization, should withdrawal be approved, would be continuation in Bellmawr and Runnemede of present elementary districts

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encompassing grades K-8. Bellmawr and Runnemede would form a new limited purpose regional high school district utilizing Triton High School as its physical plant with essentially the same offerings as at present.

Gloucester Township would assume responsibility for Highland High School with the opportunity to form a comprehensive, articulated K-12 district.

The educational program presently in effect at these high schools would continue in the near future. Pupils from Gloucester Township currently enrolled at Triton High School would be able to complete their education there on a tuition basis. The same would be true of any pupils from Bellmawr and Runnemede currently attending Highland High School. Upon graduation of all sending district pupils, Triton High School could revert to a single daily schedule.

The County Superintendent sets forth, as follows, the advantages and disadvantages which would emanate from deregionalization as proposed:

*Advantages to Bellmawr and Runnemede*

"The maximum capacity of Triton High School is approximately 1540 pupils. With only students from these districts enrolled, the school would operate below maximum capacity on a normal school day.

"Note: If Gloucester Township students currently enrolled were permitted to continue on a tuition basis, the school would exceed maximum capacity requiring some simplified overlap or staggered schedule.

"A normal school day would permit students to participate in more school activities.

"A reduction in the number of constituent districts should generate an increase in community involvement and greater support of the school.

"The withdrawing districts would continue to have control of the board of education past the next census, when Gloucester Township will receive a fifth seat on the Regional board.

"Note: It appears that a nine member board apportionment would be five members from Bellmawr and four members from Runnemede.

"Present and projected enrollment reasonably allows for a comprehensive high school program." (CSR, at pp. 18-19)

*Disadvantages to Bellmawr and Runnemede*

"It appears that, at least initially, the per pupil costs will be higher than at present.

"Students wishing to pursue vocational offerings would have to compete

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for admission to the Camden County Vocational-Technical Schools whereas Highland High School is an area vocational school.

"Staff morale and/or contractual problems may be created with changes in assignments.

"Bellmawr and Runnemede residents will continue to pay their proportionate share of debt service until the original bonded indebtedness is paid.

"A new regional district would have to be formed. The Black Horse Pike Regional High School District as a legal entity would be dissolved." (CSR, at p. 19)

*Advantages to Gloucester Township*

"The district would assume total responsibility for the education of all pupils, grades K-12, living in the Township.

"The size of the present and projected student population is large enough to allow for a comprehensive high school program.

"A K-12 system of organization can generally provide for better continuity and curriculum.

"The curriculum can be more responsive to the needs of a single community.

"Decisions affecting Gloucester Township students would only be determined by Gloucester Township residents.

"There would be only one school election each year.

"The school district presently has a large bus fleet which could possibly be large enough to transport all students K-12.

"A dollar saving would be realized by the district since two central office administrative teams would no longer be necessary.

"The borrowing capacity of the district will increase to 4% of equalized valuation because it will now be a K-12 district." (CSR, at pp. 19-20)

*Disadvantages to Gloucester Township*

"Highland High School would immediately go onto full-blown double sessions.

"Staff morale and/or contractual problems may be created with changes in assignments.

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"Gloucester Township will have to depend upon its own borrowing power and not the total Regional District's when considering a building program." (CSR, at p. 20)

The Board of Review, having carefully considered and weighed the relevant facts and the concerns iterated in the pleadings, documents in evidence, and at the hearing by citizens, the petitioning Boards and the respondent Regional and Gloucester Township Boards, determines that the application for severance from the Regional District is a proposal which, if successful, will not place excessive burden on the electorate and warrants submission to the voters. This determination, however, is based on a contingent requirement that the question before the voters must clearly set forth the respective assumptions of existing debt hereinbefore delineated. The question to be placed on the ballot in Bellmawr and Runnemede must be so worded that an affirmative vote for the question not only supports withdrawal from the Black Horse Pike Regional pursuant to *N.J.S.A.* 18A:13-51 *et seq.*, but also the formation of a new limited purpose regional high school district for grades 9 through 12 by Runnemede and Bellmawr, pursuant to *N.J.S.A.* 18A:13-34. This further contingent provision is deemed necessary to guarantee a viable educational plan for the withdrawing districts. Such requirement, of course, does not apply to the question to be placed before voters in Gloucester Township. Authorization to place such question before the voters is unanimously agreed upon by the members of the Board of Review with the further contingent understanding as set forth in the application of the petitioning Boards that pupils from Gloucester Township now attending Triton High School and those from Runnemede and Bellmawr currently attending Highland High School be allowed to continue to do so on a tuition basis until they graduate from their high schools or until other arrangements are mutually agreed upon by both Boards and approved by the Commissioner. Permission is likewise given with recognition that only by a majority of affirmative votes on the respective question placed before the voters in Gloucester Township and in each of the districts of Bellmawr and Runnemede will the proposed withdrawal from the Black Horse Regional District and the proposed formation by Bellmawr and Runnemede of a new limited purpose regional high school district be legally effected. *N.J.A.C.* 6:3-3.3 and 3.4

There remains the matter of procedure of payment of bonded indebtedness which must be addressed since the terms of *N.J.S.A.* 18A:13-61 do not coincide precisely with the factual context in the instant matter. The Board of Review directs that, in the event of a referendum approving deregionalization, the withdrawing districts of Bellmawr and Runnemede shall pay to the Gloucester Township Board of Education at least five days before it becomes due their proportionate share of the amount of the principal and interest of the assigned indebtedness. Thereupon the Gloucester Township Board of Education shall pay those funds, together with its own proportionate share of indebtedness, when it becomes due and payable.

In accordance with the foregoing determination, the Board of Review hereby authorizes the Camden County Superintendent of Schools to fix an appropriate

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date pursuant to law for an election on the proposed withdrawal of Bellmawr and Runnemede from the Black Horse Pike Regional School District and formation of a new limited purpose regional high school district as detailed herein. *N.J.S.A.* 18A:14-3.2 In the event of a favorable vote in each of the three constituent municipalities on the respective public questions placed before them, the Commissioner of Education will determine and make known the effective date of withdrawal, which date shall be coterminous with the formation of the proposed new limited purpose regional district.

COMMISSIONER OF EDUCATION

STATE TREASURER

DIRECTOR, DIVISION OF
LOCAL GOVERNMENT SERVICES

February 16, 1978

**Angela Cieri and Maria Rosa,**

***Petitioners,***

***v.***

**Board of Education of the City of Union City, Hudson County,**

***Respondent.***

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioners, Waters, McPherson, Hudzin & McNeill (Daniel E. Horgan, Esq., of Counsel)

For the Respondent, Scipio L. Africano, Esq.

This matter is continued before the Commissioner of Education from earlier litigation between the parties which resulted in a decision by the Commissioner. (See *Angela Cieri and Maria Rosa v. Board of Education of the City of Union City, Hudson County*, 1977 *S.L.D.* 393.) There, petitioners alleged that the Board allowed its school lunch program to be operated at its Hudson Elementary School contrary to the provisions of *N.J.S.A.* 18A:33-4. Petitioners grounded their allegation on the fact that the principal of the school was allowed to establish

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his own guidelines on the luncheon recess without a formal policy having been adopted by the Board.

Petitioners had sought interim relief against the school principal's guidelines by which their children, pupils enrolled in the Hudson Elementary School, were served cold box lunches in their respective classrooms at 11:30 a.m. The pupils were allowed to consume their lunch until 11:45 a.m., at which time all pupils were required to leave the school building until the afternoon session commenced at 12:45 p.m. The Commissioner observed, as part of the written decision in the earlier matter, that those pupils who remained on the school playground between 11:45 a.m. and 12:45 p.m. were supervised by a janitorial matron and a janitor. (*Cieri, supra,* at 394) The Board, on the other hand, moved to dismiss the Petition for an alleged failure of petitioners to state a cause of action upon which relief could be granted.

Subsequent to oral argument on petitioners' Motion for Interim Relief and the Board's Motion to Dismiss, the Commissioner found and determined that the principal's guidelines, with respect to the controverted school lunch program at the Hudson Elementary School, were restrictive on their face in view of the fact that the Board had not adopted a policy relative to the controverted school lunch policy. The Commissioner had directed the Board:

> "***to establish a luncheon recess policy for its Hudson Elementary School. It is further directed to submit its policy to the Commissioner of Education upon its adoption. Such a policy shall consider the luncheon recess as an integral part of the school day and a component of the learning process. The Board is not foreclosed from requiring pupils to return home during the total recess so long as a reasonable period of time is allowed for the consumption of the lunch. If the Board does not require pupils to return home during the recess, then it shall assign properly certified teaching staff members to supervise those pupils who remain on the school playground.
>
> "In the interim, the Board is temporarily enjoined from allowing the Hudson Elementary School principal to exclude pupils from school grounds, under proper supervision, pending the submission of its policy.***"
>
> (*Cieri, supra,* at 397)

The Commissioner will take this opportunity to clarify the above-cited passage with respect to who may supervise pupils on the playground during a luncheon recess. The Commissioner holds that only properly certified teaching staff members or properly approved teacher aides may be assigned such duties. Should local boards of education elect to employ teacher aides for pupil supervision on the playground during what is commonly called "free time," as opposed to organized learning activities, such boards must comply with the requirements for the approval of teacher aide positions set forth at *N.J.A.C.* 6:11-4.9. Organized pupil learning activities must always be under the supervision of a certified teaching staff member.

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The Commissioner, to the extent that the Board itself had no policy with respect to the luncheon recess and, specifically, it had no policy in regard to the recess at its Hudson Elementary School, temporarily enjoined the Board and its principal from implementing the precise guidelines of the principal as set forth therein. Furthermore, the Board's Motion to Dismiss was denied on the same grounds, i.e. its failure to have a stated policy.

Subsequent to the entry of the Commissioner's determination in the prior matter on April 11, 1977, the Board did adopt a written school lunch policy on April 17, 1977 for all its schools. That policy is set forth in full as follows:

> "***Because of limited space, the Union City school system unfortunately lacks the proper cafeteria facilities necessary to provide the optimum in a lunch program. Nevertheless, the Board desires to provide the best and most effective plan for a lunch program within its capacity to do so. Many plans have been tried in individual schools and we now feel it is appropriate to adopt a uniform policy throughout the system.
>
> "The following uniform guidelines for the lunch program will be effective as school policy in all the Union City Schools:
>
> > "Classes will start at 8:45 a.m. and continue until 11:30 a.m. Lunch will be served in the classrooms under the supervision of the classroom teacher. Those children who bring their own lunches will eat in the classroom at the same time as the children in the lunch program. Teachers will provide meaningful activities during this time for the children who will be going home for lunch.
> >
> > "At 11:45 a.m. all children will be dismissed to return home where they can relax, make use of home facilities and where their parents or guardians can ascertain as to their safety and well-being. For maximum protection, the buildings will remain closed during the luncheon sojourn.
> >
> > "Children will return to school at 12:40 p.m. This system worked to the best interests of the children in the past because of the cooperation of both parents and teachers.
> >
> > "The secondary schools will follow the same procedure except that they will adapt this procedure to their scheduled starting times and lunch periods.
>
> "The development of this policy is in accordance with the recommendation of the Commissioner of Education, Fred G. Burke, in a decision rendered to the Union City School System on April 11, 1977.***"(J-1)

Petitioners, subsequent to the Board's adoption of the stated policy, moved for Summary Judgment in their favor seeking an Order by which the controverted policy (J-1) would be set aside on the grounds that the policy is, on its face,

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arbitrary and capricious. The Board, in the alternative, seeks Summary Judgment in its favor by way of a dismissal of the Petition of the grounds that (1) it complied with the earlier decision of the Commissioner and did adopt a written policy and (2) the adoption of the policy is within its management prerogatives.

Local boards of education possess statutory authority to adopt rules and regulations for the operation of their respective schools (*N.J.S.A.* 18A:11-1) *N.J.S.A.* 18A:33-4 requires local boards of education to:

"***make school lunch available to all children enrolled in the district***."

In the instant matter, the Commissioner has reviewed petitioners' Brief filed in support of their Motion for Summary Judgment. The Commissioner does not agree that the Board's policy controverted herein is arbitrary and capricious on its face. Firstly, it is the Board's policy, not the guidelines of a school principal as in the matter decided earlier. Secondly, the policy is applicable district-wide, not just to the Hudson Elementary School. Finally, all pupils are expected to leave the school grounds at 11:45 a.m. as opposed to just the pupils at the Hudson Elementary School. Given the total circumstances of this matter, the Commissioner finds no reason to substitute his judgment for that of the Board. *Boult and Harris v. Board of Education of the City of Passaic,* 1939-49 *S.L.D.* 7 (1946), aff'd State Board of Education 15, 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.&A.* 1948) The Commissioner does direct, however, that the Board will insure that its policy be implemented so that pupils who may not be physically able to consume their lunch in fifteen minutes be granted sufficient time for consumption.

There being no basis for the Commissioner to intervene, the Board's Motion for Summary Judgment is granted. The Petition is dismissed.

COMMISSIONER OF EDUCATION

February 22, 1978

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**Linda Jenkins,**

***Petitioner,***

*v.*

**Board of Education of the Township of Washington, Morris County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Friedman & Greb (Eugene M. Friedman, Esq., of Counsel)

Petitioner, a nontenured teaching staff member employed for three consecutive academic years by the Board of Education of the Township of Washington, hereinafter "Board," alleges that she was denied reemployment in contravention of *N.J.S.A.* 18A:27-10 *et seq.* and the Board's own policy and, therefore, was denied the acquisiton of a tenure status in the district. The Board denies petitioner's allegations and avers that its determination not to reemploy her was and is legal and proper in all respects.

A hearing was conducted in this matter on December 13, 1976 at the office of the Morris County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner of Education, Thereafter, the parties filed Briefs in support of their respective positions.

At the hearing, petitioner abandoned the main allegations of her Petition of Appeal and proceeded only with respect to Issue No. 6 as set forth in the conference of counsel report and limited her demand to sixty days' salary and attendant emoluments. *Board of Education of the Township of Brick v. Ronald Heinzman et al., Ocean County,* 1976 *S.L.D.* 921, aff'd State Board of Education March 2, 1977 Paragraph No. 6 of the agreed-upon issues at the conference conducted on December 1, 1975 is concerned with the Board's policy for notifying teaching staff members regarding unemployment for the subsequent academic year.

Petitioner was absent from the hearing, therefore, she did not offer testimony on her own behalf. Counsel represented her and offered into evidence Article 11 of the Teachers' Handbook of 1973 which states, *inter alia,* "Notification of a teacher's status in relation to the coming year is made well before April.***" (P-1) Petitioner asserted that the Board's action not to reemploy her occurred at a meeting held on April 15, 1975 and Board Secretary addressed its letter to

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her dated April 16, 1975, therefore, the Board violated its own policy and failed to give her timely notice. Such a violation of its policy and the failure to give timely notice, maintains petitioner, entitles her to sixty days' salary and attendant emoluments as held by the Commissioner in *Brick Township, supra.*

The Board introduced into evidence its negotiated "Agreement Between the Washington Township Education Association and the Washington Township Board of Education, 1974-76," and in particular Article XI which states, *inter alia,* as follows:

"Non-Tenure teachers hired before September 30.

"On or before April 30, the Board shall give each non-tenure teacher continously employed by it since the preceding September 30, either:

***

2. "A written notice that such employment will not be offered.***"
(R-1, at p. 23)

The Board contends that the Agreement was entered into between the Teachers' Association and the Board subsequent to Article 11 of the Teachers' Handbook (P-1) and superseded the earlier Board policy.

The principal testified that beginning in October 1974 he had a number of discussions with petitioner in which he indicated that he was dissatisfied with her work. He stated further that he had notified her on March 3, 1975 that he was going to recommend to the Superintendent and the Board that her contract not be renewed. (Tr. 19-20, 35-37)

The Superintendent testified that in the middle of March 1975 he conducted a four-hour conference with petitioner and a representative of her choice, at which time he indicated that he was going to recommend to the Board that she not be reemployed. (Tr. 38-40)

The Board asserts that petitioner's claim for sixty days' salary and attendant emoluments has no application to the instant matter. It contends that, unlike the Commissioner's determination in *Brick, supra,* it scrupulously adhered to the terms of the agreement and gave petitioner written notice prior to the required date and, therefore, cannot be accused of bad faith.

The Board denies that its notice to petitioner was defective and asserts that it has met its statutory and contractual obligations which terminated June 30, 1975.

The hearing examiner finds that the issue herein is *stare decisis. Patricia Bolger and Frances Feller v. Board of Education of the Township of Ridgefield Park,* 1975 *S.L.D.* 93, aff'd State Board of Education 98, aff'd Docket No. A-3214-74 New Jersey Superior Court, Appellate Division, April 21, 1976. In that

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decision the Commissioner quoted *Thomas Aitken v. Board of Education of the Township of Manalapan, Monmouth County,* 1974 *S.L.D.* 207, 209 in *Ronald Elliott Burgin v. Board of Education of the Borough of Avalon,* 1974 *S.L.D.* 396, 400 as follows:

> "***[I]t is clear that it is the local board of education which must decide the status of its nontenured employees each year, and it must do so on or before April 30. It is equally clear that *subsequent to such decision,* but within the same time parameter, the *decision* must be transmitted by the Board through its administrative agents in 'written form' to such employees.***" (*Emphasis in text.*) (1975 *S.L.D.* at 96)

The hearing examiner finds that the Board has met the statutory requirements of *N.J.S.A* 18A:27-10, its own policies and the directions of the Commissioner as enunciated in his several decisions with respect to the non-reemployment of nontenured teachers. He further finds no merit in petitioner's claim for sixty days' salary subsequent to the termination of her contract on June 30, 1975.

The hearing examiner recommends, therefore, that the Petition of Appeal be dismissed.

* * * *

The Commissioner has reviewed and carefully considered the record of the controverted matter including the exhibits in evidence, the testimony adduced at the hearing, the report of the hearing examiner and the exceptions thereto filed by petitioner pursuant to *N.J.A.C.* 6:24-1.17(b).

Petitioner states in her exceptions that Article XI of the negotiated agreement between the Education Association and the Board merely recites the statute *N.J.S.A* 18A:27-10, with which the Board complied in the instant matter and further states that the Commissioner has held that a local board of education is not bound by its policies and rules when no vested rights are involved. Petitioner's exceptions aver that vested rights are involved in the instant matter since the Board failed to give termination notice by September (sic) [April] 15, in accordance with former Board policy and therefore she is entitled to sixty days' salary.

The Commissioner is constrained to enunciate the relevant statutes as follows:

*N.J.S.A* 18A:27-10

> "On or before April 30 in each year, every board of education in this State shall give to each nontenure teaching staff member continuously employed by it since the preceding September 30 either
>
> a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment

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but with such increases in salary as may be required by law or policies of the board of education, or

b. A written notice that such employment will not be offered.''

*N.J.S.A.* 18A:27-11

''Should any board of education fail to give to any nontenure teaching staff member either an offer of contract for employment for the next succeeding year or a notice that such employment will not be offered, all within the time and in the manner provided by this act, then said board of education shall be deemed to have offered to that teaching staff member continued employment for the next succeeding school year upon the same terms and conditions but with such increases in salary as may be required by law or policies of the board of education.''

*N.J.S.A.* 18A:27-12

''If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In the absence of such notice of acceptance the provisions of this article shall no longer be applicable.''

The effect of these statutes on a teacher's employment status has been the subject of numerous determinations by the Commissioner. See *Barbara Hicks v. Board of Education of the Township of Pemberton,* 1975 *S.L.D.* 332; *Phebe Baker v. Board of Education of the Lenape Regional High School District et al.,* 1975 *S.L.D.* 471; *Inez Nettles v. Board of Education of the City of Bridgeton,* 1976 *S.L.D.*555; *Joanne Johnson v. Board of Education of the Township of Monroe et al., Gloucester County,* 1977 *S.L.D.* 508; and *Bolger supra.*

The Commissioner is constrained to observe that a policy of a local board of education may not supersede or amend a controlling statute. Nor is there a penalty for the violation of a board's policy with regard to a date of notification deadline, other than that of the statute, when, as here, the statute provides for such deadline date and procedure.

Petitioner has not shown that any of her due process or statutory rights have been violated. Nor has it been shown that the Board has acted in bad faith or abused its discretionary authority. The Commissioner finds no reason in the matter controverted herein to substitute his judgment for that of the Board in respect to the non-reemployment of petitioner. Notwithstanding petitioner's claim for sixty days' salary entitlement, the Commissioner finds and holds that respondent Board has met its obligations to petitioner pursuant to *N.J.S.A.* 18A:27-10 *et seq.*

The Commissioner will not substitute his judgment for that of a local board absent a showing of abuse of its discretionary powers. *Boult and Harris v.*

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*Board of Education of Passaic,* 1939-49 *S.L.D.* 7, aff'd State Board 15, 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.&A.* 1948) There is no such showing in the instant matter. The Commissioner adopts the findings and recommendations of the hearing examiner as his own. Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

February 22, 1978

**Louis A. Foleno,**

***Petitioner,***

***v.***

**Board of Education of the Township of Bedminster, Somerset County,**

***Respondent.***

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Mandel, Wysoker, Sherman, Weingartner & Feingold (Richard H. Greenstein, Esq., of Counsel)

For the Respondent, Blumberg, Rosenberg, Mullen & Blumberg (William B. Rosenberg, Esq., of Counsel)

Petitioner, a nontenured teacher employed from September 1974 through June 1976 by the Board of Education of Bedminster, hereinafter "Board," alleges that the Board's determination not to reemploy him for the 1976-77 academic year was in violation of *N.J.S.A.* 18A:27-3.1 which provides that:

> "Every board of education in this State shall cause each nontenure teaching staff member employed by it to be observed and evaluated in the performance of his duties at least three times during each school year but not less than once during each semester***. Each evaluation shall be followed by a conference between that teaching staff member and his or her suprior or superiors. The purpose of this procedure is to recommend as to employment, identify any deficiencies, extend assistance for their correction and improve professional competence."

Petitioner charges that noncompliance with this statute by the Board and

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its administrative staff renders his non-reemployment arbitrary, capricious, unreasonable and in bad faith and prays that it be set aside. The Board maintains that its determination not to reemploy petitioner was a legal exercise of its discretionary authority.

A hearing was conducted at the office of the Somerset County Superintendent of Schools, Somerville, on January 25, 1977 by a hearing examiner appointed by the Commissioner of Education. Thereafter a Stipulation of Facts and Briefs were filed by the parties. The report of the hearing examiner follows, setting forth first those facts not in dispute which form the contextual setting of the controversy.

Petitioner was employed by the Board during the 1974-75 school year as a classroom teacher and unit leader of seventh and eighth grade teachers at a salary of $15,700. During 1975-76 as director of the seventh and eighth grade resource room he was paid $16,859. (J-1, 2) On December 29, 1975, the administrative principal, hereinafter "principal," notified petitioner as follows:

> "This letter is to inform you that the***Board has decided not to renew your contract for the 1976-77 school year.
>
> "I will provide any and every assistance possible in helping you relocate in another position.***" (J-3)

Thereafter on January 27, 1976, the principal prepared a teacher evaluation of petitioner which commended him for his good transition from classroom teacher to resource room teacher and his improvement in interpersonal relationships with staff members but stated that his demonstrated administrative leadership which justified his initial salary had not materialized in accordance with expectations. (J-6, 6A)

The principal submitted a personnel report to the Board signed by petitioner and dated March 12, 1976, which stated, *inter alia,* the following:

> "Today, in a personal conference with Mr. Foleno, I again advised him that it is the intention of the Board of Education not to renew his contract for the 1976-77 school year. This action is based on the fact that Mr. Foleno was initially employed *** with the expectation that he would demonstrate strong staff leadership qualities *** and eventually evolve into an individual who could fulfull an administrative role***. Mr. Foleno has not lived up to those expectations.
>
> ***
>
> "At the conclusion of the 1974-75 school year he was advised that he was being reemployed with the reservation that he would have to demonstrate the strong leadership qualities that were anticipated at the time of initial employment. That did not occur.***" (J-5)

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On March 18, 1976, a motion to renew petitioner's contract was unanimously defeated. (R-3) Thereupon, the Board President by letter dated April 22, 1976 advised petitioner as follows:

> "The ***Board*** has decided not to renew your contract for the 1976-77 school year as documented by the evaluations of the Administrative Principal and in the opinion of the Board there is insufficient positive evidence of teaching effectiveness, an absence of dramatic improvement in performance and your failure to demonstrate the strong leadership qualities that you were advised would be necessary for renewal of your contract***." (J-4)

Petitioner testified at the hearing that he was formally observed during the 1975-76 school year only once on November 3, 1975, and that such other contacts he had with the principal were of no more than three to five minutes' duration and typically occurred before school, at lunch and after school. (Tr. 6, 8, 26-31) He admitted that the principal had informed him of dissatisfaction with his performance at the end of the 1974-75 school year. He testified further that his assignment to the resource room resulted from his voluntary application for that position when it was posted. (Tr. 42-44)

The Board moved at the close of petitioner's case to dismiss the Petition of Appeal, which Motion was held in abeyance by the hearing examiner for final disposition by the Commissioner. (Tr. 49-55)

The Board called one of its members as its sole witness. She testified that the reasons for the Board's determination regarding petitioner were that his evaluations were unsatisfactory and that budgetary problems prompted the Board to replace him at his approximate salary of $18,000 with a teacher at a lower placement on the salary guide. (Tr. 55-56)

It is argued by petitioner that the Board's determination was not only in violation of *N.J.S.A.* 18A:27-3.1 but also in noncompliance with *N.J.A.C.* 6:3-1.19 which was promulgated on January 16, 1976 and states, *inter alia*, the following:

> "(a) For the purpose of this Section, the term 'observation' shall be construed to mean a visitation to a classroom by a member of the administrative and supervisory staff of the local school district, who holds an appropriate certificate for the supervision of instruction, for the purpose of observing a nontenured teaching staff member's performance of the instructional process:
>
> "1. Each of the three observations required by law shall be conducted for a minimum duration of one class period in a secondary school, and in an elementary school for the duration of one complete subject lesson.
>
> "(b) The term 'evaluation' shall be construed to mean a written evaluation prepared by the administrative-supervisory staff member who visits the

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classroom for the purpose of observing a teaching staff member's performance of the instructional process.

"(c) Each local board of education shall adopt a policy for the supervision of instruction, setting forth procedures for the observation and evaluation of nontenured teaching staff members, including those assigned to regular classroom teaching duties and those not assigned to regular classroom teaching duties. Such policy shall be distributed to each teaching staff member at the beginning of his/her employment.

"(d) Each policy for the supervision of instruction shall include, in addition to those observations and evaluations hereinbefore described, a written evaluation of the nontenured teaching staff member's total performance as an employee of the local board of education.

"(e) Each of the three observations required by law shall be followed, within a reasonable period of time, but in no instance more than 15 days, by a conference between the administrative/supervisory staff member who has made the observation and written evaluation and the nontenured teaching staff member. Both parties to such a conference will sign the written evaluation report and retain a copy for his/her records. The nontenured teaching staff member shall have the right to submit his or her written disclaimer of such evaluation within ten days following the conference, and such disclaimer shall be attached to each party's copy of the evaluation report.

"(f) The purposes of this procedure for the observation and evaluation of nontenured teaching staff members shall to be identify deficiencies, extend assistance for the correction of such deficiencies, improve professional competence, provide a basis for recommendations regarding reemployment, and improve the quality of instruction received by the pupils served by the public schools."

Petitioner asserts that neither the sole ten minute observation of his teaching on November 3 nor any other purported evaluation by the principal during the 1975-76 school year satisfies the criteria as defined by *N.J.A.C.* 6:3-1.19. Petitioner argues that the two documents which were provided (J-5, 6) were deficient in that neither was based on classroom observations of one complete subject lesson. Thus it is argued that petitioner, in fact, had "absolutely no observations and evaluations" in compliance with mandatory rule of the State Board of Education and the statute. (Petitioner's Brief, at pp. 4-8)

Petitioner avers that the Board's failure to evaluate his performance in accordance with legal requirements renders its determination not to reemploy him an arbitrary, capricious and unreasonable act without basis in fact which may only be remedied by his reinstatement. In support of the contention that the Commissioner must set aside arbitrary, capricious, unreasonable or illegal acts, petitioner cites, *inter alia, Cullum v. Board of Education of Township of North Bergen,* 15 *N.J.* 285 (1954).

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Petitioner argues that the Commissioner's holdings in *Moses Cobb v. Board of Education of the City of East Orange,* 1975 *S.L.D.* 1047, aff'd State Board of Education 1976 *S.L.D.* 1135 and *Richard Dooley et al. v. Board of Education of the Borough of Keansburg,* 1975 *S.L.D.* 540 are importantly distinguishable from the instant matter for the following reasons:

1. *Dooley* and *Cobb* were dismissed prior to enactment of *N.J.S.A.* 18A:27-3.1; and

2. The boards of education in *Dooley* and *Cobb* had, separate and apart from evaluations, sufficient bases on which to make their judgments.

Petitioner, surmising that the decision in *Dooley, supra,* would have been different had *N.J.S.A.* 18A:27-3.1 been in effect, avers that only by restitution of lost salary and reinstatement for a one year period, during which he would not gain tenure, may an appropriate remedy be molded and the spirit and letter of the statute be effectuated. (Petitioner's Brief, at pp. 12-18) In this regard, in addition to *Elizabeth Rockenstein v. Board of Education of the Township of Jamesburg,* 1974 *S.L.D.* 260, 1975 *S.L.D.* 191, aff'd State Board of Education 199, aff'd Docket Nos. A-3916-74, A-4011-74 New Jersey Superior Court, Appellate Division, July 1, 1976, petitioner cites *Cohoes City School District v. Cohoes Teachers Association,* Docket No. 503 New York Court of Appeals, December 2, 1976. Therein, pursuant to failure of a school board to act in accord with its negotiated policy concerning supervision of nontenured teachers, the following was stated by the Court:

> "***[W]e see no occasion to disturb the award as modified, pursuant to which the School District is required to reinstate Mr. Hagen *without tenure* for one additional year to enable the Board to reevaluate his performance in accordance with the procedures specified in the agreement***." (*Emphasis supplied.*) (94 *LRRM* 2192, at 2194)

Petitioner additionally cites *Margaret Pelose v. Board of Education of the Township of South Brunswick,* 1977 *S.L.D.* 232 wherein the Commissioner denied a teacher's reinstatement but ordered that the teacher be paid a monetary award as a result of her employing Board's noncompliance with *N.J.S.A.* 18A:27-3.2. (Petitioner's Letter in Lieu of Formal Reply Brief)

The Board, stipulating that at most there were only two evaluations of petitioner during 1975-76, argues that petitioner's non-reemployment was legal despite the technical violation of *N.J.S.A.* 18A:27-3.1. The Board argues that such was a *de minimus* technical violation, citing *Inez Nettles v. Board of Education of the City of Bridgeton,* 1976 *S.L.D.* 555. Therein, the Commissioner, upholding the non-reemployment of a nontenured teacher, stated:

> "***The Board made its determination not to reemploy her for reasons other than her classroom performance. Boards of education are invested with broad discretionary powers. *N.J.S.A.* 18A:11-1 One of the most essential of these is the power to determine who shall be employed and

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reemployed to teach in the public schools in each successive year. That a board may consider elements of a teacher's performance other than classroom performance is made clear by the words of the New Jersey Supreme Court in *Donaldson* *** [v. Board of Education of North Wildwood, 65 *N.J.* 236 (1974)] wherein it was stated that :

> '***The board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board *** may conclude that tenure should not be granted.***' (65 *N.J.* at 241)

''See also *Baker* [*v. Board of Education of the Lenape Regional High School District et al.*, 1975 *S.L.D.* 471].

***

''Absent a showing of abuse of its discretionary powers, the Board's determination is entitled to a presumption of correctness. *Quinlan v. Board of Education of North Bergen Township*, 73 *N.J. Super.* 40 *(App. Div.* 1962) In such matters the Commissioner will not substitute his discretion for that of a local board of education.***'' (at 560)

The Board argues that its determination arose not from bad faith but from ''***its regrettably misplaced reliance on its then administrative principal.***'' (Board's Brief, at p. 6) The Board avers that, absent violation of constitutionally protected rights, the Commissioner, when faced with a board's statutory violation or capricious action, has consistently upheld the right of a board not to renew a nontenure teacher's contract but has, in the alternative, molded appropriate remedy in the form of monetary award as in *David Payne v. Board of Education of the Borough of Verona,* 1976 *S.L.D.* 543, aff'd State Board of Education 554; *Elaine M. Chianese v. Board of Education of the Township of Bordentown,* 1976 *S.L.D.* 804, aff'd State Board of Education 1977 *S.L.D.* 1279; and *John C. Roy v. Board of Education of the Township of Middle,* 1976 *S.L.D.* 569, aff'd State Board of Education 574.

The Board also cites *Cobb, supra,* wherein the Commissioner, in upholding that board's right not to reemploy a principal despite a violation of terms of a negotiated agreement requiring a specified number of evaluations, stated:

> ''***[T]he Board's decision not to reemploy petitioner *** was properly grounded in a subjective judgment and recommendation by the Superintendent of Schools, was timely pursuant to law (*N.J.S.A.* 18A:27-10) and may not be set aside by the Commissioner for procedural reasons.***
>
> ''The judgment of local boards of education, with respect to the employment or non-reemployment of nontenured teaching staff members, does not depend alone on such evaluations although they may constitute a part, even the principal part, of a total consideration. [*Donaldson* 65 *N.J.* 236]***'' (1975 *S.L.D.* at 1055)

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The Board argues further that it would be grossly unfair to require it to reinstate petitioner when it had done all that it could to assist him to correct noted deficiencies while he was still employed. The Board submits that since petitioner was given timely notice pursuant to *N.J.S.A.* 18A:27-10 and thus had ample opportunity to seek alternate employment, an award of back pay would be singularly inappropriate. (Board's Brief, at p. 10)

In conclusion the Board avers that *Payne, supra,* and *Chianese, supra,* are not analogous for the reason that in those cases the employing boards offered but later withdrew contracts to teaching staff members.

The hearing examiner, having carefully reviewed the entire record of the controversy, sets forth his findings of facts and recommendations to the Commissioner as follows:

1. Petitioner was noticed in timely fashion of his non-reemployment pursuant to *N.J.S.A.* 18A:27-10 *et seq.*

2. Neither the Board, its administrative principal, nor any other supervisor observed or evaluated petitioner three times during the 1975-76 school year. Petitioner was observed pursuant to *N.J.S.A.* 18A:27-3.1 for approximately ten minutes in November. The statute is silent as to the required length of observations or the time which may reasonably elapse between an observation and a conference. Only after the promulgation of *N.J.A.C.* 6:3-1.19 by the State Board of Education was the Board under requirement to observe petitioner for a minimum of one complete subject lesson and confer with him about the written evaluation within fifteen days. The record is barren of proof that petitioner was observed a second time or that a second written evaluation by the principal was based on such observation as comtemplated by the statute or rules of the State Board. In any event, at best, one observation and written evaluation of petitioner were provided during 1975-76. This constitutes substantial noncompliance with both the cited rule and the statute.

3. The hearing examiner knows of no precedent within this jurisdiction wherein noncompliance with *N.J.S.A.* 18A:27-3.1 and/or *N.J.A.C.* 6:3-1.19 have been addressed by the Commissioner or the courts. *Cobb, supra,* and *Dooley, supra,* were concerned with violation of negotiated agreements. *Cohoes, supra,* emanates from another jurisdiction in a state whose education laws are not identical to those of New Jersey. The monetary awards ordered by the Commissioner in *Payne, supra,* and *Pelose, supra,* for statutory noncompliance were based on facts unique to their respective cases and were not accompanied by reinstatement to teaching positions.

4. The hearing examiner leaves to the Commissioner the determination of such remedy as he may deem to be appropriate.

This concludes the report of the hearing examiner.

* * * *

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The Commissioner has carefully reviewed the record of the controverted matter and observes that no exceptions to the hearing examiner report were filed by petitioner pursuant to *N.J.A.C.* 6:24-1.17(b). The record validates the hearing examiner's findings which the Commissioner henceforth holds as his own.

The respondent Board states that *N.J.A.C.* 6:3-1.19 became effective January 16, 1976, allowing an inadequate period of only 3½ months remaining in the 1975-76 school year prior to April 30 for three evaluations to be completed prior to the required April 30 notification of non-reemployment of a nontenured teacher. This contention is without merit. The Legislature in June 1975 promulgated *N.J.S.A.* 18A:27-3.1 to take effect "July 1 next following enactment." Accordingly, the Board was under statutory obligation to provide three evaluations of each of its nontenured teaching staff members in the school year beginning July 1, 1975 regardless of any subsequent action taken by the State Board of Education. While the Board could not know, prospectively, the content of the State Board's promulgation of January 16, 1976, the fact remains that three evaluations of any kind were not provided. It is the Board's failure to comply with this statutory mandate which requires the Commissioner's determination as to petitioner's entitlement to either reinstatement or other appropriate relief.

The Legislature of this State has delegated to local boards of education the authority to determine who shall teach in the public schools. As was stated by the Court in *Porcelli et al. v. Titus et al.*, 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert.* den 55 *N.J.* 310 (1970):

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

Similar endorsement of that principle was iterated by the Commissioner in *Payne, supra,* as follows:

> "***The Commissioner opines that no duty of a board of education is more crucial to the fulfillment of its constitutional mandate to provide a thorough and efficient system of education than is the responsibility of evaluating the performance of its employees and staffing its classrooms with skillful and effective teachers. It was said in [*Sallie Gorny v. Board of Education of the City of Northfield et al., Atlantic County,* 1975 *S.L.D.* 669] that:
>
> > '***One of the most significant of all factors which comprises a thorough and efficient system of education is a well-trained, scholarly, and highly competent faculty, described in the school law as teaching staff members. In the judgment of the Commissioner, the overall competence and effectiveness of the faculty, in any local school district, is a primary factor, more so than the schoolhouse, the library, and all other instructional materials and equipment, which directly and positively correlates with the quality of the educational program re-

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> ceived by the pupils. Indeed, since the very inception of the institution known as the free public schools, or common schools as they were originally called, professional practitioners of the art of teaching have recognized that the system cannot function without the services of competent teachers, principals, and other educational specialists. This sound educational principle has, over the years, been cited with approval by the courts of this State. See *Redcay v. State Board of Education,* 130 *N.J.L.* 369 (*Sup. Ct.* 1943), aff'd 131 *N.J.L.* 326 (*E.&A.* 1944); *Kopera v. West Orange Board of Education,* 60 *N.J. Super.* 288 (*App. Div.* 1960).***' ***'' (at 551)

It has been clearly established, however, that boards of education may not, with impunity, exercise their discretionary authority in disregard of the protected rights of their nontenured employees. *Rockenstein, supra; North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, AFL-CIO and Beth Ann Prudente v. Board of Education of the Township of North Bergen,* 1975 *S.L.D.* 138

As was stated in *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District,* 1968 *S.L.D.* 7, dis. State Board of Education 11, aff'd New Jersey Superior Court, Appellate Division, 1969 *S.L.D.* 202:

> ''***The Commissioner agrees that boards of education may not act in an unlawful, unreasonable, frivolous, or arbitrary manner in the exercise of their powers with respect to the employment of personnel. Thus a board of education may not resort to statutorily proscribed discriminatory practices, *i.e.*, race, religion, color, etc., in hiring or dismissing staff. Nor may its employment practices be based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served. Such a *modus operandi* is clearly unacceptable and when it exists it should be brought to light and subjected to scrutiny.***'' (1968 *S.L.D.* at 10)

In the instant matter, the fault lay in the dilatory evaluation of petitioner by the Board's administrative officer, rather than in an improper act of the Board itself. It may validly be argued, however, that the Board failed to cause its principal to carry out the statutory mandate of providing three evaluations during the 1975-76 school year. While that failure to fulfill the statutory mandate may not be lightly regarded, it does not strip the Board of its yet more weighty statutory responsibility of determining who shall teach in its classrooms. Nor did the Board disregard other pertinent statutory mandates as witnessed by its notification to petitioner of his employment status in timely fashion in compliance with *N.J.S.A.* 18A:27-10.

In such matters the canons of statutory interpretation require that pertinent statutes bearing on the reemployment of nontenured teachers be read *in pari materia.* No one statute may be considered to the total exclusion of others. In *Payne, supra,* a board withdrew from a teacher in June a contract which had been executed in March. The withdrawal was accompanied by no apparent

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change in his teaching performance. The Commissioner determined that the board's review of the teacher's performance, albeit at a later date, revealed valid reasons not to reemploy him. The board was, nevertheless, found to have acted capriciously. The Commissioner stated the following:

> "***While such action does not divest the board of the right to terminate the contract *** such action may not be taken with impunity. *** Accordingly, it is ordered that the Board pay petitioner the entire amount of his contractual salary for the 1974-75 school year *** together with such emoluments and benefits, excepting tenure, which would normally have accrued***." (at 554)

The instant matter is clearly distinguishable from *Payne, supra,* and *Chianese, supra,* in that petitioner, herein, was notified prior to April 30 that he would not be reemployed and was not issued a contract for the ensuing year. The Board, however, had valid reasons for his non-reemployment. Thus, the single element calling for redress is the Board's failure to cause him to be evaluated a second and third time pursuant to *N.J.S.A.* 18A:27-3.1. This violation neither lulled petitioner into complacency by issuance of a successor contract nor perpetrated on him the disadvantage of having to seek alternate employment at the end of the academic year as in *Payne*. Nevertheless, the disregard of statutory mandate demands equitable redress.

The Commissioner determines that the equitable relief of payment of one year's salary with attendant emoluments ordered in *Payne, supra,* and *Chianese, supra,* would be excessive since petitioner was neither issued a contract nor disadvantaged by being noticed subsequent to April 30. Likewise, an award in excess of six months' salary, as was ordered for the South Brunswick Board's persistent refusal to provide reasons for non-reemployment of a teacher in *Pelose, supra,* would be excessive. Therein, it was within the Board's power to provide those reasons. In the instant matter, although the Board gave both timely notice and reasons for non-reemployment, it *could not* provide evaluations which had not been completed during the school year which concluded prior to the filing of the Petition of Appeal on July 7, 1976.

In *Roy, supra,* a teacher invoked the provisions of *N.J.S.A.* 18A:27-12 after failure of the Upper Township Board to give notice of non-reemployment by April 30. That board gave Roy sixty days' notice but did not pay him for that sixty days. Thereupon, the Commissioner ordered that he be paid sixty days' salary but denied his plea for reinstatement.

The Commissioner views the Board's omission of the statutorily mandated evaluations as requiring similar equitable relief. Accordingly, the Board is directed to pay petitioner sixty days' salary and attendant emoluments in accordance with the terms of his 1975-76 contract. The remaining prayers for relief in the Petition of Appeal are dismissed.

COMMISSIONER OF EDUCATION

February 22, 1978

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**"D.P.," a minor, by his mother,**

***Petitioner,***

***v.***

**Board of Education of the Township of Ocean, Monmouth County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## ORDER

This matter having been opened before the Commissioner of Education (August E. Thomas, Director, Division of Controversies and Disputes) by Michael B. Kirshner, Esq., attorney for petitioner, on Notice of Motion for Interim Relief and Summary Judgment dated October 31, 1977 to vacate the expulsion of D.P. by the Board of Education of the Township of Ocean and order his reinstatement, Peter Shebell, Jr., Esq., counsel for the Board; and

The arguments of counsel having been heard on November 18, 1977 in the office of the Commissioner, Trenton, regarding petitioner's expulsion for selling two marijuana cigarettes; and

It appearing that petitioner, a thirteen year old eighth grade pupil, concedes that he has been afforded due process by the Board (Tr. 1-2); and

Petitioner's sole contention is that his expulsion is too harsh a penalty for his transgression; and

The Commissioner having ordered home instruction for petitioner, commencing November 28, 1977, pending his final determination; and

The Commissioner having reviewed the record and determined that this is a single incident in the course of an otherwise ordinary record of a school pupil; and

It appearing that expulsion is too harsh a penalty to be imposed in the particular circumstances of this case; and

It appearing that D.P. has been out of school since October 7, 1977; and

It appearing that the best interest of D.P. and the community at large will be served by continuing his education in a regular school setting; and

It appearing that the instant matter is distinguishable from "*W.G.,*" *a minor v. Board of Education of the Township of Ocean,* 1974 *S.L.D.* 781; and

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It appearing petitioner's suspension and expulsion of approximately seven weeks and his home instruction of an additional nine weeks are sufficient penalty for his actions; now therefore

IT IS ORDERED on this 23rd day of February 1978 that D.P. be reinstated in school immediately on a regular full time basis.

COMMISSIONER OF EDUCATION

**Nicholas D'Agostino and the Passaic Education Association,**

***Petitioners,***

*v.*

**Board of Education of the City of Passaic, Passaic County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioners, Goldberg, Simon & Selikoff (Gerald M. Goldberg, Esq., of Counsel)

For the Respondent, Louis Marton, Jr., Esq.

Nicholas D'Agostino and the Passaic Education Association, petitioners, are teaching staff members employed by the Board of Education of the City of Passaic, hereinafter "Board," who challenge the method of payment of their salaries and state that there is no authority in law permitting the Board to pay them according to a summer payment plan without first receiving their approval.

The Board asserts that its method of paying staff salaries is legal and proper and has existed for fifty to seventy-five years. The Board asserts further that its staff knowingly and willingly accepted offers of contracts whose terms established the payment of salaries for a twelve month period rather than a ten month academic year.

Oral argument was heard in the office of the Commissioner of Education on an Order to Show Cause why the Board should not be directed to adjust its salary payments to petitioners. In evidence is an excerpt from the Board's policy

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regarding payment of salaries and two typical teachers' contracts. Petitioners submitted a Brief in support of their Order to Show Cause.

The salient facts are not in dispute and are as follows:

1. All contracts are issued on a twelve (12) month basis by Board policy. The policy states that these contracts are for a "*ten-month work year*" and summer salaries will be paid on or before July 25. (*Emphasis added.*) (Exhibit A)

2. The contracts call for twenty-four (24) equal monthly installments to be paid between September 1 and August 30 next. (Exhibits B, C)

3. The Board admits that it pays its staff five sixths of their earned salary between September 1 and June 30, and the remaining one sixth is paid during the summer. (Tr. 21-24)

Thus it is evident that teaching staff members have accepted contracts for the period from September 1 through August 30 and there is no allegation that the contracts' offer and acceptance was other than voluntary.

Nevertheless, petitioners complain further and state that the Board cannot even fulfill its policy obligation to pay the remainder of their salaries by July 25. The Board admits the truth of this complaint and states that it is dependent on the municipality for the funds necessary to pay its teachers during the summer and if the municipality does not have the funds "***the Board is unable to comply with any kind of a payment plan***." (Tr. 20)

The question requiring a determination by the Commissioner follows:

Is the Board compelled by law to pay its staff according to a ten month academic year unless a summer payment plan is requested by individual members?

A review of the relevant statutes shows that a year of employment is defined as one academic year which is the period between the end of the general summer vacation for pupils and the next succeeding summer vacation. *N.J.S.A.* 18A:29-6 Unless employed to work for a longer period, all teachers work between September 1 and June 30 next. Teachers' salaries are subject to the statutory interpretation of an academic year. *N.J.S.A.* 18A:29-5 Thus the salary schedule set forth in *N.J.S.A.* 18A:29-7 is clearly established, considering only an academic year of employment. A local board of education may pay salaries in excess of these minima salary scales. *N.J.S.A.* 18A:29-4.1 Further evidence of the statutory scheme is found in *N.J.S.A.* 18A:29-15 which states in part that:

> "Nothing contained in this article shall be construed to interfere with or discontinue any salary schedule now in force; *provided, such schedule shall meet the requirements of this article****." (*Emphasis added.*)

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All boards of education must adopt an annual budget which must "***contain such amounts as may be necessary to fully implement such* [salary] *policy and schedules for that budget year."* (*Emphasis added.*) *N.J.S.A.* 18A:29- 4.1 The school budget year is the fiscal year July 1 through June 30. *N.J.S.A.* 52:5-1 reads as follows:

> "Except as otherwise expressly provided by law, the fiscal year of the state and of the several state departments, officers and institutions shall begin on the first day of July and end of the thirtieth day of June."

Thus, the contract year for eleven or twelve month employees must begin on July 1 and end on June 30. *In the Matter of the Request of the Board of Education of the Township of Brick, Ocean County, for a Declaratory Judgment Concerning the Payment of Salaries,* 1977 *S.L.D.* 704

The statute *N.J.S.A.* 18A:29-3 regarding summer payment plan is reproduced in its entirety as follows:

> "Whenever persons employed for an academic year by a board of education shall indicate in writing their desire to participate in a summer payment plan, and such board of education approves such participation, then, and thereupon, the proper disbursing officer of the board of education, under such rules as may be promulgated by the commissioner with the approval of the state board, is hereby empowered and directed to deduct and withhold an amount equal to 10% of each semimonthly or monthly salary installment, from the payments of the salaries made to such employees as shall participate in such plan and the accumulated deductions for any academic year shall be paid to the employee or his estate under such rules as may be established by the board of education in one of the following ways: (1) at the end of the academic year; (2) in one or more installments after the end of the academic year but prior to September 1; (3) upon death or termination of employment if earlier. Such deductions may be deposited by the board of education in an interest bearing account in any financial institution having its principal office in the State of New Jersey. Amended by L.1970, c. 238, §1, eff. Oct. 28, 1970."

In his review of the several aforementioned statutes as a harmonious whole, the Commissioner determines that the Board of Education of the City of Passaic must pay its teaching staff members according to an academic year plan. The Board may offer the summer payment option by strictly following the statutory requirements of *N.J.S.A.* 18A:29-3. An opinion of the Attorney General dated July 9, 1976 in this regard reads in part as follows:

> "***Should the *** district wish to start a summer payment plan consistent with the requirements of N.J.S.A. 18A:29-3 for the current school year, funds should be withheld from employee salaries as budgeted for 1976-77 based on the pay scale for this year in the manner required by statute and regulation, beginning in September. Payments must be made to staff mem-

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bers in the summer of 1977 from those funds alone. It should be made clear to both the governing body and the board of education of *** that continuation of their practices of the past years concerning summer payments would constitute a clear violation of law subject to appropriate civil legal action by private and/or public parties.''

When teaching staff members are actually employed for eleven or twelve months, the period of employment is the school year, which begins on July 1 and ends June 30 next. The Board is precluded from offering contracts which extend into the succeeding school year. Further, the Board has not included sufficient funds in its budget as required by law to pay its academic year salary commitment. *N.J.S.A.* 18A:29-4.1 In the instant matter the Board is illegally paying its staff the past year's earned wages with the next year's budgeted monies. Teaching staff members are entitled to their full salary by June 30, whether they are employed for ten, eleven or twelve months.

If the Board has been in compliance with the statutory plan for salary payments, it would not have had to improperly rely upon the municipality for funds during the summer for payment of teachers' salaries. Such funds would have been in the control of the Board as provided in *N.J.S.A.* 18A:29-3. The recent enactment of Chapter 152, Laws of 1977, effective July 11, 1977, provides a period of time for boards of education to make up for a shortage of money caused by the existence of an illegal payment plan such as the matter herein controverted. Those statutes read as follows:

*N.J.S.A.* 18A:29-3.1

''Any local board of education which is unable to meet contractual obligations to make payments pursuant to a summer payment plan authorized by N.J.S.A. 18A:29-3, may, for a period not exceeding 5 years, expend moneys from the appropriations of a subsequent year to meet these obligations; provided all such expenditures are approved by the Commissioner of Education and are subject to his ongoing supervision.''

*N.J.S.A.* 18A:29-3.2

''Nothing herein shall relieve local boards of education from strict compliance with all requirements of N.J.S.A. 18A:29-3 and any regulation adopted thereunder.''

''NOTE: This act shall take effect immediately and shall expire 5 years from the effective date.''

The Board or its agent is directed to meet with the Assistant Commissioner of Education in charge of Administration and Finance and develop a plan to end its long-standing salary payment practice so it may begin paying its teaching staff members pursuant to law.

COMMISSIONER OF EDUCATION

February 24, 1978

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**In the Matter of the Annual School Election Held in the School District of the Township of Howell, Monmouth County.**

## COMMISSIONER OF EDUCATION

## ORDER

The matter of the February 14, 1978 annual Type II school election conducted by the Howell Township Board of Education, hereinafter "Board," having been called to the attention of the Commissioner of Education by the Acting Monmouth County Superintendent of Schools; and

It appearing that the Board caused to be set forth on civilian and military absentee ballots and on voting machines used at the election the incorrect amount of $7,985,515 to be raised by local taxation for current expenses of the Board for the 1978-79 school year; and

It appearing that the correct amount to be raised by local taxation for current expense for the 1978-79 school year should have been $3,740,307; and

It appearing that the aforestated current expense proposal was defeated by the voters who cast 410 yes votes and 419 no votes for that proposal; and

It appearing that on the same civilian and military absentee ballots and voting machines the Board caused to be set forth a proposal to be raised by public taxation for capital outlay for the 1978-79 school year the amount of $148,000; and

It appearing that the correct amount to be raised by local taxation for capital outlay should have been $97,267; and

It appearing that the aforestated capital outlay proposal was approved by the voters who cast 409 yes votes and 406 no votes for that proposal; and

The amounts which actually appeared on the ballots and voting machines, the correct amounts which should have appeared on the ballots and voting machines, and the voting results having been verified to the Commissioner, together with a copy of the respective civilian and military absentee ballots used in the election, by the Acting Monmouth County Superintendent of Schools; and

The Commissioner upon review of the matter having determined that the error on the current expense proposal was so gross as to have deprived the legal voters of the district of a fair opportunity to vote on the Board's true proposal of the amount to be raised by local taxation for current expenses for the 1978-79 school year; and

The Commissioner having also determined that the amount approved by

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the voters to be raised by local taxation for capital outlay for the 1978-79 school year is, in fact, neither necessary nor the actual intent of the Board; now therefore

IT IS ORDERED that the Board conduct a second election no later than March 28, 1978, pursuant to the provisions of *N.J.S.A.* 18A:12-15 as amended by Chapter 324 of the Laws of 1977, whereby the voters will be given opportunity to vote on the Board's true proposal to raise by public taxation for current expenses of the Board for the 1978-79 school year the amount of $3,740,307, the results of such election, if affirmative, to be reported to the County Board of Taxation on or before April 1, 1978; and

IT IS ALSO ORDERED that only the amount of $97,267 be raised by local taxation for the capital outlay needs of the Board for the 1978-79 school year, to which end the Commissioner certifies to the Monmouth County Board of Taxation the amount of $97,267 which amount shall be raised for capital outlay requirements of the Howell Township Board of Education for the 1978-79 school year.

Entered this 27th day of February 1978.

COMMISSIONER OF EDUCATION

**Board of Education of the Township of Ocean,**

***Petitioner,***

***v.***

**Mayor and Council of the Township of Ocean, Monmouth County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Shebell & Schibell (Peter Shebell, Jr., Esq., of Counsel)

For the Respondent, Schaefer, Crawford & Hirsch (Thomas J. Hirsch, Esq., of Counsel)

Petitioner, the Board of Education of the Township of Ocean, hereinafter "Board," appeals from an action of the Mayor and Council of the Township of Ocean, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Monmouth County Board of Taxation a lesser amount of appropriations for school purposes for the 1977-78 school year than the amount proposed by the Board in its budget which was rejected by the voters.

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The facts of the matter were adduced at a hearing conducted on October 17, 1977 at the office of the Monmouth County Superintendent of Schools before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election, held March 29, 1977, the Board submitted to the electorate proposals to raise $6,399,499 by local taxation for current expenses and $26,500 for capital outlay costs of the school district. These items were rejected by the voters and, subsequently, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in Ocean Township in the 1977-78 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determinations and certified to the Monmouth County Board of Taxation an amount of $6,344,499 for current expenses and $26,500 for capital outlay. The pertinent amount in dispute is shown as follows:

| | *Current Expense* |
|---|---|
| Board's Proposal | $6,399,499 |
| Council's Reduction | 6,344,499 |
| Amount Reduced | $ 55,000 |

The Board contends that Council's action was arbitrary, unreasonable and capricious and documents its needs for restoration of the reduction recommended by Council with written testimony and a further oral exposition at the time of the hearing. Council maintains that it acted properly and after due deliberation and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. Council also supports its position with written and oral testimony. As part of its determination Council suggested specific line items of the budget in which it believes economies could be effected as follows:

| Account Number | Item | Board's Proposal | Council's Proposal | Amount Reduced |
|---|---|---|---|---|
| CURRENT EXPENSES: | | | | |
| J220 | Textbooks | $ 89,000 | $ 79,000 | $10,000 |
| J240D | Teaching Suppls. | 171,000 | 161,000 | 10,000 |
| J610 | Sal., Oper. of Plant | 538,838 | 528,838 | 10,000 |
| | Subtotal | $798,838 | $768,838 | $30,000 |
| | *Unappropriataed free balance | | | 25,000 |
| Total Reduction | | | | $55,000 |

*Council directed the Board to appropriate an additional amount of $25,000 from its unappropriated current expense balance.

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The Board's audit report (P-3) for the 1976-77 school year shows the Board's unexpended current expense balance to be $320,600.91. The Board had previously appropriated $30,000 of this sum to its 1977-78 current expense budget proposal. Consequently, the remaining unappropriated current expense balance for the 1976-77 school year is $290,600.91.

The hearing examiner has reviewed the testimony of the Superintendent on behalf of the Board, as well as the documents marked in evidence in support of the Board's position that the entire reduction imposed upon its current expense proposal is necessary to operate a thorough and efficient program of education in 1977-78. The hearing examiner has also reviewed the testimony of the School Business Administrator in regard to the loss of Federal Impact Funds pursuant to *P.L.* 874 due to a housing policy change by Fort Monmouth for its employees.

The hearing examiner observes that the Board's total current expense appropriation for 1977-78 minus Council's reduction of $55,000 is $9,202,926. The unexpended current expense balance is $290,600, or approximately three percent of the total current expense budget.

The hearing examiner finds that the Board has sufficient funds available in its current expense unappropriated balance to absorb the total reduction imposed by Council. Should the Board elect this option, it would have an amount of $245,000 available to it to meet unexpected contingencies.

The hearing examiner further finds that the Board has failed in its proofs to establish that the reduction of $55,000 imposed on its 1977-78 current expense budget by Council is essential or would, in any way, impair its efforts to provide for the maintenance of a thorough and efficient program of education.

Accordingly, the hearing examiner recommends that the Commissioner sustain Council's reduction of $55,000 and that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record in the instant matter, including the report of the hearing examiner and concurs in the findings. He observes that neither the Board nor Council filed exceptions to the report. He finds the amounts certified by Council to be sufficient to maintain a thorough and efficient school system in the Township of Ocean.

The Commissioner hereby authorizes the Board of Education to expend $55,000 from its unbudgeted current expense appropriation during the 1977-78 school year. This authorization does not increase the local tax levy for 1977-78 school purposes in the School District of the Township of Ocean.

COMMISSIONER OF EDUCATION

February 27, 1978

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**Eveline Bland,**

***Petitioner,***

***v.***

**Board of Education of the Borough of Caldwell—West Caldwell, Essex County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Rothbard, Harris & Oxfeld (Barry A. Aisenstock, Esq., of Counsel)

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

Petitioner, formerly employed as a teaching staff member by the Board of Education of the Borough of Caldwell-West Caldwell, hereinafter "Board," alleges that the reasons afforded her by the Board for her non-reemployment are not the true reasons and that the evaluations performed upon her teaching performance by the Board's administrators are invalid. The Board denies the allegations and asserts that its action with respect to petitioner's non-reemployment is in all respects proper and legal. The Board seeks dismissal of the matter by way of Summary Judgment in its favor for the alleged failure of petitioner to state a cause of action upon which relief could be granted. Petitioner opposes the Board's Motion for Summary Judgment and demands a plenary hearing before the Commissioner of Education to establish the truth of her allegations.

The Board's Motion for Summary Judgment is referred directly to the Commissioner for determination on the record, including the pleadings, exhibits and opposing Briefs of the parties. The facts of the matter are as follows:

Petitioner was employed by the Board as a teacher of vocal music for the 1973-74, 1974-75 and 1975-76 academic years. Petitioner was notified by letter dated April 9, 1976 from the Superintendent of Schools that

> "***The Board of Education, after a complete and full consideration of all the evaluations contained in your personal folder of the years 1974, 1975, and 1976, and also of your complete personal refutations to some of the evaluations, concluded that a contract was not to be offered to you for the school year 1976-77.
>
> "The reasons for non-renewal are contained in the evaluations of [the

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supervisor of music] (January 14, 1976 and March 17, 1976) and of [the school principal] (January 16, 1976 and March 19, 1976).***'' (P-5)

The Commissioner observes that the written evaluation of the supervisor on January 14, 1976 advised petitioner, *inter alia,* that

''***There is no discernible difference between classes observed in this period and those in September—October. Mrs. Bland's classes suffer from a proliferation of topics, a lack of definition and coherence in content, a lack of meaningful development within the time span, and a generally low level of intensity in spite of feverish activity.***'' (P-1, at p. 2)

The supervisor also advises petitioner that

''***There will have to be significant improvement in all areas recommended by March 15, 1976 or I will not be able to recommend reemployment.'' (P-1, at p. 2)

The Commissioner observes that the supervisor did state in writing his recommendations for improving her teaching performance.

The principal evaluated petitioner's teaching performance on January 16, 1976 and stated, *inter alia,* that she agreed with the supervisor's evaluation. (P-1) The principal also set forth a review of recommendations she had already made to improve petitioner's performance in addition to six additional recommendations offered petitioner to improve her performance. (P-2, at p. 2) The principal concludes the evaluation by stating

''***There will have to be significant improvement in all the recommended areas by March 15, 1976 or I will not recommend Mrs. Bland for reemployment***.'' (P-2, at p. 4)

The supervisor evaluated petitioner's teaching performance again on March 17, 1976 and set forth in detail his analysis of his observation. (P-3) The supervisor concluded his evaluation by stating

''***I have given thorough and conscientious deliberation, and I do not feel that either the children's or Mrs. Bland's interests would be served by her continuing as a music teacher in our schools. I therefore do not recommend reappointment for the 1976-77 school year.'' (P-3, at p. 6)

The principal evaluated petitioner's performance on March 19, 1976 and set forth in detail an analysis of her observation. (P-4) The principal states that petitioner's instructional methods had not improved, nor was improvement shown in other areas with which the principal had expressed concern in earlier evaluations. The principal concludes by stating

''***I am unable to recommend reappointment for Mrs. Bland for the 1976-

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77 school year due to the lack of substantial improvement in the critical areas mentioned above [in the evaluation report]." (P-4, at p. 3)

The Commissioner observes that the Board's reasons for its determination not to reemploy petitioner for the 1976-77 school year are grounded upon these four specific evaluations. (P-1, 2, 3, 4)

Petitioner grounds her allegation that the Board acted improperly with respect to her non-reemployment because it failed to consider all prior evaluations of her teaching performance and that the evaluations it did rely upon were inconsistent in terms of the recommendations made to her for improvement. Petitioner alleges that, in fact, the evaluators failed to assist her in a constructive fashion.

The Commissioner notices that contrary to the allegations of petitioner, the Board did consider all evaluations of petitioner's teaching performance prior to its determination not to reemploy her. (P-5, *ante*) Furthermore, the Board is not required in matters such as these to carry the burden of proof to establish the validity of its action. It is petitioner who carries such burden.

The Commissioner finds no basis to support petitioner's allegation that the four evaluations (P-1, 2, 3, 4) are inconsistent in their recommendations to her for improvement nor that the evaluators failed to assist her in a constructive fashion.

Petitioner contends that the controverted action of the Board must be set aside because it failed to distribute to her a written copy of its evaluation procedure as required by *N.J.A.C.* 6:3-1.19(c).

The Commissioner observes that the whole of *N.J.A.C.* 6:3-1.19 addresses the requirements of the State Board of Education for the supervision of instruction and for the observation and evaluation of nontenured teaching staff members. *N.J.A.C.* 6:3-1.19(c) specifically provides as follows:

"Each local board of education shall adopt a policy for the supervision of instruction, setting forth procedures for the observation and evaluation of nontenured teaching staff members, including those assigned to regular classroom teaching duties and those not assigned to regular classroom teaching duties. Such policy shall be distributed to each teaching staff member at the beginning of his/her employment."

The whole of the rule became effective January 16, 1976 and in the Commissioner's judgment, is intended to require, *inter alia*, that local boards of education set forth procedures for their administrators to insure that each nontenure teacher it employs is fairly evaluated during the course of the academic year. The primary purpose of such policies is the improvement of instruction received by pupils. See *Sally Gorney v. Board of Education of the City of Northfield et al.*, 1975 *S.L.D.* 669.

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Petitioner's complaint that she did not receive a written copy of the Board's policy, even if true, is wholly without merit for purposes of this litigation. The fact remains that her performance was evaluated and that detailed evaluation reports were given to her.

Petitioner is not entitled as a matter of right to a plenary hearing into the allegations she makes in regard to her non-reemployment. There is no claim entered that she was refused reemployment for proscribed reasons (race,color, religion, sex, political affiliation, etc.) or in violation of other constitutional rights. Petitioner's naked allegations that the evaluations (P-1, 2, 3, 4) on her performance are invalid do not constitute grounds upon which a plenary hearing is granted. (*cf. Winston v. Board of Education of the Borough of South Plainfield,* 125 *N.J. Super.* 131 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974); *Joan Sherman v. Malcolm Connor and Board of Education of the Borough of Spotswood,* 1973 *S.L.D.* 51, aff'd State Board of Education 1974 *S.L.D.* 1433, aff'd Docket No. A-2122-73 New Jersey Superior Court, Appellate Division, January 28, 1975 (1975 *S.L.D.* 1157); *Claire Haberman v. Board of Education of Morris Plains,* 1975 *S.L.D.* 848)

The Commissioner finds and determines that petitioner has failed to state a cause of action upon which relief could be granted. The Board has authority to determine which of its nontenure teachers shall be continued in their employment so long as it takes such action consistent with law. *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974) In the instant matter no allegation is made that the Board in its action not to reemploy petitioner violated any statutory provisions from which would attach any rights to petitioner.

For these reasons, the Board's Motion for Summary Judgment is granted. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

February 27, 1978

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**Stephen Barba,**

***Petitioner,***

***v.***

**Board of Education of the City of Bayonne, Hudson County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Sterns, Herbert & Weinroth (Michael J. Herbert, Esq., of Counsel)

For the Respondent, John J. Pagano, Esq.

Petitioner, a janitor in the employ of the Board of Education of the City of Bayonne, hereinafter "Board," from the date of September 11, 1973 to April 4, 1976 alleges that his initial employment was for other than a "fixed term" and that he was tenured in his position pursuant to law. *N.J.S.A.* 18A:17-3 He avers that the Board could not, therefore, terminate his employment as it purported to do on that latter date and he requests judgment to this effect by the Commissioner of Education. He further requests reinstatement in his position and retroactive payment of salary from the date of his termination. The Board avers that petitioner's initial employment was that of a *per diem* employee and that he is not entitled to the protection which tenure affords.

A hearing was conducted on January 31, 1977 at the office of the Hudson County Superintendent of Schools by a hearing examiner appointed by the Commissioner. Thereafter the parties filed Briefs by March 30, 1977. The report of the hearing examiner is as follows:

At the conference of counsel in this matter which was held on December 13, 1976 it was agreed that petitioner would prepare a set of stipulated facts for submission as part of the record. Such stipulation was in fact prepared but was not met with agreement by the Board although there is substantial agreement on many primary facts which are reported, *post*. The central question for consideration is whether petitioner's initial employment by the Board in September 1973 to date of April 4, 1974 was that of a regular employee of the Board which could not be characterized as that for a "fixed term" and thus would entitle him to the protection of tenure according to the statutory terms. *N.J.S.A.* 18A:17-3 The applicable statute is cited in its entirety as follows:

> "Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure

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during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B or article 2 of chapter 6 of this title."

Documents submitted in evidence at the hearing provide a frame of reference for the testimony of petitioner and other witnesses and for the arguments of the parties.

Petitioner submitted an application to the Board in the summer of 1972 for employment as a maintenance man (R-1) and was hired by school officials as a "janitor" to begin work on September 11, 1973. (R-3) At the time of initial hire there was no formal action by the Board and a formal contract was not issued to petitioner. His rate of pay from September 11, 1973 as a "per diem" employee was $18.00 (R-3), and he was afforded none of the usual fringe benefits, *i.e.*, paid holidays, sick days, pension enrollment, health insurance, etc. This salary was paid to petitioner from the Board's J610-2 account which was budgeted by the Board as an expenditure expected to be incurred in the 1973-74 academic year for "Salaries—Per Diem Employees." (R-7) Petitioner was paid on or about the 15th of each month and his pay was dependent on the number of days of actual work in the prior month. Thus his pay with deductions only for F.I.C.A. and income tax was $252.00 in October, $378.00 in November and $416.28 in December 1973. (R-3) He continued on the same pay status in January 1974 but the Board's payroll sheet for petitioner for 1974 contains the notation "Per Diem—Washington." (R-4) There is also the notation "Contracted 4/5/75" and from that time forward petitioner's pay was increased to a gross pay of $666.66 per month. (R-4) The employment contract executed by petitioner and the Board on April 4, 1974, to run for the period April 5, 1974 to April 4, 1975, specified that petitioner's salary of $7,500 per annum was calculated at the "First step of salary guide for Janitor." (PR-1)

On April 9, 1974, petitioner sent the following letter to a school official:

"I greatly appreciate your offering to me the position of janitor in the Bayonne School System. I accept your offer and will strive to do the best job I can." (R-2)

Thereafter petitioner and the Board executed a second contract which extended from April 5, 1975 to April 4, 1976. (PR-2) This contract provided for an increase in salary and like the first contract (PR-1) contained a termination clause which could be exercised by either party at any time upon 60 days' notice. (PR-2) The Board's payroll records of petitioner's employment in the two year period April 5, 1974 to April 4, 1976 indicated that deductions were made for pension fund, contributory insurance, union dues, and medical coverage. As noted, *ante,* there were no deductions from petitioner's pay for these purposes prior to April 5, 1974.

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On March 9, 1976, the Superintendent of Schools wrote petitioner and told him that:

> "Your present one-year contract as Janitor for the Board of Education runs from April 5th, 1975 through April 4th, 1976.
>
> "Your contract as custodian is *not* being renewed by the Board of Education and your services will not be required as of April 5th, 1976."
>
> (*Emphasis in text.*) (PR-3)

Petitioner contests such non-reemployment on the principal grounds that his initial employment by the Board was not for a position for a fixed term but for a permanent position and, thus, he has tenure protection which bars the Board's termination action. His testimony at the hearing centered around this contention. He testified that when initially employed by the Board he was assigned to a school identified as Number 2 School and served there two months. (Tr. 12) Petitioner testified he was then transferred to the Washington School and served continuously thereafter in that schoolhouse from the date of that transfer in 1973 to the date of the notification in 1976 that his contract would not be renewed. (PR-3; Tr. 12) He testified that at all times prior to April 5, 1975 and thereafter he had worked a five day, 40 hour week, as a janitor and that a janitress, engineer and assistant engineer had also been assigned to each of the two schools where he was assigned. (Tr. 15) He testified that at the time he was employed he understood he had a "steady job" and that he had been told by the Superintendent that he was serving in a permanent position. (Tr. 16, 32) He further testified that in the initial period of employment his position was that of a janitor and that he performed the same work as other janitors. (Tr. 21) On cross-examination petitioner said he was not told at the time of hire that he was to be employed on a per diem basis but only that he was to be employed at $18 per day. (Tr. 26) He testified that while he was paid once a month the other janitors were paid every two weeks. (Tr. 33)

A custodian-engineer in the employ of the Board testified it was customary for the Board to hire persons on a per diem basis for varying periods of employment prior to the time when contracts were offered. (Tr. 40) He testified that such employment was not on a daily call basis but was continuous (Tr. 41) and that persons so employed were assigned to specific locations. (Tr. 42)

A janitor-clerk employed by the Board testified that petitioner came to his school one day looking for work and that at that time he was "looking for a janitor" to replace a man in the high school. (Tr. 44) He testified that petitioner agreed to take the job and worked there approximately two weeks. (Tr. 46) He testified that petitioner was then without work for one day but was then employed in the Number 2 School. (Tr. 46, 51) The clerk testified further that he had not told petitioner he was to have a "steady job." (Tr. 53) He testified that petitioner's employment in the schools was "continuous until he was told differently***." (Tr. 54) The clerk testified that per diem employees receive contracts when a job becomes vacant. (Tr. 58) He further testified from the time petitioner

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was assigned to the Washington School his employment there was continuous to the time when the first contract was signed. (PR-1)

The executive secretary to the Superintendent testified it was not unusual for a per diem employee to be employed on a continuous basis for a period of months. (Tr. 74) She testified that per diem employees were usually employed to replace persons who were temporarily absent but that on occasion per diem employees were assigned to positions where there was no present incumbent. (Tr. 76, 81)

The Superintendent testified that he had not told petitioner at the time of employment that his position was to be a permanent one. (Tr. 83) He testified that in December 1973 he had talked with petitioner and told him his employment as a per diem employee would be compensated at the salary of $18, without fringe benefits, and would be on "***a day-to-day basis.***" (Tr. 84) The Superintendent testified that this talk with petitioner to get a physical examination and the possibility of an appointment of petitioner to a regular position at some future date. (Tr. 87) The Superintendent testified that petitioner was in fact regularly employed and "***worked most work days***" during the period September-December 1973. (Tr. 88) The Superintendent testified that it was not inaccurate to say that petitioner's service prior to April 4, 1974 could be characterized as an "***informal probationary period***" during which time his work could be observed. (Tr. 91) He testified further that on December 11, 1973 when he talked to petitioner there was a vacancy at the Washington School and that petitioner was "***making the transition***" to it. (Tr. 91) The Superintendent testified that he, and not the Board, hires per diem employees. (Tr. 92)

Petitioner avers that such documentation and testimony attests to the truth of his allegation that he was regularly employed by the Board without a fixed term contract and that therefore tenure accrued. He further avers that he did not waive the protection of tenure when he signed the fixed term contracts PR-1 and 2. In support of his arguments he cites or distinguishes many court decisions and decisions of the Commissioner. *Board of Education of Jersey City v. Wall,* 119 *N.J.L.* 308 *(Sup. Ct.* 1938); *Juanita Zielenski v. Board of Education of the Town of Guttenberg,* 1970 *S.L.D.* 202, rev'd State Board of Education 1971 *S.L.D.* 664, aff'd Docket No. A-1357-70 New Jersey Superior Court, Appellate Division, February 16, 1972 (1972 *S.L.D.* 692); *Rall v. Board of Education of Bayonne,* 54 *N.J.* 373 (1969); *Custodians—Maintenance—Matrons Service Association v. Bridgewater—Raritan Regional Board of Education,* 1971 *S.L.D.* 135, aff'd State Board of Education 139, aff'd Docket No. A-273-71 New Jersey Superior Court, Appellate Division September 25, 1972 (1972 *S.L.D.* 668) In petitioner's view his employment by the Board was continuous from September 11, 1973 and a denial of tenure on the basis of a designation as a temporary per diem employee represents an attempt to circumvent the statutory plan.

The Board avers that a janitor hired by the Superintendent on a per diem basis possesses no tenure rights pursuant to law but that, even if it is held that petitioner accrued tenure, he thereafter waived its protection by his execution

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of two fixed term contracts. The Board cites *James Mignone v. Board of Education of West Orange*, 1965 *S.L.D.* 104; *Frederick Olley v. Board of Education of Southern Regional High School*, 1968 *S.L.D.* 20; and *Custodians—Maintenance—Matrons Service Association, supra*, in support of its contentions.

The hearing examiner has examined all such evidence and arguments and sets forth the following findings of fact:

1. Petitioner was employed on September 11, 1973 by the Board as a janitor replacement for an employee temporarily absent and served in that position for approximately two weeks. Such position may be characterized as temporary.

2. He was transferred thereafter to Number 2 School and served as a janitor there until approximately December 1, 1973 (the exact date is not clearly established). This position may also be classified as temporary or transient.

3. On December 1, 1973, or shortly thereafter, petitioner was transferred to the Washington School and remained continuously employed there in the same position as janitor for the entirety of the period December 1, 1973 to April 4, 1976.

4. In the initial phase of this assignment petitioner was paid as and recognized as a per diem employee with none of the benefits afforded contracted employees and he recognized and accepted such status.

5. On April 4, 1974 and thereafter, petitioner's recognized status was altered to that of a regular contracted employee and on April 9, 1974, petitioner took formal cognizance of the alteration in status in his letter to the Board (R-2), wherein he indicated he appreciated the fact the Board was offering him the position. While his duties remained the same thereafter, the benefits accorded him were changed significantly and his salary status was elevated to that of a regular employee.

The question to be answered from such facts is whether petitioner's employment during the period December 1, 1973 to April 4, 1974 without a fixed term contract entitles him to the protection of tenure. The hearing examiner concludes that it does not since there is no conclusive evidence that an offering of a permanent appointment as janitor was made to or accepted by petitioner prior to April 4, 1974. Petitioner acknowledged this fact, in effect, by his acceptance of the offering of the Board in the fixed term contract of April 5, 1974. (R-2) The testimony with respect to the nature of prior offerings is conflicting. The documentation and the factual record are not.

The hearing examiner finds support for the conclusion that petitioner is not entitled to tenure protection from the decision of the Commissioner in *Arthur Lynch v. Board of Education of the Town of Irvington*, 1938 *S.L.D.* 703, aff'd State Board of Education 705 (1934). There, as herein, there was a tentative

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appointment of an employee for a period of probationary employment followed by appointment for a fixed term and the Commissioner said:

> "***The Board of Education appointed the appellant as a janitor for a probationary period of three months beginning November 1, 1931 and the word 'probation' is defined as 'any proceeding attempting to put a person to a test' or 'a period of testing or trial.' When, therefore, a janitor continues after the probationay period without appointment for a definite time, he is protected by the Janitors' Tenure Act (Chapter 44, P.L. 1911), and if, after that time, *he does not accept a definite term appointment,* he cannot be removed except in the manner prescribed by the Tenure Act.***"
>
> (*Emphasis supplied.*) (at 704)

The State Board in its affirmance of *Lynch* said:

> "***It is too well established to need citation of authority, that acceptance of a position for a definite term, is deemed a waiver of tenure rights which would have resulted upon an appointment for an indefinite term. Hardy vs. Orange, 61 N.J.L. 623. DeBolt vs. Board of Education of Mount Laurel Township, Supplement to School Law Decisions of 1928, page 933.***

And,

> "While the facts and circumstances surrounding an employment may be considered to determine its term, the formal acts of respondent and its committee preclude the inference that respondent at any time intended to employ appellant for an indefinite term.***" (at 705-706)

Similarly herein, the facts and circumstances clearly indicate petitioner knew that his status during all of the preliminary period of his employment by the Board was not that of a regular employee hired for an indefinite term. The salary and other emoluments offered him and accepted by him were those of a probationary employee. Even the method and time of payment varied from those of regular employees and he knew it. (Tr. 33) When formal employment was offered him as a regular janitor it was for a fixed term and he accepted it. The hearing examiner finds that petitioner's initial period of employment was one for a fixed term of temporary, day-by-day assignment, and did not constitute regular employment without a fixed term.

Accordingly, the hearing examiner recommends that the Petition be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the findings and recommendations set forth therein in the context of the total record. It is observed that no exceptions to the report have been filed.

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The Commissioner concurs in all respects with the findings and recommendations of the report. It is clear from the record that petitioner's initial employment by the Board's agents was not the permanent employment by the Board requisite for a tenured entitlement, but a probationary, administrative assignment of petitioner by school officials. His rate and frequency-of-pay status at the time of employment and forward to April 4, 1976 differed markedly from his status subsequent to that date. Petitioner recognized this fact in his letter to the Board on April 9, 1974. (R-2) Neither the initial period of per diem employment nor the period of fixed-term contractual employment qualify petitioner for the protection of tenure which the statute, *N.J.S.A.* 18A:17-3, affords to those employed for "***other than a fixed term.***." The Commissioner so holds.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

February 27, 1978

**"R.P." and "F.P.," as parents and guardians *ad litem* for "R.P.,"**

***Petitioners,***

***v.***

**Board of Education of the Borough of South Plainfield, Middlesex County,**

***Respondent.***

**COMMISSIONER OF EDUCATION**

**DECISION ON MOTION**

For the Petitioners, John F. Richardson, Esq.

For the Respondent, Allen Dzwilewski, Esq.

This matter was opened before the Commissioner of Education through the filing of a formal Petition of Appeal by the parents of "R.P." to stay the actions of the Board of Education of the Borough of South Plainfield, hereinafter "Board," and a Notice of Motion for an Interim Order dated November 10, 1977, requesting that R.P. be permitted to participate in the high school varsity interscholastic wrestling program until such time that a hearing can be conducted

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and a final determination made by the Commissioner with regard to the instant matter.

The Board, having filed its Answer with respect to the allegations, prays that the matter be dismissed with prejudice or, in the alternative, petitioners' request for an Interim Order to allow R.P. to participate in its wrestling program be denied pending a plenary hearing.

Oral argument of the parties on petitioners' Motion for an Interim Order was heard at the State Department of Education, Trenton, on December 8, 1977 by a representative of the Commissioner. The facts of the matter are these:

R.P., a twelfth grade pupil enrolled in the Board's high school, admits to having one kidney. The Board has denied his participation in the school's varsity wrestling program upon the advice and recommendation of its medical inspector.

R.P. asserts that he has been permitted to participate in the Board's intramural football program and other programs conducted in the Board's physical education classes.

R.P.'s parents assert that they are willing and have offered to give a general release to the Board in any language which it may require saving and holding the Board harmless from any possible injury which R.P. may suffer while participating in the varsity wrestling program. R.P. avers that his physician has advised him and the Board's medical inspector that he may participate in wrestling.

Petitioners argue that the Board's action, based upon the medical inspector's judgment, that R.P. should not participate in the varsity wrestling program is based solely on the fact that R.P. has only one kidney. R.P. contends that the Board's action deprives him of a thorough and efficient education pursuant to the New Jersey Constitution.

The Board denies the allegations and argues that petitioner did not cite any competent medical authority which would permit him to participate in the varsity wrestling program. Nor, argues the Board, has petitioner demonstrated that the judgment of the medical inspector was in any way arbitrary. The Board relied upon a similar matter in "*P.N.,*" *by his parents v. Board of Education of the City of Elizabeth,* 1975 *S.L.D.* 783 wherein the Commissioner denied petitioner's prayer for Interim Relief and found that the board's action to deny petitioner's participation on the school's soccer team, because petitioner had only one kidney, was entitled to the presumption of correctness.

The Board asserts that the parents' offer to release and save it harmless from liability which might result from any injury to R.P. as a result of the wrestling program would not, in fact, protect the Board. The Board contends that R.P., upon reaching the age of majority, could subsequently bring suit against it as the result of any injuries sustained due to his participation in the wrestling program.

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The Board further asserts that it offers a variety of non-contact varsity athletic sports in which petitioner may participate.

The Commissioner is aware of the criteria set forth by the courts for the exercise of discretion in the issuance of a *pendente lite* restraint. In *United States v. Pavenick,* 1971 *F. Supp.* 257, 259-60 (*D.N.J.* 1961) wherein the Court cited *Communist Party of the United States of America v. McGrath,* 96 *F. Supp.* 47, 48 (*D.D.C.* 1951) as follows:

> "***Issuance of a preliminary injunction is a matter within the sound discretion of the court. That discretion is traditionally exercised upon the basis of a series of estimates: the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally.***"

In the judgment of the Commissioner, the interests of the pupil, his parents and the community at large are best served by permitting the Board to exercise its legal discretion in adhering to the advice of its own medical inspector, absent a clear showing that the medical inspector's determination was arbitrary or discriminatory. Petitioner has failed to make such a clear showing.

The Commissioner is constrained to state that the action taken by the Board is entitled to the presumption of correctness and the Commissioner will not overturn its decision unless there is an affirmative showing that the decision was improper, unreasonable or arbitrary. *Schinck v. Board of Education of Westwood Consolidated School District,* 60 *N.J. Super.* 448, 476 (*App. Div.* 1960); *Thomas v. Board of Education of Morris Township,* 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966); *Joseph J. Dignan v. Board of Education of the Rumson-Fair Haven Regional High School District,* Docket No. A-444-74 New Jersey Superior Court, Appellate Division, October 10, 1975 (1975 *S.L.D.* 1083)

While the Commissioner is cognizant that a hearing on the merits and a subsequent determination thereon might not be concluded in sufficient time for R.P. to participate during this wrestling season, he is aware that other interscholastic sports will be played during this academic year. Therefore, a plenary hearing will be set down at the request of petitioner.

In the instant matter, the Commissioner finds and determines that no sufficient grounds have been presented to support the application for a restraining order against the Board. Accordingly, the Motion for *pendente lite* relief is denied.

COMMISSIONER OF EDUCATION

February 27, 1978

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**"E.F.," parent and guardian *ad litem* of "J.F.,"**

***Petitioner,***

***v.***

**Board of Education of the City of Clifton *et al.*, Passaic County,**

***Respondents.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Krieger, Klein & Henkoff (Avram B. Segall, Esq., of Counsel)

For the Respondent, John J. Nemetz, Jr., Esq.

Petitioner is the adoptive father of a minor son, J.F., who is a pupil enrolled in Clifton High School. J.F. was suspended from school on February 25, 1976 for the distribution of a controlled dangerous substance in the school and was placed on home instruction. He remained on home instruction until June 1976 and was refused admittance to the daily class program of the high school on September 8, 1976. Subsequently, on September 14, 1976, he was readmitted into that daily program but was removed on October 22, 1976 and returned to home instruction by resolution of the Clifton Board of Education, hereinafter "Board". It is his continued exclusion which petitioner protests herein. The Board contends its action is consistent with its discretionary authority.

Oral argument was heard at the State Department of Education, Trenton, on November 8, 1976 by a hearing examiner appointed by the Commissioner of Education, on petitioner's Motion for Interim Relief in the form of immediate reinstatement of J.F. to the daily program at Clifton High School. The Commissioner denied such relief absent evidence that J.F. was suffering irreparable harm. An expeditious hearing was ordered and the hearing was conducted on April 20, 1977 in Pompton Lakes. The report of the hearing examiner follows:

The uncontroverted facts of the matter are these:

J.F. was suspended on February 25, 1976 because of his alleged possession of a controlled dangerous substance and was placed on home instruction. Thereafter, on April 27, 1976, J.F. and his parents appeared before the Honorable Harold C. Nitto, Judge of the Passaic County Juvenile and Domestic Relations Court, at which time the infant plaintiff submitted to the jurisdiction of the Court and requested a Stay of Adjudication pursuant to *R*.5:9-9(b) (1).

J.F. remained on home instruction until June 1976 and on September 8,

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1976, his readmittance into the regular, daily class program of Clifton High School was denied. He was returned to the regular class program by a Court Order on September 13, 1976. That Order also directed the Board to afford J.F. a hearing within three days. Said hearing took place on September 15 and 23, and October 6, 1976. J.F. attended the daily class program at Clifton High School from September 14, 1976 to October 22, 1976, when he was returned to home instruction by a resolution adopted by the Board at a meeting held October 20, 1976, which reads as follows:

"WHEREAS, this Board was heard and considered the testimony of and the evidence presented by or on behalf of the parties and their respective witnesses;

"WHEREAS, a hearing was held in connection therewith at which hearing said minor was represented by an attorney;

"WHEREAS, this Board was heard and considered the testimony of and the evidence presented by or on behalf of the parties and their respective witnesses;

"WHEREAS, this Board has concluded that the minor is guilty of the charges alleged in this complaint;

"WHEREAS, this Board has had the benefit of the reports of its educators, school psychiatrist, pupil personnel services and child study team;

"WHEREAS, the child study team has recommended that the said student be continued on home instruction and that the same would be an appropriate educational program for the minor under the circumstances;

"WHEREAS, the majority of this Board has concluded that the minor's daily attendance at the Clifton High School would constitute a continuing danger to the well being of other pupils and might also well be harmful to the minor, himself;

"NOW, THEREFORE, BE IT RESOLVED, that the minor be and he is hereby continued on the home instruction program until further order of or action by the Board;

"FURTHER, RESOLVED, that the Superintendent be and he is hereby directed to pursue all avenues and to make all efforts necessary to enable this student to meet all course and other necessary requirements for graduation;

"IT IS FURTHER RESOLVED, that the Pupil Personnel Services Department, more particularly the assigned child study team, be and it is hereby directed to continue its observation, overseeing and study of this minor and to report the results thereof to this Board from time to time and at such times as it deems appropriate with the view of reinstating this minor

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into the regular, daily school program and further that it make such recommendations, if any, to the minor's parents as and when it deems appropriate, more particularly, as to the minor's need for counseling and therapy, if any."

Petitioner contends that the necessity for J.F. to remain on home instruction places an undue burden on his family and causes him irreparable harm and damage. Petitioner further alleges that his right to procedural due process was violated and questions the legality of the Board's drug policy. (Tr. 57, 60)

Petitioner argues further that "***home instruction is different from classroom participation.***" (Tr. 70) Petitioner contends that his son should "***have the opportunity *** to meet with his peers, to socialize with his peers, and to be a meaningful member of his society.***" (Tr. 72) *Goss v. Lopez*, 419 *U.S.* 565 (1975), 42 *L.Ed.2d* 725 (1975) and *R.R. v. Board of Education of Shore Regional High School District*, 109 *N.J. Super.* 337 (*Chan. Div.* 1970).

The Board refutes petitioner's legal argument based on *Goss, supra*, (Tr. 77) and states:

> "***[J.F.] was afforded a hearing on February 25th, the day he was apprehended, the next day he was afforded the opportunity again being confronted by his accuser to change his statement, his father was there, no such statement was made, no change was made.***." (Tr. 80)

The Board contends that it is clearly within its discretionary authority to remove an influence disruptive of an orderly education, that it has complied with its existing drug policy, and that its action is entitled to a presumption of correctness. (Tr. 81-82)

The hearing officer has examined the entire pupil personnel record of J.F. and finds nothing therein to support a conclusion that petitioner's presence in Clifton High School would constitute a continuing disruptive influence. Nor is there within the record evidence that J.F. has comported himself in other than a cooperative manner during continuation of the one and one-half year period of home instruction. (Tr. 75)

Given the above factual context, exclusion of J.F. would appear to serve no useful purpose.

The Board expressed the following in the closing paragraph of its resolution of October 20, 1976:

> "IT IS FURTHER RESOLVED, that the Pupil Personnel Services Department, more particularly the assigned child study team, be and it is hereby directed to continue its observation, overseeing and study of this minor and to report the results thereof to this Board from time to time and at such times as it deems appropriate with the *view of reinstating this minor into the regular, daily school program* ***." (*Emphasis supplied.*)

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The record fails to show that this mandate of the Board was carried out by the Pupil Personnel Services Department. As the Commissioner said in *John Scher v. Board of Education of the Borough of West Orange,* 1968 *S.L.D.* 92:

> "*** Termination of a pupil's right to attend the public schools of a district is a drastic and desperate remedy which should be employed only when no other course is possible. It involves a momentous decision which members of a board of education, most of whom have had little specific training in education, psychology, or medicine are called upon to make. The board's decision should be grounded, therefore, on competent advice. Such advice can be obtained from its staff of educators, from its school physician and school nurse, from its psychologist, psychiatrist, and school social worker, from its counsel, and from other appropriate sources. The recommendations of such experts are an essential ingredient in any determination which has as significant and far-reaching effects on the welfare of a pupil as expulsion from school.***" (at 96-97)

The hearer finds that such advice to the Board from its staff is a necessity and recommends that the Commissioner direct the Board to thoroughly implement its own resolution.

That J.F.'s appearance before administrators on February 25 did not constitute a hearing was determined by the Honorable Peter Ciolino who on September 13, 1976 ordered the Board to hold such a hearing. Subsequent action of the Board in holding a hearing on the matter did afford J.F. the procedural due process to which he was entitled.

Lastly, the hearing examiner turns his attention to a determination of the propriety of the Board's drug policy which reads in pertinent part as follows:

> "***
>
> "III. *Student suspected of pushing or selling illegal drugs on school property.*
>
> A. He be reported immediately to the administration for investigation
>
> B. If evidence be found he is pushing and/or selling:
>
> 1. He be reported to his parents
>
> 2. He be reported to the appropriate authorities
>
> 3. He be subject to a hearing as set forth by law and be immediately excluded from school pending disposition by legal authorities
>
> 4. Pending disposition of the court case, the pupil will be placed on home instruction

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5. If found guilty by the courts, he be reported to the Board of Education with a recommendation for appropriate action.

"***

"VII. Drugs, as defined here, should be a controlled dangerous substance as defined in P.L. 1970, Chapter 226, Section 2 (C.24 21-2) or any chemical or chemical compound which releases vapor or fumes causing a condition of intoxication, inebriation, excitement, stupefaction, or dulling of the brain or nervous system including but not limited to glue containing a solvent having the property of releasing toxic vapor and fumes as defined in P.L. 1965, Chapter 41, Section 1, (C.2A:170-25.9) taken for purposes other than the treatment of sickness or injury as prescribed or administered by a person duly authorized by law to treat the sick and injured human beings.

"VIII. *Procedure to be followed before student suspension*

A. Where public school officials have reasonable cause to believe that a student by virtue of activities during school hours or after school hours and off school property, presents a danger to himself, to others, or to school property, they may temporarily suspend the student for a short period of time pending a full hearing which will afford such student procedural due process.

B. A preliminary hearing should be held by the Principal to determine this fact.

C. The Principal shall forthwith report the suspension to the Superintendent of Schools, who in turn shall report the suspension to the Board of Education at its next regular meeting.

D. The Principal may reinstate the pupil prior to the second regular meeting, unless the Board shall reinstate the pupil at such first regular meeting.

E. No suspension shall be continued longer than the Board's second regular meeting, unless the same is continued by action of the Board and the power to reinstate, continue any suspension, etc. shall be vested in each Board.

F. Where a student is suspended after a preliminary hearing, a full formal hearing may take place at the earliest practicable time after the imposition of the interim suspension and no longer than 21 days from the date of the interim suspension.

G. The nature of the full formal hearing depends upon the circumstances of the particular case. The following are a few guidelines that may be observed:

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1. A notice should be sent to the student containing a statement of the specific charges and the ground which, if proven, would justify suspension.

2. A hearing which gives an opportunity to both sides to present their version in detail is best suited to protect the rights of all involved.

3. A full dress judicial hearing with the right to cross-examine is not necessary. Students are entitled to the names of the witnesses and an oral or written report on the facts to which each witness will testify so that he may properly prepare a defense. The student is also entitled to be represented by his counsel, cost of which shall not be borne by the school authorities.

4. The hearing may be conducted before an Administrative Assistant who should report his results and findings to the Board and these findings are open to the student's inspection.

"IX. All staff members who act ethically and sincerely, in good faith, and properly in any action taken to implement the above policy, will receive the support of the Board of Education and are protected against any action for damages of any kind in any court of competent jurisdiction under Chapters 390 and 414 of the Laws of New Jersey 1971, and will be defended by the Board Counsel in such action.

"X. Special Services Department will conference parents of all students evaluated and discuss their findings and recommendations. Recommendations will be made to the principal of the school involved, who will be responsible for officially notifying the parents of the conditions for the student's return to school.

"XI. Any student who fails to comply with the conditions for his return to school, will have his case reconsidered and a recommendation made to the Board for appropriate action."

The hearing examiner after a careful inspection of the Board's policy, *ante*, finds it to be consistent with existing law with the exception of VIII (G) (3,4), *ante*. The procedures outlined therein are in conflict with decisional law as set forth in *Tibbs v. Board of Education of Franklin Township, Somerset County*, 59 *N.J.* 506 (1971). Specifically, in this State, such a hearing must be before the Board and rights of cross-examination of witnesses be afforded.

In summation the hearing examiner recommends that the Commissioner:

1. Determine that the Board accorded J.F. procedural due process

2. Determine that the Board's drug policy with the exception of VIII (G) (3, 4) comports with existing law

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3. Direct the Board to return J.F. to the regular daily class program of Clifton High School

4. Direct the Board to insure that J.F. receives the full services of the assigned child study team as may be necessary to thoroughly rehabilitate him

5. Direct the Board to revise its drug policy in conformity with *Tibbs, supra*

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the objections, exceptions and replies pertinent thereto which have been filed by the parties pursuant to *N.J.A.C.* 6:24-1.17(b). Exceptions were filed by petitioner. The Board in a letter of Ocrober 21, 1977 from counsel to the Assistant Commissioner in charge of the Division of Controversies and Disputes replied as follows:

> "This will acknowledge receipt of your letter enclosing a copy of the report of the Hearing Examiner in the above entitled matter.
>
> "Please be advised that on October 19th, at a regularly scheduled public meeting, the Clifton Board of Education determined to implement all the recommendations of the Hearing Examiner and further directed me to so advise you of its decision."

The Commissioner after careful examination of the record and the findings and recommendations of the hearing examiner herewith adopts the report of the hearing examiner as his own.

The Commissioner observes that petitioner's exceptions deal largely with J.F.'s denial of having been accorded due process. Petitioner however does not dispute the end result of the hearing and welcomes J.F.'s re-admission. The Commissioner observes further that the report of the hearing examiner clearly states that J.F. was not initially accorded due process but by subsequent Board action at a three day hearing J.F. was afforded the procedural due process to which he was entitled. The Commissioner concurs in the recommendation that the Board's drug policy be revised to conform with *Tibbs, supra.*

The Commissioner opines that boards of education should start child study team evaluations as soon as possible after suspension in such cases. The right of each pupil in the public schools of New Jersey to a free, thorough and efficient education clearly mandates that every resource of a board of education must be utilized to reach this goal while not precluding the responsibility that each pupil bears to conform to the rules and regulations promulgated by the board in its effort to ensure the proper education of all pupils.

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In the matter herein controverted the Commissioner directs the Board to determine the appropriate proceedings to rehabilitate the pupil and to closely supervise this process.

COMMISSIONER OF EDUCATION

February 27, 1978

**Margaret Perrault,**

***Petitioner,***

*v.*

**Board of Education of the Hopewell Valley Regional School District, Mercer County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

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

For the Respondent, Peter R. Knipe. Esq.

Petitioner, formerly employed as a teaching staff member by the Board of Education of the Hopewell Valley Regional School District, hereinafter "Board," alleges that the reasons afforded her by the Board for her non-reemployment are false and that the Board, in its determination not to reemploy her, violated the provisions of *N.J.S.A.* 18A:27-3.1 and 3.2, as well as *N.J.S.A.* 18A:27-10. The Board denies the allegations and asserts that its determination not to reemploy petitioner is in all respects proper. The Board seeks dismissal of the action by way of a Motion for Summary Judgment for failure of petitioner to state a cause of action upon which relief may be granted.

The matter is referred directly to the Commissioner of Education on the Board's Motion with supporting Brief, petitioner's Brief in opposition to the Motion, letter memoranda and joint exhibits of the parties, as well as the pleadings herein.

The Commissioner has reviewed the record and finds that the essential facts of the matter are as follows:

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It is agreed between the parties that petitioner began her employment as a teaching staff member with the Board during January 1975 and continued through June 30, 1975. Thereafter, petitioner was reemployed by the Board for the 1975- 76 academic year. Petitioner was not reemployed by the Board for the 1976-77 academic year. Subsequent to petitioner's request for a statement of reasons why her employment was not to be continued, the Board Secretary, at the direction of the Board, advised her the reasons were as follows:

***

"1. Lack of classroom management and organization.

"2. Unsatisfactory techniques of instruction.

"3. Failure to seek out the assistance of the Elementary Helping Teacher, as recommended by three different supervisors.

"4. Overanxiety and tenseness resulting in overreaction and abruptness with students.

"5. Attendance at conferences only at the insistence of the Supervisors to discuss required visitation reports and evaluations.

"6. Failure to interact in a professional manner with the Principal and the Director of Elementary Education.

"7. Failure to accept recommendations for the improvement of the educational program as suggested by the supervisors." (J-5)

In the judgment of the Commissioner, the principle applies, that, when a board of education takes action consistent with its statutory authority, such action is entitled to a presumption of validity and will not be overturned unless it is established that the controverted action is arbitrary, capricious or unreasonable. *Schinck v. Board of Education of Westwood Consolidated School District,* 60 *N.J. Super.* 448, 476 (*App. Div.* 1960); *Thomas v. Morris Township Board of Education,* 89 *N.J. Super.* 327, aff'd 46 *N.J.* 581 (1966); *Joseph J. Dignan v. Board of Education of the Rumson-Fair Haven Regional High School District,* Docket No. A-444-74 New Jersey Superior Court, Appellate Division, October 10, 1975 (1975 *S.L.D.* 1083) In the instant matter, petitioner, as a probationary teaching staff member employed by the Board, has no claim to continuing employment with the Board. *Donaldson v. Board of Education of the City of North Wildwood,* 65 *N.J.* 236 (1974). The Board has the discretionary authority to determine who of its probationary teaching staff members shall be continued in its employ so long as it complies with the provisions of *N.J.S.A.* 18A:27-3.1 *et seq.* The Board, of course, may not determine not to offer continued employment to a probationary employee for proscribed reasons (e.g. race, color, religion, etc.), or in violation of constitutional rights or in an arbitrary or capricious fashion. *Donaldson, supra*

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The statutes applicable in the instant matter and which bear recitation are as follows:

*N.J.S.A.* 18A:27-3.1

> "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 his duties at least three times during each school year but not less than once during each semester, provided that 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."

*N.J.S.A.* 18A:27-3.2

> "Any teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such nonemployment which shall be given within 30 days after the receipt of such request."

The Commissioner observes, with respect to petitioner's allegation that the Board violated the provisions of *N.J.S.A.* 18A:27-3.1, that between January and June 30, 1975 petitioner was formally observed and her teaching performance was evaluated by either the Superintendent, the school principal, or by the director of elementary education in written form on January 23, 1975 (J-12), February 3, 1975 (J-13), March 6, 1975 (J-15), March 13, 1975 (J-16), March 18, 1975 (J-17), March 19, 1975 (J-18), May 6, 1975 (J-20), May 15, 1975 (J-22), and June 16, 1975. (J-24)

During the 1975-76 academic year, petitioner was again observed and evaluated by either the Superintendent, the principal, or by the director of elementary education on October 15, 1975 (J-25), October 23, 1975 (J-28), November 24, 1975 (J-30), December 16, 1975 (J-33), January 20 and 23, 1976 (J-35), February 17, 1976 (J-37), March 3, 1976 (J-39), March 30, 1976 (J-41), March 16, 1976 (J-46), and April 16, 1976. (J-48) The Commissioner has reviewed each of these evaluations prepared between January 1975 and April 1976, as well as the two statements filed by petitioner in reaction to the January to June 30, 1975 evaluations and the nine statements in reaction to the evaluations prepared upon her performance during the 1975-76 academic year.

The Commissioner finds no need to discuss each of the written evaluations here, nor petitioner's statements in reaction thereto. It shall suffice to say that a fair reading of the evaluations establishes that the Board's statement of reasons for its non-reemployment of petitioner is well-grounded on the evaluations which were shared with her.

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Consequently, the Commissioner finds and determines that the Board's reasons for not reemploying petitioner are not false as alleged. Rather, the reasons are grounded upon written documentation of the Superintendent, the school principal, and the director of elementary education. Furthermore, the Commissioner finds, with regard to the frequency of evaluations performed upon petitioner's performance and the efforts of the evaluators to counsel with her and to assist her to improve her teaching, that no violation of *N.J.S.A.* 18A:27-3.1 has been established. To the contrary, it is well documented that the Board complied with the provisions of the referenced statute.

Next, petitioner alleges that the Board violated the provisions of *N.J.S.A.* 18A:27-3.2 The Commissioner does not agree. Petitioner was notified by the Superintendent on April 15, 1976 that she would not be recommended for reemployment to the Board for the 1976-77 academic year. (J-1) Petitioner, by letter dated April 16, 1976, submitted copies of each of her statements in reaction to her evaluations to the Board. (J-2) Petitioner was notified by the Board President on April 21, 1976 that her statements were distributed to Board members for their review and that no final action on her reemployment had yet been taken. (J-3)

Petitioner was notified by letter dated April 27, 1976 that she would not be offered reemployment by the Board for 1976-77. (J-4) The Board supplied, upon her request, the statement of reasons for such action on April 28, 1976. (J-5) Petitioner requested the opportunity for an informal appearance before the Board (J-6) which was granted and held on May 27, 1976. (J-7) Subsequent to the informal appearance, the Board notified petitioner on June 1, 1976 that it affirmed its earlier determination not to offer her reemployment. (J-8)

The Commissioner finds neither any defect with the procedure used by the Board in this regard nor any violation of *N.J.S.A.* 18A:27-3.2 or of the Court's holding in *Donaldson, supra*.

The Commissioner acknowledges that petitioner encountered some difficulty with regard to whether she possessed proper certification during September 1975. (J-9, J-10, J-11) The Commissioner finds that no allegation has been made that would directly link such difficulty with adverse evaluations of her teaching performance.

Petitioner seeks, as an alternative to the Commissioner granting the Board's Motion to Dismiss, a plenary hearing to establish that the reasons for her non-reemployment are false. The Commissioner has reviewed the letter memoranda of the parties, as well as the Briefs filed in support of their respective positions. The Commissioner finds, however, that a cause of action has not been stated. Petitioner has failed to provide detailed specific instances of illegal or improper action by the Board with respect to her non-reemployment. Absent such precise allegations, and in view of the Board's discretionary authority, Summary Judgment must be entered on its behalf.

Accordingly, there being no reason established which would require the

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Commissioner of Education's intervention, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

February 28, 1978

**Frank La Grace,**

***Petitioner,***

***v.***

**Board of Education of the Manalapan-Englishtown Regional School District, Monmouth County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

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

For the Respondent, Dawes, Gross & Youssouf (Joseph D. Youssouf, Esq., of Counsel)

Petitioner is a teaching staff member in the employ of the Board of Education of the Manalapan-Englishtown Regional School District, hereinafter "Board," who was suspended from his teaching duties in March 1973, pending disposition of a criminal charge which had been preferred against him. Two years elapsed before the criminal charge was heard and dismissal entered. On August 21, 1975, petitioner was reinstated as a teaching staff member for the 1975-76 school year.

Petitioner brings this action claiming entitlement to payment of back salary for the period from March until June 1973 and the school years 1973-74 and 1974-75, and escalation on the salary guide representing the school years 1973-74 and 1974-75. Entitlement to back salary and escalation on the salary guide have been deined by the Board and are the grounds for this dispute before the Commissioner of Education.

During the course of these proceedings, petitioner advanced a Motion for

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Summary Judgment. Oral argument on the Motion was heard February 14, 1977 at the State Department of Education, Trenton, by a representative of the Commissioner. The matter is referred directly to the Commissioner on the record as presented by the parties including the pleadings, exhibits, and Briefs filed by the parties in support of their respective positions. The facts relevant and material to this Motion are not in dispute.

The record discloses that petitioner was initially employed as a teaching staff member by the Board in September 1970 and continued in that employment until March 1973. (Petition, at p. 1) At that time it came to the attention of the former Superintendent of Schools that petitioner had been arrested and charged with a drug-related offense. (Board's Brief, at p. 1; Tr. 5) As a result, petitioner was suspended from his teaching duties pursuant to the provisions of *N.J.S.A.* 18A:25-6. (Board's Brief, at p. 1; Petitioner's Brief, at p. 1) Subsequently, at its regularly scheduled meeting on April 26, 1973, the Board voted to suspend petitioner from his teaching duties without pay. (Board's Brief, at p. 1) The statute of reference is set forth in its entirety as follows:

*N.J.S.A.* 18A:25-6

"The superintendent of schools may, with the approval of the president or presidents of the board or boards employing him, suspend any assistant superintendent, principal or teaching staff member, and shall report such a suspension to the board or boards forthwith. The board or boards, each by a recorded roll call majority vote of its membership, shall take such action for the restoration or removal of such person as it shall deem proper, subject to the provisions of chapter 6 and chapter 28 of this Title."

The exhibits before the Commissioner in this matter include a portion of the Board minutes for April 26, 1973. An excerpt from those minutes is repeated below:

"***Mr. Swalm [former Superintendent of Schools] reported that the case of Mr. Frank La Grace was presented before the local court on March 20th [1973]. At that time, the recommendation was made that the case be remanded over to the Grand Jury. Pending the local hearing, Mr. La Grace was suspended with full salary, However, since the case load of the Grand Jury is heavier, the hearing may be delayed longer and it is therefore recommended that Mr. La Grace be suspended without pay from his teaching duties pending the outcome of the case. If the case is dismissed, it is recommended that he be reinstated with all back pay returned. If the court rules against him, then it is recommended that he be dismissed from his position from the time of his second suspension. Mr. La Grace is not under tenure.

"Motion made by Mr. Bergen, seconded by Mr. Carr and carried with Mr. Faulhaber and Mr. Jud opposing the motion, to suspend Mr. Frank La Grace without pay from his teaching duties pending the outcome of his case.***" (Board Minutes, April 26, 1973, at p. 10)

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Petitioner alleges that at the time of his suspension there was an agreement that he would be reinstated with all back pay if the criminal charge was dismissed. (Petition, at p. 2) Petitioner's specific allegation is repeated below:

> "***At the time of his suspension, it was agreed between the Superintendent of Schools on behalf of the Board and the Petitioner that if, in fact, the criminal charges were dismissed, then *** Petitioner would be reinstated with all back pay and benefits.***" (Petition, at p. 2)

The alleged agreement has been denied by the Board. The Board maintains that the Motion, as carried on April 26, 1973, *ante,* reflects no action was taken regarding the "reinstatement with all back pay recommendation" made by the former Superintendent. (Board's Brief, at p. 1)

Petitioner buttressed support for the alleged agreement in his pleadings wherein he asserts that the Board escrowed his salary for the balance of the 1973 school year and for the school years 1973-74, 1974-75, and provided medical insurance coverage during the entire period. (Petition, at p. 2) It was later established that the Board did indeed place petitioner's salary for the balance of the 1972-73 school year in escrow (Board Minutes, May 11, 1973, at p. 11); however, on or about July 1, 1974, "***that account was cancelled and the funds therein returned to the free balances account.***" (Letter of Board attorney, March 2, 1977) The record does not reveal the establishment by the Board of any other escrow accounts regarding this matter. The Board admits that it continued petitioner's medical insurance in full force and effect during the entire period. (Board's Brief, at p. 2)

The Commissioner has carefully studied the language of the Board's Motion as carried on April 26, 1973, and which is repeated below:

> "***Motion made by Mr. Bergen, seconded by Mr. Carr and carried with Mr. Faulhaber and Mr. Jud opposing the motion, to suspend Mr. Frank La Grace without pay from his teaching duties pending the outcome of his case.***" (Board Minutes, April 26, 1973, at p. 10)

The Commissioner concludes that the language of the Motion is clear to the extent that the Board took no formal action regarding the "reinstatement with all back pay recommendation" of the former Superintendent.

The Board minutes for April 26, 1973 also include a list of teachers to be employed for the 1973-74 school year. Petitioner's name appears on that list. (Tr. 5) It should be noted that on May 25, 1973, petitioner addressed the following communication to the Board:

> "I hereby notify you in writing pursuant of (sic) Chapter 436 of the laws of 1971 [*N.J.S.A.* 18A:27-10, 11, 12] that I hereby accept your offer of employment for the coming school year [1973-74]. (Exhibit A)

As has been established by the record, petitioner did not resume his teaching duties during the 1973-74 school year. (Petition, at p. 2)

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The next Board action regarding this matter took place on April 18, 1974, when the successor Board approved the following resolution at its regular monthly meeting:

> "Be It Resolved by the Manalapan-Englishtown Regional Board of Education that a contract for the teaching year 1974-75 be offered to Mr. Frank La Grace and that he be suspended for the school year 1974-75."
> (Board Minutes, April 18, 1974, at p. 7)

Ultimately, in February 1975, the indictment against petitioner was dismissed and by letter dated March 8, 1975, petitioner sought to make arrangements with the Superintendent for his reinstatement. (Letter of Petitioner, March 8, 1975) Several months later, the Board appointed petitioner to a teaching position for the 1975-76 school year. (Board Minutes, August 21, 1975, at p. 6) Petitioner has been employed by the Board continuously since that time.

In support of its Motion for Summary Judgment, petitioner relies primarily upon *Elizabeth Rockenstein v. Board of Education of the Borough of Jamesburg,* 1974 *S.L.D.* 260, 1975 *S.L.D.* 191, aff'd State Board of Education 199, aff'd Docket Nos. A-3916-74, A-4011-74, New Jersey Superior Court, Appellate Division, July 1, 1976 (1976 *S.L.D.* 1167), wherein the Commissioner determined that he has the authority in law and equitable powers to order a local board of education to make whole a nontenured employee who was injured by an improper action of a board. It is asserted that the Board entered into a bona fide contractual agreement which secured for the district the services of petitioner and that the Board should be called upon to honor that agreement. Further, petitioner argues that the Board has the right to enter into a specific contractual relationship with one of its employees in a unique factual situation, that such contracts will be enforced by the courts and should be enforced by the Commissioner. *Weber v. Board of Education of Trenton,* 127 *N.J.L.* 279 (*E.&A.* 1941), *Maywood Education Association Inc. v. Maywood Board of Education,* 131 *N.J. Super.* 551 *(Chan. Div.* 1974), and *John Mountain v. Board of Education of the Township of Fairveiw,* 1972 *S.L.D.* 526, aff'd State Board of Education 1973 *S.L.D.* 777, are cited in support of this argument.

Conversely, the Board argues that petitioner is not entitled to back pay for the period of suspension. Since the suspension was valid, and because petitioner rendered no services, the Board argues no compensation should be paid. It does not controvert the authority of the Commissioner to render such relief as requested by petitioner; however, it asserts that the issue is not whether the Commissioner has the power to grant petitioner his requested relief, but whether petitioner is entitled to that relief.

The Board distinguishes the instant matter from *Rockenstein, supra,* by pointing out that Rockenstein clearly established that the Board had acted unlawfully. The Board maintains that petitioner's suspension was valid pursuant to the provisions of *N.J.S.A.* 18A:25-6 and, furthermore, that petitioner does not challenge the legality of his suspension.

The Board's argument is grounded on one of the basic tenets of contract

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law, in that there must be an exchange of value in the formation of a contract. It states that:

> "***Should the Commissioner award back pay to the Petitioner for not teaching he would be giving something for nothing and thereby violate the concept of consideration which is an essential ingredient in New Jersey contract law. *Cohn v. Fisher,* 118 N.J. Super. 286 (L. Div. 1972).***"
> (Board's Brief, at p. 4)

It argues that the offer of a contract to petitioner may be viewed as a promise of future employment upon the satisfaction of a condition precedent; namely, the dismissal of a pending criminal charge. Lastly, the Board emphasizes that petitioner was reinstated as a teaching staff member, and to now required payment for services which were not rendered would place an unconscionable burden upon the taxpayers of the district.

It is well established that a board of education is a noncontinuous body whose authority is limited to its own official life and whose actions can bind its successors only in those ways and to the extent expressly provided by statute. *Henry S. Cummings v. Board of Education of Pompton Lakes et al.,* 1966 *S.L.D.* 155; *Skladzien v. Bayonne Board of Education,* 12 *N.J. Misc.* 602 *(Sup. Ct.* 1934), aff'd 115 *N.J.L.* 203 (*E.&A.* 1935); *Evans v. Gloucester City Board of Education,* 13 *N.J. Misc.* 506 (*Sup. Ct.* 1935), aff'd 116 *N.J.L.* 488 (*E.&A.* 1936) Given the nature of this matter and the chronology of events encompassing actions of three separate and distinct boards of education, the Commissioner must perforce examine each Board's action in sequence and in light of the statutory authority whereby each was empowered to act.

The first action to be examined in this matter is the suspension of petitioner in March 1973. It must be determined whether petitioner's suspension was in conformity with the authority and direction set forth in *N.J.S.A.* 18A:25-6 which is repeated below:

> "The superintendent of schools may, with the approval of the president or presidents of the board or boards employing him, suspend any assistant superintendent, principal, or teaching staff member, and shall report such a suspension to the board or boards forthwith. The board or boards, each by a recorded roll call majority vote of its membership, shall take such action for the *restoration or removal* of such person as it shall deem proper, subject to the provisions of Chapter 6 [18A:6-1 *et seq.*] and Chapter 28 [18A:28-1 *et seq.*] of this Title." (*Emphasis supplied.)*

As can be seen, the statute clearly provides two alternatives for a board of education. It shall restore or remove. In the matter, *sub judice,* the Board in office in April 1973 did neither. Instead, it continued petitioner's suspension without pay pending the outcome of a contingency, the dismissal of the criminal charge. As a result, petitioner's status was unclear, the terms of his contract were breached and the statutory prescription of *N.J.S.A.* 18A:25-6 was disregarded. The Commissioner finds that petitioner's suspension was not in con-

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formity with the authority and direction set forth in *N.J.S.A.* 18A:25-6 and concludes that petitioner is entitled to appropriate relief.

Petitioner seeks to be made whole by the entry of a Commissioner's order directing the Board to provide compensation for the period from March until June 1973, and the school years 1973-74 and 1974-75. *Rockenstein, supra,* is cited as an instance in which the Commissioner exercised his equitable powers to devise an appropriate remedy which was not provided by statute.

The Commissioner cannot agree that the remedy devised in *Rockenstein, supra,* should be applied here and determines that Rockenstein is not analogous to this case. Rockenstein is distinguishable in that she was denied reemployment for unconstitutional and otherwise improper reasons. Lacking from the Petition in the instant matter is any allegation that the reasons for the Board's suspension of petitioner were constitutionally deficient or improper. The Board in office at that time took a step which it deemed to be in the best interests of the pupils in its charge. (Tr. 16) At the same time, the Board recognized the gravity of termination and in a gesture of good faith proceeded to devise a less severe course of action. (Tr. 23) While the Commissioner acknowledges the gesture of good faith on the part of the Board (Tr. 14), nonetheless the Board must be faulted for not forthrightly and properly determining, pursuant to the statutory prescription by which it was bound, whether reinstatement or termination of contract was the action to be taken. *N.J.S.A.* 18A:25-6

In determining an appropriate remedy in this matter, the Commissioner has looked to *N.J.S.A.* 18A:6-30 for the elucidation it may provide.

> "Any person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom, shall be entitled to compensation for the period covered by the illegal dismissal or suspension, if such dismissal or suspension shall be finally determined to have been without good cause, upon making application therefor with the board or body by whom he was employed, within 30 days after such determination."

In contemplation of an instance where a teaching staff member is illegally dismissed, *N.J.S.A.* 18A:6-30.1 is also examined for further guidance.

> "When the dismissal of any teaching staff member before the expiration of his contract with the board of education shall be decided, upon appeal, to have been without good cause, he shall be entitled to compensation for the full term of the contract, but it shall be optional with the board whether or not he shall continue to perform his duties for the unexpired term of the contract."

It can be seen that one who is subject to illegal dismissal may be entitled to the outermost parameter of remedy set by the statute which is "compensation for the full term of the contract." Petitioner is entitled to no greater remedy than that specifically prescribed by statute for one who is illegally dismissed. In the circumstances of this matter, the Commissioner holds that petitioner is entitled

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to be made whole for his lost earnings from the date of his suspension without pay until the expiration of his existing contract with the Board in June 1973.

In regard to petitioner's contractual rights for the 1973-74 school year, the question is presented whether or not the Board resolution of April 26, 1973, which included petitioner's name on the list of teachers to be reemployed for the 1973-74 school year, constituted a binding contractual obligation on the part of the Board. Petitioner's letter of May 25, 1973, purports to convey acceptance of a contract for the 1973-74 school year.

> "***Gentlemen,
>
> I hereby notify you in writing pursuant of (sic) Chapter 436 of the laws of 1971 [*N.J.S.A.* 18A:27-10, 11, 12] that I hereby accept your offer of employment for the coming school year [1973-74].
>
> Very truly yours.
>
> Frank C. La Grace, Jr.***"
>
> (Exhibit A)

The statutes to which petitioner refers in his letter operate to offer employment for the next succeeding year to those who have been continuously employed in the school district since the preceding September 30. Whether or not a suspension may be included in determining a period of continous employment need not be reached in the disposition of this case for the reasons that follow. Firstly, the Commissioner observes that, at the time of his suspension, petitioner alleges he had no expectation of employment with the Board until there was a favorable disposition of the criminal charge. (Petition, at p. 2)

Secondly, the criminal charge was still pending on May 25, 1973, when petitioner purportedly accepted the offer of employment for the 1973-74 school year. (Exhibit A) Assuming, *arguendo,* that a contract was offered to petitioner either by Board resolution on April 26, 1973, or by operation of *N.J.S.A.* 18A:27-10 *et seq.*, the Commissioner determines that in either instance the offer was clearly qualified by the happening of a certain event, such event being the dismissal of the criminal charge. As events transpired, the contingency failed to occur during the 1973-74 school year and the Board was not faced with the claim of reinstatement during the 1973-74 school year.

Thus, we come to April 18, 1974. A successor Board had approved the following resolution:

> "Be It Resolved by the Manalapan-Englishtown Regional Board of Education that a contract for the teaching year 1974-75 be offerd to Mr. Frank La Grace and that he be suspended for the school year 1974-75."
>
> (Board Minutes, April 18, 1974, at p. 7)

On its face, the resolution is ambiguous and presents a question of Board intent. The Board explains that the impact of this action was to demonstrate a gesture

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of good faith on its part toward petitioner. (Tr. 14) This explanation does not shed light on the ultimate legal question: Whether the action of the Board in office on April 18, 1974 created a binding obligation for the 1974-75 contractual year, requiring reinstatement of petitioner in March 1975, when the criminal charge was dismissed. Based on the wording of the April 18, 1974 resolution, the Commissioner concludes that the Board in office was attempting to ratify the action of the Board in office on April 26, 1973. Such a conclusion is reached for the reason that the resolution is totally inexplainable without reference to the Board minutes of April 26, 1973.

Thus, the issue squarely presented is whether the Board in office in April 1974 could ratify the previous Board's action. The Commissioner determines that it could not. The original Board action in this matter was not in conformity with, nor pursuant to, its authority at *N.J.S.A.* 18A:25-6. The succeeding Board's action compounded the error and attempted to ratify that which was improper pursuant to law. The Commissioner holds there was not and could not be an effective ratification, either expressed or implied, of the alleged original agreement calling for petitioner's reinstatement upon dismissal of the criminal charge. The Commissioner further holds that the Board of Education of the Manalapan-Englishtown Regional School District in office in March 1975 was not bound to reinstate petitioner because of the *ultra vires* actions of previous Boards in office. The Board action taken on August 21, 1975, appointing petitioner as a teaching staff member for the 1975-76 school year, was an act completely within the discretion of the Board in office at that time, pursuant to its authority at *N.J.S.A.* 18A:27-3. For the reasons stated previously, therefore, petitioner is not entitled to salary for the school years 1973-74 and 1974-75, nor to escalation credit on the salary guide for those two years. As stated earlier, however, petitioner is entitled to be made whole for his lost earnings from the date of his suspension without pay in March 1973 until the expiration of his contract in June 1973.

COMMISSIONER OF EDUCATION

February 28, 1978

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**Beulah Scott,**

***Petitioner,***

***v.***

**Board of Education of the Borough of Red Bank, Monmouth County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent, Reussille, Cornwell, Mausner & Carotenuto (Martin M. Barger, Esq., of Counsel)

Petitioner is a teacher employed by the Board of Education of the Borough of Red Bank, hereinafter "Board," who alleges that the Board's refusal to employ her during the summer of 1975 constituted racial discrimination. The Board denies this allegation.

A hearing was held on December 13, 1976 at the office of the Monmouth County Superintendent of Schools, Freehold, before a hearing examiner appointed by the Commissioner of Education. Several exhibits were introduced in evidence and memoranda were filed after the hearing. The report of the hearing examiner follows:

Petitioner testified that she is certified as a home economics teacher, grades K-12, and that she has a supervisor's certificate for that discipline. She testified that she has been employed by the Board since the summer of 1969 and has worked in each summer school through the summer of 1974 with the exception of the summer of 1973. In these several summer schools she taught adult women in the area of management and nutritional aspects of home economics, preschool pupils, speech and drama workshops, and clothing construction. (Tr. 8-9) She testified further that during the summer of 1974 she taught grades four, five and special education pupils in the areas of reading, language arts, and mathematics. (Tr. 9-10)

During the spring of 1975, petitioner learned of vacancies in two summer programs, the summer school program and the summer enrichment program. She applied for employment in both programs and discovered on June 5, 1975 that her name had been crossed off a list of teachers' names for employment. (Tr. 14-16, 31; Exhibit G) Another teacher's name was written on the list (Exhibit G) and petitioner testified that she recognized the handwriting as that of her Superintendent, even though the list was prepared by her school principal.

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(Tr. 16-18) Three of the four teachers remaining on the list were caucasian and one was negro. The teacher whose name was penciled on the list was caucasian and was a teacher initially employed for the 1974-75 school year. (Tr. 34-35)

The Superintendent notified petitioner by letter dated June 30, 1975 that she would not be employed for the summer school. That letter is reproduced in pertinent part as follows:

> "***Vacancies in the Summer Program are not included in Article XI, paragraph E, of the contract, inasmuch as they related to Title I programs. Nevertheless, they were advertised in the Superintendent's Newsletter. As a result of this, numerous applications were received. Yours was duly considered by the Director of the Summer School Program and all administrators who make up the Superintendent's Cabinet.
>
> "In filling the vacancies there was an effort made to find the best qualified people to work with the children. Due consideration was given to the professional background and attainments of applicants and similar factors. Again I wish to state that while this was not required by the contract because of the program being under Title I, it was part of our ordinary procedure.
>
> "There was a conscious attempt to balance the professional staff and the paraprofessional staff used in the Title I program so as to reflect the ethnicity of the school system. Assignments to the various schools were made on the same basis.***" (Exhibit A)

Petitioner's allegation of racial discrimination is grounded on the last paragraph of this document which she alleges is proof that employment or non-employment was based on race or ethnicity. (Petitioner's Memorandum, at p. 2)

The director of the summer school program, who is also a principal in the school district, testified that the only reason petitioner was not employed is that she is a special area teacher and that the summer school programs employed only classroom teachers in the fields of math, reading, language arts, and special education. He defined "special areas" as physical education, home economics, music and art. No special area teachers were employed in the summer of 1975. (Tr. 44-45, 48) He testified that regular "cabinet meetings" were held on Tuesdays to discuss administrative concerns in the school district. Cabinet meetings were defined as meetings of all school principals, the director of child study, the supervisor of reading and language arts and the Superintendent. All applications for summer employment were reviewed in these meetings and the result was that only classroom and special education teachers were employed. (Tr. 43-45)

The Superintendent testified that it was her determination to use only classroom teachers in academic subject areas and special education teachers for the summer programs. She defined academic areas as reading, language arts, sci-

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ence, social studies, and mathematics and testified that no special area teachers were employed. (Tr. 55-58)

She testified that petitioner did not meet the criteria set for summer school employment as established at the cabinet meetings and that all academic area teachers were teaching reading in their classes. (Tr. 61) She testified that the teacher who was employed after petitioner was eliminated from contention was recommended by the director of child study services, who is responsible for special education programs, and she said the new teacher was doing an outstanding job. (Tr. 81) The Superintendent testified further that race was a consideration after the thirteen staff members were selected for the summer programs. Of the thirteen selected, six were negro. The cabinet concurred with her determination that a distribution of teachers by race among the three summer school locations was necessary so that no situation might develop of having all caucasian staff in one school and all negro staff in another school. She testified that other than that consideration, race or ethnicity had absolutely no bearing on summer school employment. (Tr. 64-67, 82, 92-96, 99-100, 107-110) Her testimony is corroborated by the director of the summer school program. (Tr. 113-114)

The coordinator of the summer enrichment program testified that that program was for highly motivated advanced pupils and that petitioner was not qualified for the positions which were offered. (Tr. 117-118)

The hearing exaimer finds that the testimony of all witnesses was candid and direct. Further, the demeanor of the several witnesses was such that there was no question as to their credibility. There was no evidence whatsoever to show any illegal or improper motives or procedure during the teacher selection process. There is nothing in the testimony or the record which supports petitioner's allegation of discrimination. She was simply not employed for either summer school program. Her background and qualifications were different from all of those teachers who were employed.

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

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter including the report of the hearing examiner and notices that no exceptions have been filed thereto. The Commissioner concludes that the record in this matter fails to support petitioner's allegations of racial discrimination. For these reasons the report of the hearing examiner is adopted in its entirety and the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

February 28, 1978

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**Paul J. McCormick,**

***Petitioner,***

*v.*

**Board of Education of the Hunterdon Central Regional High School District, Hunterdon County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Bernhard, Durst & Dilts (Edmund R. Bernhard, Esq., of Counsel)

For the Respondent, Harper & O'Brien (John J. Harper, Esq., of Counsel)

Petitioner, a tenured instructional staff member employed by the Hunterdon Central Regional Board of Education, hereinafter "Board," alleges that he had acquired tenure as a department chairman and that the Board on November 10, 1975, illegally removed him from that position and reassigned him to teaching duties with reduction of salary in violation of *N.J.S.A.* 18A:28-5.

The Board, conversely, avers that petitioner had acquired tenure only as a teacher and that its action reassigning petitioner to teaching duties was none other than a reasoned and legal exercise of its statutory discretionary authority.

Eight days of hearing were conducted between August 31, 1976 and January 17, 1977 at the office of the Hunterdon County Superintendent of Schools and the Hunterdon Agricultural Building, Flemington, by a hearing examiner appointed by the Commissioner of Education. Thereafter, Briefs were filed by respective counsel by July 16, 1977. The report of the hearing examiner follows setting forth first those uncontroverted facts which provide the contextual setting of the controversy.

Petitioner had been employed by the Board for ten years when in 1966 he was assigned duties as chairman of the English department, which position he held until the Board, by unanimous passage of a formal resolution on November 10, 1975, removed him from that position and reassigned him to teaching duties. That resolution, replicated here in pertinent part, summarizes the events preceding the Board's action:

> "***WHEREAS, the Board desires to remove Paul McCormick from his position as Chairman of the English Department of the High School and seeks to assign him to a teaching position at an appropriate salary; and

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"WHEREAS, the Board sets forth the circumstances and reasons upon which its decision is based:

"1. Paul McCormick was appointed by the Administration, and not the Board, to the status of Chairman of the English Department in the Spring of 1966. Paul McCormick has performed as a Department Chairman for approximately nine (9) years.

"2. The Board has not, by its action, established the position of English Deparment Chairman or set forth the duties and responsibilities therefor. This position was established solely by Administrative action and the assignment of Paul McCormick thereto was made only by the Administration. Further, the Board has not and does not require that Paul McCormick hold a supervisor's certificate to serve as Department Chairman. From these and other pertinent factors, the Board concludes that Paul McCormick has no tenure in the position of Chairman of the English Department.

"3. In (sic) or about August 1, 1975, Paul McCormick, was directed to serve cafeteria duty along with other Department Chairmen. Specifically, he was assigned to duty in the Freshman cafeteria during Period 4 as part of a team of Department Chairmen to cover Period 4 on a schedule of their own devising. This team determined initially to serve this duty five (5) times a week. Later the assignment was reduced by Administrative action to two (2) times a week.

"4. On or about September 10, 1975, Paul McCormick began to absent himself from cafeteria duty. Despite numerous conferences between representatives of the Administration and Paul McCormick, he continued thereafter to absent himself and refused, upon direction, to serve cafeteria duty as assigned.***

"6. On September 18, 1975, Paul McCormick was suspended with pay from his position as English Department Chairman for refusal to perform cafeteria duty. This action was taken at the direction of the Superintendent of Schools after he conferred with the Board's President and members of the Board's Personnel Committee in accordance with N.J.S.A. 18A:25-6. This suspension was communicated to Paul McCormick in writing on September 18, 1975 to be effective at the end of the school day on September 19, 1975.***

"9. Following this Board meeting, on September 25, 1975, Paul McCormick was invited to appear before the Board to discuss the circumstances leading up to his suspension as Department Chairman. At a meeting held on October 4, 1975, Paul McCormick appeared, waived his right to counsel, and made a presentation with supporting documents to explain his actions. Paul McCormick sought to justify his refusal to perform cafeteria duty on the basis that he was too busy and that, in light of the other assignments he was expected to perform, cafeteria duty would represent an unwarranted incursion into his time.***

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"10. On or about October 13, 1975, the Board, by recorded, roll call vote, unanimously determined that Paul McCormick should be reinstated as Chairman of the English Department provided he perform cafeteria duty as assigned by the Administration. The Board also reaffirmed the interim suspension with pay of Paul McCormick as Department Chairman due to acts of insubordination in having refused to perform cafeteria duty as assigned. The Resolution of the Board on October 13, 1975, setting forth this action, contained a statement of the Board's intent should Paul McCormick thereafter neglect or refuse to perform cafeteria duty:

> 'Should Paul McCormick neglect or refuse to perform the aforesaid cafeteria duty within three school days from the date of service of a copy of this Resolution upon him or thereafter, then, in that event, he shall be removed as Chairman of the English Department and returned to teaching duties at an appropriate salary***.'

"11. On October 15, 1975, Paul McCormick was served with a copy of the Resolution stating the Board's action of October 13, 1975 and on October 16th, 21st, 23rd, 28th, 30th and November 4th and 6th, he neglected or refused to perform cafeteria duty as required by the Board in its Resolution.

"12. As a result of Paul McCormick's neglect or refusal to perform cafeteria duty as assigned on the dates stated under paragraph 11 above, the Board is desirous of taking the personnel action set forth herein. Further the Board has considered the fact that in prior years partial and/or full increments were withheld as disciplinary actions.

"NOW, THEREFORE, BE IT RESOLVED, by the Hunterdon Central High School Board of Education on this 10th day of November 1975 as follows:

"1. That Paul McCormick is hereby removed as Chairman of the English Department of the Hunterdon Central High School, effective immediately.

"2. That, effective November 11, 1975, Paul McCormick is assigned to teaching duties in the Special Services and English departments of the Hunterdon Central High School.

"3. Effective November 11, 1975, Paul McCormick's annual salary is reduced from $22,160.00 to $19,827.00 and his work year is reduced from twelve (12) months to ten (10) months in accordance with his new assignment.***" (P-10)

The hearing examiner deems it unnecessary to further elaborate on the events referred to in the above resolution. Further documentation of those events is found in the following exhibits in evidence: P-48, 51, 55; R-2, 17, 18, 26, 28, 31, 32. See also Tr. 8-100-141.

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Petitioner has been certified by the New Jersey State Board of Examiners since September 1971 as a supervisor and throughout his tenure with the Board as a teacher of English. (P-39) During the period since he was certified as a supervisor he has typically been assigned to teach at least one but not more than two classes of English daily. In its staff information reports of October 1973 and 1974 the Board advised the State Department of Education that petitioner was assigned, respectively, ninety percent and seventy percent of the time as a subject supervisor. (P-11a)

Until June 11, 1973, department chairmen were compensated at the applicable rate which teachers were paid plus a stipend for their services as chairmen. Thereafter, they received no stipends but were paid an annual salary on a twelve month basis in accordance with unanimous passage of a motion of the Board which set the "***Department Chairmen salary range at $16,500 to $21,500.***" (P-4) In accord with the Board's subsequent revision of that salary range, petitioner was receiving $22,160 when on November 11, 1975 the Board reassigned him to a ten month teaching position and reduced his annual salary to $19,827. (P-7, 10, 14, 18)

Petitioner argues that as a teaching staff member already under tenure as a teacher pursuant to *N.J.S.A.* 18A:28-5 he also acquired tenure as a department chairman pursuant to *N.J.S.A.* 18A:28-5 and 6 which provide respectively that:

> "The services of all teaching staff members including all teachers *** and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any Board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, after employment in such district or by such board for:
>
> (a) three consecutive calendar years***." (*N.J.S.A.* 18A:28-5)
>
> "Any such 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 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***." (*N.J.S.A.* 18A:28-6)

Petitioner contends that the Board recognized the positions of department chairmen as twelve month supervisory employees on June 11, 1973, *ante,* having previously adopted on March 13, 1972 a policy that required, *inter alia,* the following:

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"***Process of Evaluation

"1. *Teachers will be evaluated by certified supervisors.*

"2. *Teachers will be informed of the evaluation by the evaluator****.

"6. *The teacher may appeal the evaluation to the Supervisor of Instruction.****

*"Each department chairman will develop the necessary procedures for implementing evaluation****."* *(Emphasis supplied.)* (P-50)

Thus, petitioner asserts that he was not only properly certified but also served for two calendar years at the direction of the Board as a nearly full-time supervisor of the English department in a position which required a supervisor's certificate issued by the State Board of Examiners. He further asserts that, as a matter of law, that service fulfilled the precise requirement for the attainment of tenure pursuant to *N.J.S.A.* 18A:28-6 and that the Board could not, absent certification of tenure charges, legally remove him from that position, or reduce his salary. In support of that contention petitioner cites, *inter alia, Constance Vieland v. Board of Education of the Princeton Regional School District,* 1976 *S.L.D.* 892; *Elizabeth Boeshore v. Board of Education of the Township of North Bergen,* 1974 *S.L.D.* 805, *Herbert J. Buehler v. Board of Education of the Township of Ocean,* 1970 *S.L.D.* 436, aff'd State Board of Education 1971 *S.L.D.* 660, aff'd Docket No. A-2297-70 New Jersey Superior Court, Appellate Division, November 2, 1972 (1972 *S.L.D.* 664); *Walter Wilson v. Board of Education of the City of New Brunswick,* 1977 *S.L.D.* 555. (Brief of Petitioner, at pp. 14-32; Reply Brief of Petitioner, at pp. 4-7)

The Board argues, conversely, that petitioner at no time acquired tenure as department chairman and was subject to reassignment to full-time teaching duties at its discretionary option. In support of this contention the Board relies on *Buehler, supra,* and *Wilson, supra.* The Board contends that petitioner's performance of department chairman duties was not at its direction but at the direction of the Superintendent and that his performance of duties as chairman confers no tenure entitlement.

The Board avers that at no time did it affirmatively act to appoint petitioner as department chairman, promulgate a job description, or adopt policy which required its department chairman to perform supervisory functions or to obtain a supervisor's certificate. (Respondent's Brief, at pp. 6-11, 17-24) The Board contends that its action fixing the salaries of department chairmen was merely a fixing of salary rather than an affirmative act of appointment. It further contends that the ongoing efforts of its administrative staff to synthesize an acceptable job description for department chairmen has thus far proven fruitless. (*Id.*, at pp. 12-16)

The Board avers that its reduction of petitioner's salary was proper for the reason that it could reassign duties for which he held no tenure entitlement.

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*Henry R. Boney v. Board of Education of the City of Pleasantville et al.*, 1971 *S.L.D.* 579; *Joseph J. Dignan v. Board of Education of the Rumson-Fair Haven Regional High School,* 1971 *S.L.D.* 336, aff'd State Board of Education 1974 *S.L.D.* 1376, aff'd Docket No. A-444-74 New Jersey Superior Court, Appellate Division, October 10, 1975 The Board further maintains that the salary reduction from $22,160 to $19,827 represented merely his reassignment to ten month teaching duties. (Respondent's Brief, at pp. 26-27)

The Board asserts that, faced with petitioner's insubordinate refusal to perform cafeteria monitoring duties, its action removing him from the department chairmanship and reducing his salary was a reasonable exercise of its discretionary authority. Finally, it is argued that the Commissioner in such a context is without authority to direct the reformation of petitioner's contract. Accordingly, the Board presses its Motion to Dismiss, held in abeyance by the hearing examiner at the close of petitioner's case. (*Id.*, at pp. 28-33; Tr. 6-39-60)

The relevant testimony of witnesses is summarized by the hearing examiner as follows:

The supervisor of instruction who was employed by the Board in July 1972 and who is subordinate to the Assistant Superintendent in Charge of Curriculum and Instruction testified that on August 14, 1972 the Board adopted as a guideline for supervision of instruction a document entitled ''An Approach to Supervision.'' (P-2a, b) That document defines the role of the department chairman, *inter alia,* as the teacher's ''immediate supervisor'' who should observe classroom teachers and complete three evaluations annually of each nontenure teacher and two of each tenure teacher. It further specifies that the department chairman should assess teacher performance and make written and oral recommendations to the teachers for improvement of the educational process in individual and group conferences, in-service meetings, and evaluation reports. (P-2b, at pp. I through IV)

The supervisor of instruction stated that he perceived department chairmen to be primarily members of the administration rather than members of the teaching staff. (Tr. 2-23) He testified that, although on occasion he had informally observed English teachers in their classrooms, most of the teachers in the English Department were observed only by petitioner who then forwarded evaluation reports to him. (Tr. 2-31-41; Tr. 3-63, 66) That testimony was corroborated by the English teachers who testified, the Superintendent, and petitioner. (Tr. 3-135, 143; Tr. 4-1-71, 124-130; Tr. 5-15; Tr. 7-74) The supervisor of instruction testified further that in Hunterdon Central Regional High School he perceived that the terms department chairman and department supervisor ''***would be considered synonymous terms.***'' (Tr. 2-42)

The supervisor of instruction also testified that, although he had caused to be placed in the *New York Times* of June 10, 1973 an advertisement inviting applicants for the position of science department chairman which specified New Jersey supervisory certification, he had not considered such certification as a requirement. (Tr. 2-85; P-15) He testified further that department chairmen

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contracts specified only that they "***teach and perform such duties as designated by the Superintendent.***." (P-18, 19; Tr. 2-106)

The supervisor of instruction also testified that, since numerous attempts to develop consensus or Board approval on an acceptable job description for department chairmen had failed, no Board-approved job description for the school's twelve department chairmen exists. (Tr. 3-20, 49, 54, 73, 87, 95-96) Documentary evidence that numerous attempts were in fact made to formulate an acceptable job description are found in P-16, 20, 23 through 26, 30; R-2 through 4, 16, 20.

The Superintendent testified that, prior to petitioner's reassignment to teaching duties and the filing of the Petition of Appeal, he had suggested but never required that department chairmen procure supervisors' certificates. He testified, concerning the Board's resolution of March 13, 1972, which states that "***[t]eachers will be evaluated by certified supervisors***," that, from the moment of its passage, he considered it only a guideline. (P-50) He stated further that he deemed it totally unworkable and took no steps to implement it, since numerous department chairmen were at the time not certified as supervisors. (Tr. 7-62-78) His testimony was corroborated by that of the supervisor of instruction. (Tr. 8-82)

The Superintendent also testified that he at no time felt that he could not deviate from "An Approach to Supervision" (P-2b, *ante*) and other administrative supervisory guidelines since these were promulgated only as guidelines rather than formalized policies. (Tr. 6-93-94; Tr. 7-81) He testified further that he depended not only on evaluations of teachers by department chairmen but also on those of housemasters, athletic director, and the coordinator of pupil activities in their respective spheres other than classroom subject matter evaluations. (Tr. 6-143-144) He stated also that recommendations for reemployment of teachers initially came to him from department chairmen through the supervisor of instruction with additional input from others. (Tr. 7-3-12, 35, 41)

Petitioner testified that he had relied on numerous directives from administrators setting forth the duties of department chairmen and followed the job descriptions set forth therein. (Tr. 4-100-104) He related that his duties consisted, *inter alia*, of formally evaluating teachers, teaching one class per day, conducting summer in-service workshops, assisting with scheduling of teachers and pupils, updating curriculum, taking inventory of teaching supplies and equipment, processing teachers' requests for field trips, professional conferences and personal leave, interviewing candidates, recommending reemployment and non-reemployment of teachers and conducting department meetings. (Tr. 4-73-74, 107-116, 131-145; Tr. 5-7-19, 70, 84-99, 102,107)

Various members of the Board testified that they looked upon "An Approach to Supervision" (P-2b) and its March 13, 1972 adopted policy (P-50) merely as guidelines rather than firm mandates. (Tr. 1-81-86; 110-129; Tr. 8-33) All members of the Board who testified stated that they considered petitioner to be at least a part-time member of the administrative staff with responsibilities

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to supervise teachers and aid in curriculum development in the largest department of the school. They testified also that they were aware that petitioner reported to the supervisor of instruction and on occasion directly to the Board or its designated committees. (Tr. 1-57, 62, 90-105, 108; Tr. 8-27; P-28, 29)

The hearing examiner, having carefully reviewed the documentary evidence and transcripts of testimony elicited at the hearing, sets forth his findings of facts as follows:

1. The Board adopted as policy and recorded in its minutes on March 13, 1972 the requirement that department chairmen be certified by the New Jersey State Board of Examiners as supervisors. (P-50) That policy has never been rescinded. The hearing examiner recommends that the Commissioner discount the rationale of Board members who testified that they intended that action only as a guideline rather than a policy. The minutes record that the Board unanimously adopted as "policy" a process of evaluation specifically requiring that "***[t]eachers will be evaluated by certified supervisors.***" Since it is abundantly clear that petitioner was the only supervisor to formally observe and evaluate teachers in the English department, it follows that the stated intent of the Board was that petitioner be a certified supervisor in order to effect the desirable goal that the instructional process be properly supervised.

This finding is made with full consideration of the applicable dicta set forth by the Commissioner in *Harry A. Romeo, Jr. v. Board of Education of the Township of Madison,* 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* (3*rd ed.* 1943), *section* 4502***" (at 106)

See also *Vieland, supra.*

2. No formal job description for department chairman was ever finalized and adopted by the Board. The Board, however, through its approval on August 14, 1972 of "An Approach to Supervision," delineated numerous duties which are commonly performed by department chairmen who supervise teachers. Petitioner was certified as a supervisor in compliance with the Board's policy as recorded in its minutes. He was the only one who formally observed, supervised and evaluated teachers in the English department in accord with the Board's action of August 14, 1972. That the Board was aware of petitioner's supervisory

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function is amply shown in the record by the testimony of three Board members.

The hearing exaimner, in consideration of the above findings of fact, recommends that the Commissioner determine the following:

1. That petitioner by reason of having served in a position as a certificated supervisor with the full knowledge and at the direction of the Board and its administrative agents for a period in excess of two years, was tenured as a supervisor of instruction. *N.J.S.A.* 18A:28-6

2. That the Board, albeit through nescience, illegally reassigned petitioner to a position subordinate in salary and responsibility.

3. That the factual contexts presented in *Buehler, supra*, and *Wilson, supra*, are inapplicable to the instant controversy.

4. That petitioner is entitled to reinstatement to the position of supervisor of instruction with lost salary, less mitigation in the amount of earnings in alternate summer employment, if any.

5. That petitioner may not be awarded counsel fees and other expenses of litigating the matter before the Commissioner, who has consistently held that he is without authority to award such costs, as was stated in *Jack Noorigian v. Board of Education of Jersey City,* 1972 *S.L.D.* 266, aff'd in part/rev'd in part State Board of Education 1973 *S.L.D.* 777:

> "***The Commissioner has previously determined that there is no provision in the statutes for payment of interest, costs and legal fees.*** Nor can there be found any precedent or statutory authority for awarding counsel fees as claimed by petitioner.***" (at 272)

This concludes the report of the hearing examiner.

* * * *

The Commissioner has carefully reviewed the entire record of the controverted matter including the exceptions to the hearing examiner report filed by the parties pursuant to *N.J.A.C.* 6:24-1.17(b). Therein, the Board contends that its policy of March 13, 1972 requiring supervision by certificated supervisors was rendered of no effect by the Superintendent's disregard thereof, since he believed it patently unworkable at that time. The Board also contends that the succeeding board which passed a subsequent policy on supervision was not bound by that policy.

A policy once adopted and spread on the minutes of a board of education may not be so lightly disregarded. While it is true that in matters of management prerogative one board may not bind its successor, except as provided by law, the record is barren of evidence that any successor board rescinded the existing policy that supervision be provided by certificated supervisors. Absent such

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rescission, the policy remained viable. Neither the inaction of the Superintendent in implementing that policy nor the adoption by the Board of a subsequent policy statement on supervision which was silent on the matter of supervisory certificates could by indirection negate the March 13, 1972 policy. The Commissioner so holds. It is not within the authority of a Superintendent by action or inaction to establish or alter Board policy. Nor may such authority as is statutorily required of boards be delegated. *Mary Ann Popovich v. Board of Education of the Borough of Wharton, Morris County,* 1975 *S.L.D.* 737

The familiar canons of statutory interpretation requiring that words be given their ordinary meaning are similarly applicable to the interpretation of a policy. *Hoeganaes Corporation v. Division of Taxation,* 145 *N.J. Super.* 352, 359 (*App. Div.* 1976) Absent forthright action rescinding the policy adopted on March 13, 1972, the policy remained viable. It was that viable policy which importantly distinguishes the instant matter from both *Buehler, supra,* and *Wilson, supra*. Therein the employing boards had adopted no similar policy requiring supervisory certificates of Buehler and Wilson. The unauthorized assignment of Buehler and Wilson by principals to supervise presents no parallel to the matter herein controverted.

Petitioner, herein, by assignment and with full knowledge and approval of the Board was required to supervise instruction. By existing Board policy he was required to be certified as a supervisor. In that capacity he served as a tenured teacher with a supervisor's certificate for a period in excess of two years. That service, by statutory prescription, established him as a supervisor of instruction with a tenure status. *N.J.S.A.* 18A:28-6 The further argument that only by the Board's act of conferring tenure could he gain that status must fail. Had the Legislature intended to require such action, it would have incorporated that requirement within language of the statute. As was iterated by the State Board of Education in *Juanita Zielenski v. Board of Education of the Town of Guttenberg,* 1970 *S.L.D.* 202, rev'd State Board of Education 1971 *S.L.D.* 664, aff'd Docket No. A-1357-70 New Jersey Superior Court, Appellate Division, February 16, 1972 (1972 *S.L.D.* 692):

> "***These statutes lead us to conclude that it was not intended to deny tenure to a teacher, otherwise eligible, who taught continuously and performed all the duties of a regular teacher because the formality of a roll call vote may not have been undertaken where, as here, the Board had full knowledge of the details of petitioner's employment, assignment and benefits, and where the actions of its Superintendent were ratified and concurred in by the Board.***" (1971 *S.L.D.* at 668)

The Commissioner finds the record supportive of the findings of the hearing examiner and adopts them as his own. Since petitioner had acquired a tenure status as a supervisor of instruction, the Board's action transferring him to a position of lesser status and compensation was improper. Accordingly, it is ordered that the Board restore petitioner to an appropriate position commensurate in duties, salary and emoluments with his tenure status as a supervisor of instruction. It is similarly ordered that the Board reimburse petitioner for the

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difference between the salary and emoluments which he has received since November 10, 1975 and that which he would otherwise have received had he not been reassigned with reduction in benefits on that date. The amount of the difference shall be mitigated only by applicable earnings, which petitioner received for summer employment, if any, during the intervening period.

The Commissioner finds no need to address the matter of reformation of contract raised by petitioner. No individual written contract is required to be issued to a tenured employee who enjoys the status of continued employment during satisfactory performance of his duties. While the terms of any individual written contract which the Board chooses to issue its tenured employees should accurately reflect the prevailing duties and benefits, the tenure status and rights of such employees may not be altered thereby, as demonstrated herein.

COMMISSIONER OF EDUCATION

February 28, 1978

**Board of Education of the Lower Cape May Regional School District,**

***Petitioner,***

*v.*

**Mayor and Committee of the Township of Lower, Mayor and Council of the City of Cape May and Mayor and Committee of the Borough of West Cape May, Cape May County,**

***Respondents.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Hayman, Gorelick and Groon (Paul W. Dare, Esq., of Counsel)

For the Respondent Cape May, John J. Ludlam, Esq.

For the Respondents Lower Township and West Cape May, Bruce Gorman, Esq.

Petitioner, the Board of Education of the Lower Cape May Regional School District, hereinafter "Board," appeals from an action of the three governing bodies of the municipalities which constitute the Regional School District, the

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Township of Lower, the City of Cape May and the Borough of West Cape May, hereinafter "Councils," certifying to the Cape May County Board of Taxation an amount of local tax appropriations for school purposes for the 1977-78 school year $175,000 less for current expenses and $25,000 less for capital outlay than the amounts proposed by the Board in its school budget which was rejected by the voters.

The matter is referred directly to the Commissioner of Education for adjudication on the record, including the pleadings, exhibits, and the written testimony of the parties.

The facts of the matter are these:

At the annual school election held March 22, 1977 the Board submitted to the electorate proposals to raise $2,480,760 by local taxation for current expense and $55,000 for capital outlay costs of the school district. These items were rejected by the voters and subsequent to the rejection the Board submitted its budget to the respective Councils for determination of the amounts necessary for the operation of a thorough and efficient school system in the Lower Cape May Regional District for the 1977-78 school year, pursuant to the mandatory obligation imposed on the Councils by *N.J.S.A.* 18A:22-37.

The Councils made their determinations and certified to the Cape May County Board of Taxation an amount of $2,305,760 for current expense and $30,000 for capital outlay. The difference between the amounts proposed by the Board and the amounts deemed necessary by the Councils is shown in the following table:

| | CURRENT EXPENSE | CAPITAL OUTLAY |
|---|---|---|
| Board's Proposal | $2,480,760 | $ 55,000 |
| Councils' Proposal | 2,305,760 | 30,000 |
| Amount Reduced | $ 175,000 | $ 25,000 |

The Commissioner notices that of the total reduction imposed by the Councils on the current expense and capital outlay proposals, the Board seeks to have restored an amount of $152,109 to its current expense budget and $25,000 to its capital outlay budget.

The Board asserts that the Councils' action was arbitrary, capricious and unreasonable because of an alleged failure of the Councils to set forth specific economies which should be effected in the budget which had been defeated by the voters. The Councils contend that the Board failed to provide them with adequate information in support of its original proposed budget and that their recommended reductions are, in fact, based on limited data they received from the Board.

The Commissioner observes in this regard that the Councils met in a joint

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work session on March 30, 1977 and determined to reduce the Board's proposed budget and recommended the following economies: (C-2)

CHART I

| Account Number | Item | Board's Proposal | Councils' Proposal | Amount Reduced |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J120D | Oth. Contr. Servs. | $ 15,000 | $ 1,000 | $ 14,000 |
| J200 to J216 | Sal., Instr. | 1,765,266 | 1,696,424* | 68,842 |
| J310 | Sal., Att. Servs. | 3,500 | 2,833 | 667 |
| J320 | Oth. Exp., Att. Servs. | 1,100 | 559 | 541 |
| J510 | Sal., Pupil Trans. | 68,500 | 65,996* | 2,504 |
| J520 | Contr. Servs. Pub. Carr. | 160,600 | 145,291 | 15,309 |
| J610 | Sal., Oper. Plnt. | 147,735 | 141,001 | 6,734 |
| J630 | Heat | 54,000 | 49,000 | 5,000 |
| J650 | Supls. Oper. Plnt. | 20,700 | 17,475* | 3,225 |
| J710 | Sal., Maint. Plnt. | 35,400 | 31,867 | 3,533 |
| J720B | Contr. Servs. Repr. | 20,000 | 15,000 | 5,000 |
| J730B | Repl. Equip. | 21,350 | 14,454* | 6,896 |
| J730C | New Equip. | 52,500 | 47,795* | 4,705 |
| J810D | Health Benefits | 119,123 | 89,123 | 30,000 |
| J920 | Oth. Exps. Food | 12,000 | 8,290 | 3,710 |
| J1020 | Oth. Exps. Stud. Bdy. Activ. | 48,000 | 43,557* | 4,443 |
| *Rounded to Next Highest Dollar | | | | |
| TOTALS | | $2,544,774 | $2,369,665 | $175,109 |

CAPITAL OUTLAY:

| | | | | |
|---|---|---|---|---|
| L1220 | Sites | $ 30,000 | $ 30,000** | $ 25,000** |
| L1230C | Remodeling | 35,000 | | |
| | TOTALS | $ 55,000 | $ 30,000 | $ 25,000 |

*Rounded to Next Highest Dollar

**Councils recommended total reduction in both items.

The Commissioner finds the Councils' recommended economies to be sufficiently specific to have enabled the Board to ascertain the areas wherein the Councils had made reductions. The Commissioner also finds, on the basis of the Councils' submitted written testimony that the Board did provide sufficient

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data to enable the Councils to arrive at their suggested economies.

The Commissioner notices that the total amount of current expense reductions recommended by the Councils is $109 more than the amount actually reduced. The Commissioner also observes that the Board accepts Councils' specific reductions in the following line items and in the stated amount which, accordingly, are not in dispute.

*J120D Other Contracted Services* *Reduction $14,000*

The Board accepts a reduction of $13,000 in this line item but demands restoration of $1,000. (P-1, at p. 2) The Commissioner has reviewed the written testimony of the Board in support of its need for an amount of $1,000 to be restored to this item. (P-1-2) The Commissioner finds that the Board failed to establish its need for the $1,000. The entire reduction of $14,000 is therefore sustained.

*J630 Heat* *Reduction $5,000*

The Board accepts the reduction of $5,000 in this line item. (P-1, at p. 6)

*J720B Contracted Services, Repairs* *Reduction $5,000*

The Board accepts the reduction of $5,000 in this line item. (P-1, at p. 6)

The 1976-77 annual audit report of the Board's finances shows an unappropriated current expense balance in the amount of $439,069 as of June 30, 1977. The Board applied $200,000 of that amount to its proposed 1977-78 current expense budget which leaves $239,069 as the present amount of unappropriated current expense balance, slightly more than seven percent of the total of its original proposed current expense budget.

The Commissioner notices that of the $152,000 in dispute, five line item reductions total $127,619. Those five line items shall now be discussed *seriatim*.

*J200-J216 Instructional Salaries* *Reduction $68,842*

The Councils arrived at this specific amount of reduction by comparing the Board's 1975-76 appropriations in line items J200 through J216 with actual 1975-76 expenditures in those line items. The Councils arrived at the figure of $87,685 the Board had over-appropriated in those line items. The Councils then took 50 percent of the over-appropriation, or $43,842, as the amount the same line items should be reduced in 1977-78. The Councils added to that figure the sum of $25,000 which, they assert, represents an amount for two additional classroom teachers, for the total reduction of $68,842.

The Board argues that restoration is essential in order for it to employ summer help, to employ teachers for home instruction, to employ substitute teachers, a pianist for its choir, and to employ one additional teacher.

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The Commissioner has reviewed the Board's 1976-77 expenditures in each of the J200 series line items compared to the budgeted amounts and the amounts proposed for 1977-78. In 1976-77 the Board budgeted $16,650 for supplementary teachers and expended only $1,665. The Board has appropriated $16,650 for supplementary teachers for 1977-78. It had appropriated $100,000 for additional teachers in 1976-77, but expended nothing. The Board has appropriated $58,000 for additional teachers for 1977-78.

The Commissioner finds that the Board has demonstrated a need for $32,192 of the total reduction in this major series of line items. The Board has failed to establish a need for $25,000 to employ additional teachers in view of its written testimony that it has already employed for 1977-78 eight additional teachers. Nor did the Board establish a need for more than $5,000 to be appropriated for supplementary teachers compared to the amount of $16,650.

Accordingly, the Commissioner finds and determines that of the total reduction in the amount of $68,842, the Board shall have restored to it an amount of $32,192.

*J520 Contracted Services — Public Carriers* *Reduction $15,309*

The Board appropriated $160,600 in this line item and already has executed contracts in the amount of $145,740. The Board argues that it needs at least $9,200 of the reduction to compensate parents who transport their own children pursuant to the provisions of *N.J.S.A.* 18A:39-1. The Board presently has thirty-five children being transported by parents. The maximum rate of reimbursement is $250 per parent.

The Commissioner finds that the Board has established its need for $9,200 of the reduction in this line item. Accordingly, $9,200 shall be restored to the Board.

*J610 Salaries for Operation of Plant* *Reduction $6,734*

The Commissioner has reviewed the testimony of the Board in regard to its need for this amount. The Commissioner has also reviewed the conflicting data submitted to the Councils in regard to its need for these moneys for the salaries of two persons. The Commissioner finds that the Board failed to establish its need for the restoration of this reduction.

*J730B Replacement — Noninstructional Equipment* *Reduction $6,896*

The Board bases its need for this amount of reduction solely on the fact that a six percent increase for inflation from last year's expenditure is built into the amount it budgeted for this line item.

The Commissioner finds that the Board failed to establish its need for the amount reduced by the Councils in this line item. Accordingly, the total reduction is sustained.

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*J810D Health Benefits* *Reduction $30,000*

The Board asserts that it is in need of the total reduction to meet its obligation to provide health benefits to its employees. The Commissioner finds that the Board's written testimony proves the need for this restoration. (P-2, at p. 10)

Accordingly, the total reduction in this line item is restored.

The Commissioner has reviewed the remaining nine line item reductions imposed by the Councils on the Board's current expense budget and the written testimony of the parties. The Commissioner finds no need to discuss the items separately. The Board has a sufficient amount of unexpended current expense balance to absorb those reductions, if in its wisdom it so desires. The Commissioner finds that the Board has failed to establish its need for the restoration of the remaining current expense reductions.

*L1220 Sites*
*L1230C Remodeling* *Combined Reduction $25,000*

The Board agrees to the reduction of $25,000. (P-2, at p. 12) The Councils further argue that the amount of $30,000 it already certified to the Cape May County Board of Taxation for capital outlay purposes should also be set aside. The Commissioner knows of no reason, nor has any been presented, why the certification of $30,000 already made by the Councils should be considered here.

The reduction of $25,000, agreed to by the Board, is sustained.

A recapitulation of the amounts restored to the Board is as follows:

CHART II

| Account Number | Item | Reduction | Amount Restored | Amount not Restored |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J120D | Oth. Contr. Servs. | $ 14,000 | $ - 0 - | $ 14,000 |
| J200 to J216 | Sal., Instr. | 68,842 | 32,192 | 36,650 |
| J310 | Sal., Att. Servs. | 667 | - 0 - | 667 |
| J320 | Oth. Exp., Att. Servs. | 541 | - 0 - | 541 |
| J510 | Sal., Pupil Trans. | 2,504 | - 0 - | 2,504 |
| J520 | Contr. Servs. Pub. Carr. | 15,309 | 9,200 | 6,109 |
| J610 | Sal., Oper. Plnt. | 6,734 | - 0 - | 6,734 |
| J630 | Heat | 5,000 | - 0 - | 5,000 |
| J650 | Supls. Oper. Plnt. | 3,225 | - 0 - | 3,225 |
| J710 | Sal., Maint. Plnt. | 3,533 | - 0 - | 3,533 |

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| | | | | |
|---|---|---|---|---|
| J720B | Contr. Servs. Repr. | 5,000 | - 0 - | 5,000 |
| J730B | Repl. Equip. | 6,896 | - 0 - | 6,896 |
| J730C | New Equip. | 4,705 | - 0 - | 4,705 |
| J810D | Health Benefits | 30,000 | 30,000 | - 0 - |
| J920 | Oth. Exps. Food | 3,710 | - 0 - | 3,710 |
| J1020 | Oth. Exps. Stud. Bdy. Activ. | 4,443 | - 0 - | 4,443 |
| TOTALS | | $175,109 | $71,392 | $103,717 |
| CAPITAL OUTLAY: | | | | |
| L1220 | | $ 25,000 | $ - 0 - | $ 25,000 |
| L1230C | | | | |

Accordingly, the Commissioner of Education hereby directs the Cape May County Board of Taxation to add the amount of $71,392 to the amount previously certified to it by the Township of Lower, the City of Cape May, and the Borough of West Cape May, for the 1977-78 current expense costs of the Lower Cape May Regional School District so that the total amount of the tax levy shall be $2,327,152 for current expenses. This results in a total current expense budget in the amount of $3,243,476 for the 1977-78 school year.

COMMISSIONER OF EDUCATION

March 1, 1978

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**Board of Education of the City of Plainfield,**

***Petitioner,***

***v.***

**City Council of the City of Plainfield, Union County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, King and King (Victor E.D. King, Esq., of Counsel)

For the Respondent, Sachar, Bernstein, Rothberg, Sikora & Mongello (David H. Rothberg, Esq., of Counsel)

Petitioner, the Board of Education of the City of Plainfield, hereinafter "Board," appeals from an action of the City Council of the City of Plainfield, hereinafter "Council," certifying to the Union County Board of Taxation a lesser amount of local tax appropriations for school purposes for the 1977-78 school year than was proposed by the Board in its budget submitted to the Board of School Estimate.

The matter comes before the Commissioner of Education for adjudication on the record including the pleadings, exhibits, written documentation of the parties in support of their respective positions, and transcript of a hearing conducted on August 30, 1977 at the State Department of Education by a hearing examiner. The hearing examiner report is as follows:

The Board on February 3, 1977 adopted a budget which was in excess of the legislative cap limitation. Pursuant to authority from the Commissioner to exceed the cap by $370,000, the Board thereafter promulgated a lesser budget which, exclusive of other sources of revenue, required that $7,669,640 be raised for current expenses by local taxation. Subsequent to a public hearing conducted March 29, 1977 on the Board's proposed budget, the Board of School Estimate certified $7,400,000 to the Council as the amount to be raised for current expenses by local taxation. This sum is $269,640 less than that proposed by the Board. Council determined that an amount $100,000 less was necessary to operate the schools. Accordingly, it certified the sum of $7,300,000 effecting a total reduction of $369,640.

The Board asserts that Council's action was inappropriate and contends that the restoration of the $369,640 reduction is necessary and essential for it to conduct a thorough and efficient educational program in its schools during 1977-78. Council maintains that it acted properly and after due deliberation and that

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the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. As part of its determination, Council suggested specific line items of the budget in which it believed economies could be effected.

Council's suggested economies set forth in its Supplemental Answer totaled $537,793, an amount $168,153 greater than Council's reduction of the Board's current expense budget. The hearing examiner, over Council's objection, required that Council modify its reductions to the precise amount of $369,640 by which it reduced the Board's proposed budget when it certified to the County Board of Taxation the amount to be raised by public taxation. (P-1; Tr. 8-25) *Board of Education of the Scotch Plains-Fanwood Regional School District v. Mayor and Council of the Township of Scotch Plains and Mayor and Council of the Borough of Fanwood,* 1974 *S.L.D.* 1216, 1217

In compliance with the hearing examiner's ruling, Council submitted at the hearing line item reductions totaling in the aggregate $369,640 as follows:

CHART I

| Account Number | Item | Board's Proposal | Council's Proposal | Amount Reduced |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J120D | Labor Relations | $ 23,000 | $ 10,000 | $ 13,00 |
| J211,215 | Sals., Prins. & Secys. | 994,535 | 858,010 | 136,525 |
| J213A | Sals., Tchrs. | 7,004,865 | 6,987,631 | 17,234 |
| J216 | Sal., Aides | 230,529 | 222,030 | 8,499 |
| J230C | A-V Mats. | 45,000 | 28,520 | 16,480 |
| J250A | Off. Supls. | 49,011 | 39,149 | 9,862 |
| J250B,C and J130 F,G,I,L | Trav. & Misc. Exp. | 161,794 | 150,925 | 10,869 |
| J320D | Microfilming | 5,000 | -0- | 5,000 |
| J410C | Sals., Nurses | 170,689 | 127,948 | 42,741 |
| J610A,B | Sals., Custs. | 955,500 | 905,100 | 50,400 |
| J610D | Sals., Security | 133,000 | 118,090 | 14,910 |
| J720C | Contr. Servs., Equip. | 33,000 | 26,700 | 6,300 |
| J730A,B,C | New & Repl. Equip. | 89,100 | 51,280 | 37,820 |
| TOTALS | | $9,895,023 | $9,525,383 | $369,640 |

The hearing examiner, having considered each of these reductions in the light of evidence adduced at the hearing, the written testimony submitted by the parties, and exhibits in evidence, sets forth his recommendations on those lesser reductions without narrative description in Chart II, *post*. Recommendations in narrative form for Council's proposed major reductions follow:

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*J211,215 Principals and Secretaries Salaries — Reduction $136,525*

Council proposes that the Board reduce its complement of vice-principals at the high school by one and allocate the work to the three remaining vice-principals. Council further proposes that two middle school vice-principals and one elementary school vice-principal be eliminated together with their secretaries at a total saving in salaries and fringe benefit costs of $136,525. (R-1; R- 2, at pp. 7-8)

The Board contends that duties of four previously employed full-time class advisors, a community coordinator and a grievance chairman have already, in large part, been absorbed by its four high school vice-principals. The Board states that it intends to effect long range economies by reducing vice-principals' work year to ten months with concomitant effect upon salary. The Board states that no vice-principal has a private secretary but that each utilizes secretaries from a school-wide pool. (P-1, at p. 14) The Superintendent testified that the work load stemming from monitoring and planning aspects of the Public School Education Act of 1975 and rules of the State Board of Education have been economically and effectively absorbed internally without adding members to the administrative staff. He stated that the effectiveness of that program would be subverted by the elimination of vice-principals. (Tr. 72-79)

An examination of the job description of vice-principals, the static enrollment pattern of the schools, and the convincing testimony of the Superintendent causes the hearing examiner to conclude that the thorough and efficient operation of the Board's school requires that the complement of vice-principals be maintained with the secretarial assistance now provided them. (P-1, Exhibits 22-24) The encumbered amount for principals' and vice-principals' salaries with one position yet unfilled is $596,784 of a budgeted amount of $602,800. The Board concedes, however, that one part time secretary may be deleted at a savings of $4,250. (P-1, at p. 15) An analysis of the encumbered and budgeted amounts in line item J215 establishes that the remaining amount is needed for salaries of the remaining secretaries. (C-2) Accordingly, it is recommended that $132,275 be restored to line items J211 and J215 and that the reduction be sustained in the amount of $4,250.

*J410C Nurses Salaries - Reduction $42,741*

Council proposes that the Board reduce its staff of certified school nurses by replacing some nurses with nurse's aides and increasing the work load of nurses. Council proposes that the Board further economize by contracting nursing services from the local Muhlenberg Hospital or by compensating its nurses at comparable salaries to those paid hospital nurses. (Council's Supplemental Answer, at p. 11)

The Board has contemplated such economies as suggested by Council but, because of pending litigation in a neighboring school district, has refrained from implementation of such a plan until the 1978-79 school year. (Tr. 83)

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The hearing examiner finds that, with its full staff of nurses, the Board's line item 410, fully encumbered for the 1977-78 school year, requires $167,250. It is recommended that the Commissioner determine that the Board's cautionary, thorough study prior to altering its staffing pattern for nurses should be accorded a presumption of correctness. It is further recommended that the Commissioner restore $39,302 in this line item and sustain Council's reduction in the amount of $3,439.

*J610A,B Custodial Salaries — Reduction $50,400*

Council avers that the Board is overstaffed in this area and proposes that five janitorial positions be eliminated at a savings of $50,400 including fringe benefit costs. (R-2, at pp. 8-9) The Board avers that its seventeen buildings, ranging in age from seven to one hundred years, and incorporating swimming pools, gymnasiums, multi-purpose rooms, cafeterias and community auditoriums, require a continuing complement of eighty janitorial employees. (P-1, at p. 16)

The Board presents cogent arguments that its present complement of building janitors and groundskeepers is necessary. Accordingly, it is recommended that the Commissioner determine that its janitorial staff may not be reduced. Negotiations with janitors were completed on June 23. The fully encumbered amount in the janitorial salary line item for regular employees, exclusive of overtime and substitutes, shows that $775,647 is needed of a budgeted amount of $810,000. (C-2) Accordingly, it is recommended that $16,047 be restored to this line item and that the reduction be sustained in the amount of $34,353.

*J730A,B,C New and Replacement Equipment — Reduction $37,820*

Council avers that a budgeted expenditure for equipment which is almost 350 percent greater than that expended in 1975-76 is excessive. (R-2, at pp. 5-6) The Board states that, although its initial proposals for new and replacement equipment for the current year have already been reduced, it is amenable to a further reduction in this area of its budget of 20 percent in consideration of expressed community desires. (P-1, at p. 10; R-4)

The hearing examiner perceives that this reduced proposal to purchase new and replacement equipment for a school system serving 9,000 pupils is not excessive. It is also a lesser amount than that expended in 1976-77. (C-1) Eighty percent of the Board's original proposal requires line item allocations totaling $71,280. It is recommended that $20,000 be restored to these line items and that the reduction in the amount of $17,820 be sustained.

CHART II

| Account Number | Item | Amount Of Reduction | Amount Restored | Amount Not Restored |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J120D | Labor Relations | $ 13,000 | $ 7,000 | $ 6,000 |

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| | | | | |
|---|---|---|---|---|
| J211, 215 | Sals., Prins. & Secys. | 136,525 | 132,275 | 4,250 |
| J213A | Sals., Tchrs. | 17,234 | -0- | 17,234 |
| J216 | Sals., Aides | 8,499 | 4,000 | 4,499 |
| J230C | A-V Mats. | 16,480 | 14,480 | 2,000 |
| J250A | Off. Supls. | 9,862 | 5,062 | 4,800 |
| J250B,C and J130F,G,I,L | Trav. & Misc. Exp. | 10,869 | 6,400 | 4,469 |
| J320D | Microfilming | 5,000 | -0- | 5,000 |
| J410C | Sals., Nurses | 42,741 | 39,302 | 3,439 |
| J610A,B | Sals., Custs. | 50,400 | 16,047 | 34,353 |
| J610D | Sals., Security | 14,910 | 4,900 | 10,010 |
| J720 | Contr. Servs., Equip. | 6,300 | -0- | 6,300 |
| J730A,B,C | New & Repl. Equip. | 37,820 | 20,000 | 17,820 |
| | TOTALS | $369,640 | $249,466 | $120,174 |

The School Business Administrator testified that, of the $280,869 unappropriated balance available to the Board June 30, 1976, $173,000 was appropriated as revenue to the 1977-78 budget. He testified further that, of the remaining balance available to the Board, it is anticipated that sums will have to be expended to comply with yet to be completed negotiation agreements with certain employee groups including the school administators' negotiating unit. (P-3, 4, 5; Tr. 5, 59-65) In consideration of the limited amount of unappropriated balance in the Board's current expense account, it is recommended that the Commissioner not direct that any of this amount be appropriated by the Board in connection with the recommended restorations.

In summary, it is recommended that the Commissioner determine that $120,174 of Council's reductions shall be sustained and that the additional amount of $249,466 must be certified by Council to the Union County Board of Taxation as a tax levy for the Board's current expense needs of the 1977-78 school year.

This concludes the hearing examiner report.

* * * *

The Commissioner has reviewed the record of the controverted matter including the pleadings, written and oral testimony, documents in evidence, post-hearing submissions, report of the hearing examiner and exceptions therto filed by the parties pursuant to *N.J.A.C.* 6:24-1.17(b).

Council, in its exceptions, requests the Commissioner to reverse the hearing examiner's ruling that the total amount of proposed reductions by Council in the line items of the Board's budget must precisely equal the amount by which Council chose to reduce the Board's budget when it certified to the Union County Board of Taxation the amount to be raised by local taxes. The Commissioner finds no merit in Council's contention that it should not have been precluded

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from requiring the Board to substantiate its needs for line items totaling $168,153 more than the $369,640 by which Council reduced the Board's budget in its certification to the Board of Taxation. The attempt by Council herein to delineate line item reductions in an aggregate sum which could, in effect, reduce the amount which it had already certified for the Board's budget has no basis in law. To hold otherwise would render Council's original certification improper and could conceivably result in the necessity for a post-deadline certification for which the law makes no provision. The orderly process established in law for reaching a determination requires that a municipal governing body delineate the aggregate of its line item reductions of a board's budget a sum no greater than the amount by which it reduced the board's budget when it certified to the county board of taxation the amount to be raised by local taxation. The Commissioner so holds. The ruling of the hearing examiner is proper, consistent with legal principle and prior holding of the Commissioner. *Scotch Plains-Fanwood, supra*

Respondent takes exception to the recommendations of the hearing examiner concerning implementation of the Board's salary policies and the numbers of teaching, nursing, custodial and administrative staff members necessary to operate a thorough and efficient program of education. A review of the record, which reveals a stable enrollment of approximately 9000 pupils and continuing patterns of staffing, supports the hearing examiner's findings and recommendations which the Commissioner adopts as his own.

The record reveals no abuse of its discretionary authority by the Board. That which was iterated in *Scotch Plains-Fanwood, supra*, is similarly applicable herein:

> "***This argument of the Councils is a substantive one which, if implemented, would transfer from the Board to the Councils the authority to structure the school system whenever the Board's proposed budget is defeated at the annual school election. This argument is rejected by the Commissioner. The authority for the basic management and government of local school districts is specifically conferred by statute on local boards of education. *N.J.S.A.* 18A:11-1 Teaching staff members may be employed and dismissed by action of the board of education. *N.J.S.A.* 18A:27-1, 27-3, 16-1 It is 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***.' *N.J.S.A.* 18A:28-9 (*Emphasis supplied.*) Accordingly, absent evidence of gross abuse, the Commissioner holds that there is no authority for a local governing body, or the Commissioner, to make a substantial substitution of discretion for that of a local board of education with respect to the established structure of a school system. There is need instead for a continuity of effort.

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"The Commissioner recently gave expression to this need for continuing support of a program of education in *Board of Education of the City of Plainfield v. City Council of the City of Plainfield, Board of School Estimate and County Board of Taxation, Union County*, 1974 *S.L.D.* 913 as follows:

> '***While the constitutional requirement which imposes on local school districts the obligation to conduct 'thorough and efficient' programs of education is nowhere precisely defined, the Commissioner holds that it must be interpreted to mean that as a minimum such programs are entitled to a continuing sustenance of support, one marked by constancy and not by vacillation of effort. He finds evidence herein that the recommendations are commensurate with this goal, both generally and specifically.***' (at pp. 920-921)***"
>
> (1974 *S.L.D.* at 1233)

The Commissioner determines that in addition to the amount of $7,300,000 which has been certified by Council to the Union County Board of Taxation for current expenses of the Board, the additional sum of $249,466 is necessary for current expenses of the Board in order that it may conduct a thorough and efficient program of education throughout the 1977-78 school year. Accordingly, the Commissioner certifies the additional amount of $249,466 to the Union County Board of Taxation so that the total certification for current expenses of the Board of Education of the City of Plainfield for the 1977-78 school year shall be $7,549,466.

The additional amount of $249,466 for current expenses for the 1977-78 school year means the 1977-78 current expense budget shall be $16,481,407. Using a $16,481,407 1977-78 current expense budget, the 1978-79 equalization aid shall be $7,633,782. The maximum permitted net current expense budget for the 1978-79 school year shall be $14,728,395.

COMMISSIONER OF EDUCATION

March 1, 1978

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**Evelyn Johnson,**

***Petitioner,***

*v.*

**Board of Education of River Edge, Bergen County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Goldberg, Simon & Selikoff (Gerald M. Goldberg, Esq., of Counsel)

For the Respondent, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

Petitioner had been employed as a school nurse since 1956 by the Board of Education of the Borough of River Edge, hereinafter "Board." Petitioner alleges that the Board's action abolishing her position on September 16, 1975, thereby terminating her employment sixty days later, was taken in bad faith. Petitioner demands reinstatement to her position of employment together with all wages and emoluments withheld from her and in this regard seeks Summary Judgment in her favor. The Board denies the allegations and asserts that its action with respect to the abolition of petitioner's position of employment is in all respects proper and legally correct. The Board contends petitioner's complaint has already been adjudicated by a court of competent jurisdiction and therefore ought to be dismissed by the Commissioner of Education. The Board seeks Summary Judgment in its favor.

The matter is referred directly to the Commissioner for determination on the parties' Cross-Motions for Summary Judgment, their supporting Briefs, affidavits and exhibits. The pertinent facts of the matter are these:

The Board asserts that the issue raised herein, *i.e.* bad faith, has already been adjudicated and dismissed by the United States District Court. The Board argues that the matter has been rendered *res judicata* and must now be dismissed by the Commissioner.

The Commissioner does not agree with the Board's argument on this point. Chief Judge Lawrence Whipple, in his opinion on the matter raised by petitioner, observed that both parties had stipulated in open court that the sole issue was whether petitioner was entitled to a hearing before her employment was terminated as a result of the abolishment of her position. (See *Evelyn Johnson v. Board of Education District of River Edge, County of Bergen et al., U.S.D.C.*

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(*D.N.J.*), Civil Action No. 75-1958.) The issue raised herein is whether the Board did, in fact, act in bad faith with respect to the abolition of petitioner's position of employment. This allegation was not considered by the Court. It shall, however, be considered by the Commissioner, *post*.

The Board had in its employ two school nurses, one of whom was petitioner, at the commencement of the 1975-76 academic year. Petitioner possessed the lesser seniority of the two in terms of employment service. The Board's controverted action herein occurred on September 16, 1975, two weeks after the opening of the 1975-76 academic year.

The Commissioner observes, prior to a recitation of the facts in regard to the controverted action, that the Department of Education notified the Board on August 4, 1975 that it could rely on state aid for 1975-76 in the amount of $170,121. This figure was $26,204 less than the Board had anticipated in its 1975-76 current expense budget adopted during February 1975. The anticipated state aid figure the Board had used was based on the Department's earlier notification during November 1974 that it would receive $227,308 for 1975-76. The fact is that the amount of state aid for all boards of education in the State was uncertain until the summer of 1975 when the final amounts were released. (For a complete historical review of the financial uncertainty facing boards of education during this time, see *Robinson v. Cahill*, 67 *N.J.* 333 (1975).)

It is within this context of events that the Board adopted the following resolution at a meeting held on September 16, 1975:

"*REDUCTION OF 1975-76 CURRENT EXPENSE BUDGET*

"Motion by Mr. Lowit, seconded by Ms. Fields that the following Resolution be approved:

WHEREAS: the State Dept. of Education has reduced the amount of Current Expense State Aid entitlement for the 1975-1976 School Year by $26,204.00 less than the amount provided for in the Budget and

WHEREAS: the Board of Education deems it inadvisable to cover the entirety of said shortfall by appropriating this sum from Current Expense Free Balance.

"BE IT THEREFOR RESOLVED, that the Board of Education hereby reduces the total line item allocation in the Current Expense Budget by the amount of the State Aid shortfall of $26,204.

"Motion carried unanimously on a Roll Call Vote." (C-1, at p. 1)

Thereafter and at the same meeting the Board, subsequent to considering several options on how to effect a budget reduction, determined to eliminate one of its two full-time school nurse positions. The Board then determined to

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eliminate the position occupied by petitioner, terminate her employment and give her 60 days' notice. (C-1, at p. 2)

Petitioner grounds her argument that the Board acted in bad faith on the fact that on June 30, 1975 the Board had received notice from the Department that its state aid allotment would be in the amount of $54,281. Petitioner asserts that because her position was not terminated at that time, the Board could not terminate her during September when its final state aid allocation was $170,121. The Commissioner disagrees. The amounts reported to local boards of education on June 30, 1975 was the amount of state aid they could expect had the Legislature failed to provide sufficient funding in state aid for the implementation of the Court's determination with respect to *Robinson v. Cahill, ante*.

The actual and final state aid allocations were distributed as previously stated on August 4, 1975. The state aid available to the Board was in fact less than what it initially had been informed it could anticipate for the 1975-76 year.

Boards of Education have the authority to reduce the number of teaching staff members they employ for reasons, *inter alia*, of economy at *N.J.S.A.* 18A:28-9. Such reduction of teaching staff members shall be on the basis of seniority. *N.J.S.A.* 18A:28-10 Persons whose employment has been so terminated shall be placed on a preferred eligibility list for reemployment. *N.J.S.A.* 18A:28-12

In the instant matter, the Board abolished petitioner's position of employment for reasons of economy after it learned of the amount of state aid it could expect. Petitioner's reliance on *Arthur L. Page v. Board of Education of the City of Trenton and Pasquale A. Maffei*, 1973 *S.L.D.* 704, rem. State Board of Education 1974 *S.L.D.* 1416, 1975 *S.L.D.* 644, aff'd State Board 1976 *S.L.D.* 1158, dismissed Docket No. A-1859-75 New Jersey Superior Court, Appellate Division, June 8, 1976 is misplaced. Here, the Board acted after it received notice that its anticipated state aid had been reduced. The Board asserts that on the facts of the matter, its actions may not be characterized as being taken in bad faith. The Commissioner agrees.

Petitioner has failed in her proofs that the Board of Education of River Edge acted in bad faith in regard to the termination of her employment.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

March 1, 1978

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**Faulcon Bisson,**

***Petitioner,***

***v.***

**Boards of Education of the Borough of Alpha, Townships of Greenwich, Lopatcong and Pohatcong, Warren County,**

***Respondents.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Ruhlman and Butrym (Paul T. Koenig, Esq., of Counsel)

For the Respondent Alpha, Thomas J. Kelly, Jr., Esq.

For the Respondent Greenwich, James A. Tirrell, Jr., Esq.

For the Respondent Lopatcong, Wayne Dumont, Jr., Esq.

For the Respondent Pohatcong, Swick and Swick (Howard W. Swick, Esq., of Counsel)

Petitioner alleges that he was simultaneously employed as a school psychologist by the Boards of Education of the Borough of Alpha and the Townships of Greenwich, Lopatcong and Pohatcong, hereinafter specifically named "Board," or collectively "Boards." Petitioner asserts that his termination of employment by any or all Boards violated his tenure rights pursuant to *N.J.S.A.* 18A:28-5. Petitioner demands immediate reinstatement to his position of employment with all back pay and other emoluments withheld from him. The Alpha, Greenwich and Lopatcong Boards deny any employment relationship with petitioner, while the Pohatcong Board, which admits it employed petitioner, asserts that it properly abolished the position of school psychologist pursuant to its authority at *N.J.S.A.* 18A:28-9.

A hearing was conducted in the matter on January 20, 1976 at the State Department of Education, Trenton, by a hearing examiner appointed by the Commissioner of Education. Thereafter, the Pohatcong Board and petitioner filed letter memoranda in support of their respective positions. The report of the hearing examiner follows:

The Boards of Alpha, Lopatcong and Pohatcong had agreed as early as 1967 to enter an informal arrangement by which they would provide their respective pupils with special services mandated by *N.J.S.A.* 18A:46-1 *et seq.* The three Boards then agreed that a school psychologist would be employed as

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the first step in creating a special services team, hereinafter "team." It was also agreed among the three Boards that the Pohatcong Board would be the administering district of the team because it had the space necessary to house such a team. (P-2, at pp. 5, 7; P-3, at pp. 4-5; P-4, at pp. 3-5) Each Board agreed to pay an equal amount of the total cost of the team. The Alpha and Lopatcong Boards would submit an amount equal to one third of the total cost of the team to the Pohatcong Board which, in turn, would approve and pay all team expenses.

Petitioner testified that he applied for the position of school psychologist in 1968 and was interviewed by the administrative principals of each of the three Boards. He was subsequently offered employment as school psychologist, knowing that he would serve pupils in each of the three school districts. His employment contract as school psychologist was entered into with the Pohatcong Board, the administering district of the informally arranged team. (Tr. 78)

Petitioner testified that while his office was located at the Pohatcong school, he also was assigned office space at the Alpha and Lopatcong schools. (Tr. 79) Petitioner testified that he worked with pupils in each of the three school districts.

The Greenwich Board determined at a meeting conducted on October 12, 1970 to join the informal team created by the Alpha, Lopatcong and Pohatcong Boards. (P-7) This arrangement among the four Boards continued thereafter with the Pohatcong Board retaining the administrative responsibility of the team.

Petitioner testified that since he was first employed as school psychologist in this informal arrangement, several other persons have been employed as part of the team including a learning disabilities teacher-consultant, a speech therapist, a social worker, and a team secretary. While the team was housed at the Pohatcong school, it provided services to pupils in all four school districts on a regular basis. (Tr. 80, 86)

Subsequent to the Greenwich Board joining this informal arrangement, each district contributed 25 percent of the total cost of the team. Payments were made by each Board to the Pohatcong Board which, in turn, approved and payed the team expenses, including salaries. (Tr. 85)

The administrative principal of Lopatcong testified that during September 1974 the Lopatcong Board agreed to become the administering district for 1975-76 because it had more space due to a completed building program. (P-4, at p. 19) Thereafter, the Pohatcong Board abolished the position of school psychologist on January 13, 1975. (P-9, at p. 10)

Petitioner testified that when the Lopatcong Board agreed to become the administering district and because the Pohatcong Board had abolished its position of school psychologist which he held, he was invited to apply to the Lopatcong Board for consideration as the school psychologist. Petitioner testified that he did apply to the Lopatcong Board for the position of school psychologist, which position he had held since 1968. Petitioner was thereafter informed by the

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Lopatcong Board that he was no longer being considered for appointment as school psychologist for 1975-76. (Tr. 98) It is noticed that the learning disabilities teacher-consultant and the speech therapist continued in their employment with the team subsequent to Lopatcong becoming the administering district. The social worker was not properly certified and his employment was not continued.

The hearing examiner observes that the administrative principal of Lopatcong testified that since the Lopatcong Board has become the administering district of the team, the same identical services are being shared by the same four school districts. Petitioner has been replaced in his position of employment as school psychologist by a per diem psychologist selected by Lopatcong. (P-4, at p. 20)

Petitioner claims a tenure status of employment as school psychologist either in the employ of the Pohatcong Board or, in the alternative, in the employ of all four named Boards by virtue of his years of employment as a member of the team.

The Alpha, Greenwich and Lopatcong Boards deny any employment relationship ever existed between them and petitioner. Each Board argues that it simply purchased the service of the team from the Pohatcong Board for an agreed upon price. As such, the Boards assert, the employment relationship petitioner had was solely with the Pohatcong Board.

The Pohatcong Board admits it employed petitioner by virtue of its execution of employment contracts. The Board also argues that while it employed petitioner, petitioner also served employment time in the schools of the three other named Boards. The Pohatcong Board argues that if petitioner's claim to a tenure status as a school psychologist prevails and money damages are awarded him for back pay, then such damages should be equally shared by each of the four Boards.

The Pohatcong Board argues that if petitioner is found to have had a tenure status solely in its employ, then his position as school psychologist was properly abolished on January 13, 1975. The administrative principal of Pohatcong testified that the Pohatcong Board decided to relinquish its position as the administering district of the team, and abolish the school psychologist position, solely for the reason of insufficient space to house the team. (P-3, at p. 44)

The hearing examiner observes that *N.J.S.A.* 18A:46-24 provides in full as follows:

> "Any two or more districts may provide for facilities, examinations or transportation under this chapter under the terms of an agreement adopted by resolutions of each of the boards of education concerned setting forth the essential information concerning the facilities, examination or transportation to be provided, the method of apportioning the cost among the districts and of computing the proportion of the state aid to which each

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district shall be entitled, and any other matters deemed necessary to carry out the purpose of the agreement. No such agreements shall become effective until approved by the commissioner.''

*N.J.S.A.* 18A:46-25 provides in full as follows:

''When two or more boards of education determine to carry out jointly by agreement the duties imposed upon them in regard to the education and training of handicapped pupils the said boards may, in accordance with rules and regulations of the state board, and with the approval of the commissioner by the adoption of similar resolutions establish a jointure commission for the purpose of providing such services. Said commission shall, in accordance with rules of the state board, be composed of representatives of the respective boards of education, and shall organize by the election of a president and vice president.''

The powers of such a jointure commission once properly established are enumerated in *N.J.S.A.* 18A:46-26, one of which is to:

***

''c. Employ necessary principals, teachers and other officers and employees, who shall have the same rights and privileges as those who are similarly employed by local boards of education***.''

In the instant matter, the Boards have assumed the authority of a jointure commission without adhering to the precise provisions of the referenced statutes. The Boards executed no formal agreement and adopted no resolution. The Boards did not seek the approval of the Commissioner to enter into a sharing of facilities or examinations for purposes of their individual responsibilities pursuant to *N.J.S.A.* 18A:46-1 *et seq.*

The Alpha, Greenwich and Lopatcong Boards argue that they merely purchased services from the team employed by Pohatcong and that they had no voice in the operation of the team or of the personnel employed by the Pohatcong Board for the team.

The hearing examiner observes that a document entitled ''Organizational Plan and Operational Guidelines for the Special Service Team of Alpha Borough, Greenwich Township, Lopatcong Township and Pohatcong Township School Districts'' (J-1), hereinafter ''guidelines,'' dated May 1972, though not formally adopted by any one of the named Boards, sets forth the operational guidelines followed by the administrative principals of each of the Boards with respect to the team. The guidelines state as a philosophy that:

''Being cognizant of the needs of the children and accepting the concept of the Child Study Team as mandated by state law, the district boards of Alpha Borough, Greenwich Township, Lopatcong Township, and Pohatcong Township have assumed the responsibility of sponsoring a Special

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Service Team which includes a psychologist, learning disabilities specialist, social worker, speech correctionist, and other pertinent personnel necessary to identify and classify children with learning difficulties.***

"The chief school administrators [the respective administrative principals] are designated as the agents of the respective districts to implement and direct the functioning of the Special Service Team.***

"The agents of the district will be charged with the responsibility of designing the structure of the program, compiling and reporting statistics, developing the policies and procedures, and assessing the capabilities of the staff***." (J-1, at pp. 1-2)

The guidelines also provide that the Pohatcong Board shall be the administering district which, in turn, delegates the responsibility for the actual day-to-day administration of the team to a board of directors. The board of directors consists of the administrative principals of each of the participating Boards herein. The board of directors is specifically responsible for making recommendations to the Pohatcong Board for approval with respect to the team's annual budget and the employment and discharge of personnel. The board of directors is also specifically responsible for the supervision and evaluation of the team members, financial management of the team, and the development and implementation of policies affecting the team. The board of directors meets on a regular monthly basis and the meetings are presided over by a chairman. The chairman is selected from among the administrative principals, each of whom serves a one year term. (J-1, at pp. 1-3)

The hearing examiner recognizes that each Board denies the formal adoption of the guidelines (J-1) and the hearing examiner also recognizes that the guidelines were created by the board of directors, or the respective administrative principals, for the operation of the team. (P-1, at p. 57) The hearing examiner also recognizes that while formal approval may not have been given to the guidelines by the respective Boards, it is clear that at the very least tacit approval of the guidelines was provided by each Board. The administrative principal of Alpha testified that he was a member of the board of directors which met regularly to discuss the operation of the team, in addition to interviewing applicants for employment with the team. (P-2, at pp. 26-27) The administrative principal of Greenwich testified that he, too, was a member of the board of directors, attended regular meetings at which the team budget was discussed. He further testified that he was the chairman of the board of directors for 1972-73 and that throughout the year, he reported to a committee of the Greenwich Board. (P-1, at pp. 12-18) The administrative principals of Lopatcong and Pohatcong both testified that they, too, were members of the team's board of directors and that they attended regular meetings. (P-3, at pp. 14-16; P-4, at p. 13)

The hearing examiner has also reviewed numerous copies of minutes and extracts of official minutes of three Boards' public meetings conducted since 1968 regarding the operation of the team. (P-6; P-7; P-8; P-9) The Lopatcong

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Board submitted no copies of minutes of their meetings regarding the matter. A review of the submitted documents establishes that all final determinations regarding the team's personnel and budget, and whether the team should function on a ten, eleven, or twelve month basis was vested in the Pohatcong Board. Before the Pohatcong Board made any determination the Alpha and Greenwich Boards had to approve by resolution the team's proposed budget, petitioner's salary, and the addition of personnel.

The hearing examiner, after considering the facts established herein, finds that the Boards of Alpha, Greenwich, Lopatcong and Pohatcong did, in fact, enter into an informal jointure commission pursuant to *N.J.S.A.* 18A:46-24, albeit not a jointure commission which meets the requirements of the statute. As such, an informal employment relationship with petitioner did exist with a combination of all four Boards. This being so and in view of the fact that the four Boards still operate the team in the same fashion, even though Lopatcong is now the administering district, the hearing examiner recommends that the Commissioner exercise his authority pursuant to *N.J.S.A.* 18A:4-23 and determine that a formal jointure commission has, through practice, been created by the Boards. (See *Township Committee of the Township of Morris et al. v. Board of Education of the Township of Morris et al.*, 60 *N.J.* 186 (*Sup. Ct.* 1972).) Should this recommendation be adopted, the Commissioner would then direct the several Boards to immediately comply with the precise provisions of *N.J.S.A.* 18A:46-24 and 18A:46-25 to formalize and have approved the jointure commission. Petitioner would have acquired a tenure status as a school psychologist in the employ of the jointure commission and his termination would be contrary to the provisions of *N.J.S.A.* 18A:28-5. His reinstatement would, under these circumstances, be recommended as well as back pay, less mitigation, plus all other emoluments which may have been withheld from him since his improper termination. Each Board would be assessed twenty-five percent of the total money claim awarded petitioner.

If, to the contrary, this recommendation is not adopted by the Commissioner, the hearing examiner finds that petitioner has at the very least acquired a tenure status in the employ of the Pohatcong Board. Its rationale of abolishing the position of school psychologist based on lack of space is not persuasive. The school psychologist position it created is being filled by a psychologist paid on a per diem basis. Consequently, the Pohatcong Board did not abolish the position of school psychologist pursuant to *N.J.S.A.* 18A:28-9. Instead, it transferred the duties of the position, thus improperly depriving petitioner of his tenure status as school psychologist in its employ.

The hearing examiner proffers the finding that petitioner has acquired a tenure status in the employ of the Pohatcong Board, should the first recommendation not be adopted. It is recommended that, under such circumstances, the Pohatcong Board be directed to reinstate petitioner to his employment as school psychologist with all back pay, less mitigation, and all other emoluments otherwise withheld from him.

This concludes the report of the hearing examiner.

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* * * *

The Commissioner has reviewed the record in the matter including the report of the hearing examiner and the exceptions and objections filed thereto by the several named Boards of Education.

The Boards of Education of the Borough of Alpha and of the Townships of Greenwich and Lopatcong assert that the hearing examiner erred in his finding that an informal jointure commission had been established. They collectively argue that a jointure commission may only exist pursuant to the provisions of *N.J.S.A.* 18A:46-24 *et seq.* which, *inter alia*, requires the approval of the Commissioner. The Boards assert that, because they presented no joint agreement for approval to form a commission no such commission exists.

The three named Boards assert that had a formal jointure commission been contemplated by them in their association with the Pohatcong Board, they would have insisted that all four Boards execute an agreement pursuant to the referenced statutes and would have sought the approval of the Commissioner. The Boards argue in this regard that had a formal jointure commission existed, they would have had no desire nor could they have delegated their respective responsibility to the Pohatcong Board for the conduct and operation of the special services team. They maintain that such delegation of authority would be contrary to the legislative intent as well as to the public policy of the State and cite *Summer Cottagers' Association of Cape May v. City of Cape May*, 19 *N.J.* 493 (1955) and *Scatuorchio v. Jersey City Incinerator Authority*, 14 *N.J.* 72 (1953). In the instant matter, the Alpha, Greenwich, and Lopatcong Boards contend that the Pohatcong Board had sole authority to effect policies with respect to the operation of the special services team and that they simply purchased services from that Board.

Thus the three Boards aver that if petitioner is found to have acquired a tenure status of employment and if it is found such tenure rights were violated through his termination of employment, it is the Pohatcong Board which has the sole responsibility to tender him any relief which may be afforded by the Commissioner.

The Pohatcong Board, to the contrary, admits it employed petitioner as a school psychologist for the special services team. It also contends that the team, of which petitioner was a member, was a joint effort of all four Boards. The Boards argue that pupils from all four school districts received benefits from the team and that the Pohatcong District was nothing more than the administrative center of the joint team effort solely because it had available facilities.

The Commissioner observes that each board of education has certain responsibilities pursuant to *N.J.S.A.* 18A:46-1 *et seq.* with respect to the classification and placement in an appropriate program of special education of those pupils enrolled in its respective district who are identified as handicapped pupils.

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The Commissioner does not agree with the argument of the three named Boards.

The Commissioner finds that the four named Boards herein have created a *de facto* jointure commission pursuant to *N.J.S.A.* 18A:46-25 while ignoring the requirements of the referenced statute.

The State Board of Education has adopted rules and regulations with respect to the responsibilities of each board of education to provide basic services for pupils in need of special education. *N.J.A.C.* 6:28-1.1(c) provides, in pertinent part, that "the legislation [*N.J.S.A.* 18A:46-1 *et seq.*] specifically requires *each* local public school district to identify and classify all handicapped children between the ages of five and 20 and to provide an appropriate educational program for them.***" (*Emphasis supplied.*)

*N.J.A.C.* 6:28-1.1(d) provides that

> "Diagnosis and classification shall include comprehensive medical examination, psychological evaluation, social case study, and educational assessment by *approved* child study team personnel functioning jointly." (*Emphasis supplied.*)

*N.J.A.C.* 6:28-1.5 provides in full as follows:

> "(a) All members of the basic child study team shall be employees of the board of education or the State Board of Education.
>
> "(b) Approval of the Commissioner of Education shall be obtained for the purchase by the local school district of services of eligible and/or approved diagnostic clinics, agencies or professionals in private practice representing a basic child study team discipline functioning in lieu of or to supplement members of the basic child study team."

In the instant matter, each of the four named Boards complied, through the arrangement it had, with the provisions of the State Board rules. What the four Boards did not do, however, was to secure the prior approval of the Commissioner. Such failure does not impair the rights which may have accrued to the persons employed for the special services team which has been found herein to constitute a *de facto* jointure commission pursuant to *N.J.S.A.* 18A:46-25 *et seq.*

The Commissioner finds and determines that a *de facto* jointure commission existed among the four named Boards, that petitioner had acquired a tenure status of employment with the jointure commission, and that petitioner's tenure rights were violated by his termination of employment. The Commissioner hereby directs that petitioner be immediately reinstated to his former position of employment on the special services team and that he receive all back pay improperly withheld from him, less mitigation. Each named Board shall contribute twenty-five percent of this total amount.

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The Commissioner observes that the Boards of Education of Alpha, Greenwich, and Lopatcong assert that since June 30, 1976 they have provided special services for their respective schools. Accordingly, the Commissioner directs that each of the four named Boards of Education submit to him immediately its plan in regard to the program of special services for handicapped pupils. The Boards are also directed to submit minutes of their meetings at which they respectively acted to abolish the prior jointure commission.

COMMISSIONER OF EDUCATION

March 1, 1978

**Board of Education of the City of Asbury Park, Monmouth County,**

***Petitioner,***

*v.*

**Commissioner of Education,**

***Respondent.***

## HEARING EXAMINER REPORT

For the Petitioner, McOmber & McOmber (Richard D. McOmber, Esq., of Counsel)

For the Respondent, William F. Hyland, Attorney General of the State of New Jersey (Mary Ann Burgess, Deputy Attorney General)

This matter comes before the New Jersey State Board of Education on Order of Remand of the Superior Court of New Jersey, Appellate Division, Docket No. A-3757-76, dated October 19, 1977. The petitioning Asbury Park Board of Education, hereinafter "Board," challenges both the accuracy of computation and the adequacy of a budget cap waiver of $192,089 which the Commissioner of Education granted on March 10, 1977 pursuant to *N.J.S.A.* 18A:7A-25.

A plenary hearing to establish the relevant facts and to create a record with appropriate documentation and testimony of witnesses was conducted by a hearing examiner on November 23 and 29, 1977 at the State Department of Education, Trenton. The report of the hearing examiner to the State Board of

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Education follows setting forth first those facts which were stipulated by the litigants (J-1) or are otherwise uncontroverted within the record.

The Board's current expense budget for 1976-77 was $7,031,650. (P-3) Of this amount the Board's net current expense budget, which excludes such items as tuition received, Federal and State aid and miscellaneous revenue, was $5,164,279. (Exhibit C) It is on this latter amount that the maximum increase of $339,526, as allowed pursuant to *N.J.S.A.* 18A:7A-25 in the ensuing net current expense budget, was computed at the Board's permitted rate of 6.5745 percent. (J-1)

The Board was notified in January 1977 by computer printout from the Assistant Commissioner of Education in charge of Administration and Finance, hereinafter "Assistant Commissioner," that the maximum permitted budget for the 1977-78 year would be $6,963,626. The fact that this figure was less than the permitted budget for 1976-77 resulted, *inter alia*, from a decline in tuition received from sending districts. This shortfall was the result of the Board's overestimation of allowable costs per pupil and a decline in the number of tuition pupils received. That shortfall which during 1976-77 amounted to $181,313 has increased an additional $110,792 in the 1977-78 school year. (Tr. I-83; P-10)

Discussions between the Board and the Monmouth County Superintendent of Schools resulted in the erroneous conclusion by the Board that its permitted maximum budget had been recalculated by the Assistant Commissioner at the higher figure of $7,171,505. (P-5) Accordingly, the Board advertised a total current expense budget of $7,638,250 (P-4), and filed in its cap waiver application the following amounts:

| | |
|---|---|
| Maximum permitted current expense budget including increase over cap | $7,638,251 |
| Maximum permitted current expense budget | 7,171,505 |
| Amount of increase requested | $ 466,746 (Exhibit D) |

In justification of its cap waiver application the Board submitted that it must meet, *inter alia*, the following inflated costs:

| | |
|---|---|
| Salary increments | $363,999 |
| Fringe benefits | 45,000 |
| Non-personnel inflationary factors | 160,494 |

Additionally the Board submitted to the County Superintendent and the Assistant Commissioner as justification for a cap waiver that it was compelled to meet higher premium costs of $102,000 for insurance and workmen's compensation and that the following programs would have to be eliminated without that waiver:

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| | |
|---|---|
| Security Guards and Aides | $ 92,530 |
| Additional Remedial and Bilingual Teachers | 28,000 |
| Evening High School | 27,000 |
| Driver Education | 27,000 |
| In-school Suspension | 19,400 |
| Elementary Art, Music and Physical Education Specialists | 108,000 |
| Career Counselors, Elementary | 24,000 |
| Guidance Counselors | 24,000 |
| Interscholastic Athletics | 17,070 |
| Total | $367,000 (Exhibits D and E) |

The County Superintendent recommended approval of a waiver of $469,000 but also recommended that $284,000 available to the Board in its current expense unappropriated balance be applied as revenue, thus reducing the amount of the recommended cap waiver to $185,000. (J-1) He stated, however, that:

> "***[I]f the $284,000 is applied they will have a serious cash flow problem. Asbury Park is a receiving high school district with a reliance on tuition payments and needs cash reserves." (Exhibit E)

The Assistant Commissioner, having been advised by the County Superintendent of the shortfall in tuition revenue experienced by the Board, determined in this instance not to apply the entire amount of the Board's $284,000 unappropriated current expense balance as revenue but to allow a sufficient amount to remain for the Board's use in compensating for its then anticipated tuition shortfall of $205,559. (R-1A(4); Tr. I-161)

After reviewing the Board's application, the Assistant Commissioner rejected the Board's justification for certain programs. Those proposals for increases which he disapproved or approved in whole or in part are summarized as follows:

| ITEM | BOARD'S PROPOSAL | APPROVED FOR WAIVER |
|---|---|---|
| Insurance and Workmen's Comp. | $102,000 | $ — 0 — |
| Security Guards and Aides | 92,530 | 92,530 |
| Evening High School | 27,000 | — 0 — |
| Driver Education | 27,000 | — 0 — |
| In-school Suspension | 19,400 | — 0 — |
| Interscholastic Athletics | 17,070 | — 0 — |
| Other Teaching Staff Salaries | 184,000 | 178,000 |
| Totals | $469,000 | $270,530 |

From this total the Assistant Commissioner deducted the Board's remaining free

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balance of $78,441 and recommended to the Commissioner, who in turn approved, a cap waiver of $192,089. (R-1A) By that action the Commissioner effectively increased the Board's permissible current expense budget as follows:

| | | |
|---|---|---|
| Original Maximum 1977-78 Budget | | $6,963,626 |
| Cap Waiver | | 192,089 |
| Use of Unappropriated Balances | | |
| To offset tuition shortfall | $205,559 | |
| Directly to Revenue | 78,441 | |
| | | 284,000 |
| Maximum 1977-78 Budget | | $7,439,715 |

The hearing examiner, having carefully considered the demeanor and testimony of witnesses, documents in evidence, and the Memoranda of respective counsel, now sets forth his findings of additional facts which the State Board of Education, in its consideration of this Appeal, may deem relevant:

1. The Board, as attested to by submission of its cap waiver application and its advertised budget, had concluded that its permitted 1977-78 current expense budget of $6,963,626 had been recalculated and adjusted upward to $7,171,505 by the Assistant Commissioner and the County Superintendent. (P-4 through P-7; Tr. I-22, 35- 42)

2. The record fails to disclose evidence on which to base a conclusion that the Assistant Commissioner ever authorized such a recalculation. His subordinates, recognizing that the Board's cap waiver application was based on an inflated and unauthorized cap, surmised that the Board's proposed budget as compared to the actual permitted budget indicated that the Board was, in effect, seeking a waiver as follows:

| | |
|---|---|
| Board's Proposed Budget | $7,638,250 |
| Maximum Permitted Budget | 6,963,626 |
| Waiver Requested (Adjusted) | $ 674,624 |
| | (R-1A(2), (5)) |

At no time was this noted discrepancy called to the attention of or discussed with the Board or its administrative officers. (R-1A(2), (5); Tr. I-159; Tr. II-41, 56, 60, 68)

3. Although the Board did not attempt to justify a waiver application of $674,624, the record is replete with sufficient testimony and supporting documentary evidence to conclude that, had it known with certainty that its permitted budget remained at $6,963,626, it would have submitted material seeking to justify the larger waiver request of $674,624. (Tr. I-43-49, 169)

4. Contrary to the Board's desire that its current expense unappropriated balance not be appropriated, the Assistant Commissioner, consistent with his practice that such revenues be appropriated, assigned the entire amount to offset

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the tuition shortfall and to provide additional revenue, thus reducing the amount of revenue to be generated from local tax sources.

5. The Assistant Commissioner's disallowance of those portions of the waiver request justified on the basis of evening school, driver education, in-school suspension, interscholastic athletics programs was consistent with his priorities in handling similar requests for waivers from other school districts in the State.

6. The fact that Asbury Park, as a receiving district, is prevented from applying its permitted percentage increase against that portion of its budget funded by tuition received prevents its overall budget from rising as much as it could rise were all of its enrollment non-tuition pupils. Tuition receipts are estimated for the 1977-78 school year in the amount of $1,137,000, approximately 15 percent of the total budget. (Exhibit C)

This concludes the findings of fact by the hearing examiner. Essentially, as the record now stands without the amplification of points of appeal which will be submitted directly to the State Board of Education, the Board seeks a higher cap waiver on the following rationale:

1. Existing current expense unappropriated balance should not have been appropriated by the Commissioner as revenue to the 1977-78 budget.

2. The Commissioner and the Assistant Commissioner, in view of the misunderstanding over the amount of the original budget cap, should have considered the Board's cap waiver application to have been $674,625, rather than $466,746, *ante*.

3. The Commissioner, in processing the Board's request for waiver, should not have disallowed the submitted justification for funds in the form of driver education, in-school suspension, interscholastic athletics, evening high school programs, and increased insurance and workmen's compensation costs.

Respondent, conversely, holds that the granted waiver of $192,089, coupled with the directive to utilize unappropriated balances in the amount of $284,000, will not only insure a thorough and efficient education in the district but also be in compliance with *N.J.S.A.* 18A:7A-25 which permits a cap waiver only if "***a reallocation of resources or any other action *** would be insufficient to meet the goals, objectives and standards established pursuant to this act***."

The hearing examiner, in consideration of the unusual manner by which the matter has come before the State Board of Education, with the agreement of the parties makes no recommendations but performs the limited role of creating a record and setting forth his findings of fact. The parties have requested opportunity to examine and file exceptions to the hearing examiner report, but have agreed to do so within five days of its receipt. This concludes the report of the hearing examiner.

January 31, 1978

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## SUPPLEMENTAL

## HEARING EXAMINER REPORT

For the Petitioner, McOmber & McOmber (Richard D. McOmber, Esq., of Counsel)

For the Respondent, William F. Hyland, Attorney General of the State of New Jersey (Mary Ann Burgess, Deputy Attorney General)

This matter has been reconsidered upon the application of both parties who now request that forthright recommendations be submitted by the hearing examiner for consideration by the New Jersey State Board of Education, hereinafter "State Board," in determining the matter currently on appeal. Accordingly, the hearing examiner report in the above entitled matter issued on January 31, 1978, incorporated herein by reference, is supplemented by the following specific recommendations:

1. That the State Board deny the Board's request that unappropriated balances in its current expense account not be utilized as revenue to be appropriated to offset loss of tuition revenue and expenditures incurred. *N.J.S.A.* 18A:7A-25

2. That the State Board consider the Board's appeal for cap waiver to have been, in fact, a request to increase its permitted maximum budget by an amount of $674,624, as noted by subordinates of the Assistant Commissioner, thus increasing its request for a permitted maximum budget of $7,638,250.

3. That the State Board determine that the Board's request for $102,000, based on increased insurance and Workmen's Compensation premiums over which it had no control, as well as those items of salary increments ($363,999), fringe benefits ($45,000) and other non-personnel items ($160,494), should be considered in the computation of the cap waiver.

4. That those line items totaling $63,470 and consisting of evening high school, driver education, in-school suspension, and interscholastic athletics, which were disallowed by the Assistant Commissioner consistent with his review of cap waiver appeals throughout the State, were properly disallowed in this instance also, and that the Board's request for cap waiver should be disallowed to that extent, as follows:

| | |
|---|---|
| Board's Request for Waiver | $674,624 |
| Items Disallowed | 63,470 |
| Balance | $611,154 |

5. That the Board, which is required to continue to provide an educational program for the same approximate number of pupils in 1977-78 as were enrolled in 1976-77, and which without a cap waiver would be required to do so with less money than that determined necessary for the 1976-77 school year, has set

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forth ample justification for a cap waiver of $611,154 by listing the following inflated cost items:

| | |
|---|---|
| Salary Increments | $363,999 |
| Fringe Benefits | 45,000 |
| Non-Personnel Factors | 160,494 |
| Insurance and Workmen's Comp. | 102,000 |
| Total | $671,493 |

In conclusion, it is recommended that the State Board determine that the cap waiver of $192,089 as previously approved by the Commissioner be increased by $135,065 so that the Board's permissible 1977-78 budget shall be allowed to increase as follows:

| | | |
|---|---|---|
| Original Maximum Budget | | $6,963,626 |
| Cap Waiver | | 192,089* |
| Use of Unappropriated Balances: | | |
| To offset tuition shortfall | $205,559* | |
| Directly to revenue | 78,441* | |
| | | 284,000* |
| State Board Increase of Cap Waiver | | 135,065 |
| Maximum 1977-78 Budget | | $7,574,780 |

*As previously granted by the Commissioner

This concludes the recommendations of the hearing examiner set forth in compliance with the mutual request of the parties in the matter of the Board's appeal of the Commissioner's decision on cap waiver currently before the State Board for consideration.

February 24, 1978

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## STATE BOARD OF EDUCATION

### DECISION

Decided by the Commissioner of Education, February 23, 1977

For the Petitioner-Appellant, McOmber & McOmber (Richard D. McOmber, Esq., of Counsel)

For the Respondent-Appellee, William F. Hyland, Attorney General of the State of New Jersey (Mary Ann Burgess, Deputy Attorney General)

The State Board denies request for Oral Argument and adopts the Supplemental Report and Recommendations contained in the Hearing Examiner's Report as its own. The approved cap increase in the amount of $135,065 is necessary to provide a thorough and efficient education in Asbury Park.

March 1, 1978

## COMMISSIONER OF EDUCATION

### ORDER

The Board of Education of the City of Asbury Park, hereinafter "Board," having opened this matter by submitting to the Monmouth County Superintendent of Schools a request for a cap waiver for its 1977-78 school budget; and

The Commissioner of Education having granted a cap waiver on March 10, 1977 in the amount of $192,089 and having authorized additionally the release of $284,000 in free balance to permit a maximum total current expense budget of $7,439,715; and

The Board having adopted the 1977-78 budget on March 15, 1977 which required that $2,620,016 be raised by local taxation, of which $2,385,516 was designated for current expense and $234,500 for capital outlay; and

The Board having requested the Commissioner on March 11, 1977 to grant an immediate hearing to review and appeal his cap waiver decision, which decision was denied by the Commissioner; and

The voters having rejected the budget on March 29, 1977 and the City Council having subsequently certified the amount of $2,385,516 for current expense but refused to certify any of the $234,500 for capital outlay; and

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The Board having filed a Notice of Appeal on March 31, 1977 with the State Board of Education, hereinafter "State Board," from the March 10, 1977 decision of the Commissioner on cap waiver; and

The Board having appealed to the Commissioner on May 5, 1977 the Council's refusal to certify $234,500 for capital outlay; and

The State Board of Education having on May 19, 1977 declined to accept the cap waiver appeal; and

The Board having filed on June 3, 1977 a Notice of Appeal from the Commissioner's determination on March 10, 1977 and the State Board's declination on May 19, 1977 with the Superior Court of New Jersey, Appellate Division; and

The City Council having certified to the Monmouth County Board of Taxation for the Board's use for capital outlay purposes the amount of $75,000 after amicable settlement by the parties on July 27, 1977 of the capital outlay dispute; and

The Appellate Division having on October 19, 1977 remanded the cap waiver appeal on Consent Motion to the State Board for full hearing; and

A hearing examiner having conducted a plenary hearing for the State Board on November 23 and 29, 1977; and

The hearing examiner having submitted a report on January 31, 1978 and a supplemental report on February 24, 1978 recommending "***that the State Board determine that the cap waiver of $192,089 as previously approved by the Commissioner be increased by $135,065 so that the Board's permissible 1977-78 budget shall be allowed to increase***" to a maximum current expense budget of $7,574,780; and

The State Board having determined on March 1, 1978 that an approved cap increase in the amount of $135,065 is necessary, pursuant to the requirements of *N.J.S.A.* 18A:7A-1 *et seq.*, to provide a thorough and efficient education in the Asbury Park school district; and

The voters of the City of Asbury Park having rejected the raising of an additional $135,065 in local taxation at a special election held May 9, 1978; and

The Board, subsequent to May 9, 1978 having moved for an order of the Commissioner certifying the additional amount of $135,065 to the Monmouth County Board of Taxation to be raised by taxation for the Board's current expense needs for the 1977-78 school year; now therefore

IT IS ORDERED, pursuant to the authority of *N.J.S.A.* 18A:7A-15, that an additional amount of $135,065 is certified to the Monmouth County Board

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of Taxation to be raised from local taxation in the City of Asbury Park to meet the Board's current expense needs for the 1977-78 school year.

Entered this 2nd day of June 1978.

COMMISSIONER OF EDUCATION

**In the Matter of the Annual School Election Held in the Township of Hopewell, Cumberland County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

The announced results of the voting for three seats on the Board of Education of the Township of Hopewell for full terms of three years each at the annual school election held on February 14, 1978 were as follows:

| | *At Polls* | *Absentee* | *Totals* |
|---|---|---|---|
| Linda Mecke | 62 | 0 | 62 |
| Diane Gentile | 78 | 0 | 78 |
| Arthur Marchand | 77 | 0 | 77 |
| Alfred Funke | 60 | 0 | 60 |
| John DeVoe | 2 | 0 | 2 |
| Louise Sheppard | 2 | 0 | 2 |
| George McCouch | 1 | 0 | 1 |

A total of 128 ballots were cast at the polls with no ballots voided.

Pursuant to a letter request dated February 16, 1978, from Mr. Alfred H. Funke, Jr., a write-in candidate, the Commissioner of Education directed that a recount of the votes cast at the Hopewell Township polling place be conducted. The recount was conducted on February 23, 1978 by an authorized representative of the Commissioner at the Department of Education Office in Cumberland County.

Candidate Funke alleges in his letter to the Commissioner that the Judge of Elections improperly determined that only 60 of the 65 votes cast at the polls should be counted for him. Consequently, Candidate Mecke, who received 62 votes was declared one of the three successful candidates for a full three year term on the Hopewell Township Board of Education. The other two successful

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candidates were Diane Gentile and Arthur Marchand who received 78 and 77 votes respectively.

The basis for Candidate Funke's complaint is that as a write-in candidate he was illegally denied the five votes cast for him because the voters did not place the appropriate mark in the square to the left of the space on which his name was written on these ballots. Such complaint is grounded on a recent amendment to *N.J.S.A.* 18A:14-55 which he claims neither requires a square or appropriate mark within such square to appear next to the spaces provided on the ballot for write-in candidates.

The Commissioner's representative observes that the statute of reference as amended by Chapter 86, Laws of 1975, effective May 8, 1975 reads in pertinent part as follows:

> "***Any voter who desires to vote for any person or persons whose names are not printed upon the ballot for any office to be filled at such election, may write in black ink or black pencil or paste under the proper title of the office the name or names of the persons so to be voted for. All pasters shall be printed with black ink on white paper.

It is further observed that a corresponding change was made to *N.J.S.A.* 18A:14-35 which was also amended by Chapter 86, Laws of 1975, effective May 8, 1975. The amendment to this section of the statute affected the manner in which paper ballots should be printed. The change deletes the requirement to have placed upon the ballot a space or square provided next to the left of the space for the names of write-in candidates. It also eliminates the need for a voter to place a cross (×), plus (+) or check (√) in such space or square to the left of the name of a write-in candidate.

The Secretary of the Hopewell Township Board of Education, Candidate Funke, and the Cumberland County Superintendent of Schools were among those interested persons present at the time the ballots were recounted. Candidate Mecke was not present at this time.

Prior to the commencement of the recount of the ballots the Commissioner's representative observed that the ballots were not printed to conform to the amended changes in *N.J.S.A.* 18A:14-35. Consequently, these ballots contained a square to the left of the spaces provided for write-in candidates.

In light of these circumstances the Commissioner's representative announced that he would count as valid any write-in vote for Candidate Funke provided that the placement of his name was appropriate.

The recount of the ballots by the Commissioner's representative was limited to the votes cast for Candidate Mecke, whose name was printed on the ballot, and those write-in votes cast for Candidate Funke.

During the recount of the ballots the Commissioner's representative ob-

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served that several ballots pertaining to write-in votes cast for Candidate Funke were written as "Mr. A. H. Funke, Jr.", "Mr. Funke", "Al Funke" and one ballot contained just the name "Funke". All of these ballots were counted for Candidate Funke. In arriving at this determination, the Commissioner's representative informed those present at the recount that he was relying on case law *In Re: 15 Registered Voters County of Sussex*, 129 *N.J. Super.* 296 (*App. Div.* 1974) wherein the Court held:

> "***A number of earlier cases dealing with the absence or abridgement of given names need no longer be considered in view of the enactment of *L.* 1930, *c.* 187, par. 205, to be found now in *N.J.S.A.* 19:16-4 in which the following appears:
>
> > 'No ballot cast for any candidate shall be invalid by reason of the fact that the name of such candidate may be misprinted, or his Christian name or his initials may be omitted.
> >
> > 'No ballot cast for any candidate shall be invalid by reason of the use of any paster permitted by this Title on which the title of office may be printed or the name of such candidate may be misprinted or part of his Christian or surname or initials may be omitted, or because the voter in writing the name of such candidate may misspell the same or omit part of his Christian name or surname or initials.'
>
> "Clearly, the Legislature has mandated a search for the real intention of the voter no matter how crudely it is expressed, provided only, of course, that there is a reasonable expression of that intent on the ballot.***As related above, we do not equate the casual vote—or even four—with candidacy. We are of the opinion that the record supports the conclusion that there was only one candidate named Wright—Harry Wright—and that any other conclusion is unsupported by the record.***" (at 300-301)

At the conclusion of the recount with all of the ballots counted the total votes cast for Candidates Mecke and Funke stood as follows:

| | *At Polls* | *Absentee* | *Totals* |
|---|---|---|---|
| Linda Mecke | 62 | 0 | 62 |
| Alfred Funke | 65 | 0 | 65 |

The Commissioner's representative finds that, as a result of the recount, the following candidates were duly elected to three seats on the Hopewell Township Board of Education, Cumberland County, for full three year terms:

| | *At Polls* | *Absentee* | *Totals* |
|---|---|---|---|
| Diane Gentile | 78 | 0 | 78 |
| Arthur Marchand | 77 | 0 | 77 |
| Alfred Funke | 65 | 0 | 65 |

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This concludes the report of the Commissioner's representative.

*  *  *  *

The Commissioner finds and determines that as a result of the recount of the ballots Diane Gentile, Arthur Marchand and Alfred Funke were duly elected on February 14, 1978 to three seats on the Hopewell Township Board of Education for full terms of three years each.

The Commissioner further directs the Secretary of the Board to insure that the paper ballots printed for all future school elections conform with the revisions pertaining to write-in candidates as set forth in *N.J.S.A.* 18A:14-35 as amended.

COMMISSIONER OF EDUCATION

March 2, 1978

**Charles Arangio,**

***Petitioner,***

***v.***

**Board of Education of the City of Clifton, Passaic County,**

***Respondent.***

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Sam Monchak, Esq., of Counsel

For the Respondent, Joseph F. Scancarella, Esq., of Counsel)

Petitioner, an attendance officer employed by the Board of Education of the City of Clifton, hereinafter "Board," alleges that the Board improperly and illegally abolished his position as attendance officer to which he claims a tenure status and subsequently consolidated the positions of attendance officer and school social worker, the responsibilities of which were assigned to another school employee. The Board avers that its actions were proper and legally correct in all respects and further maintains that petitioner is barred by the doctrine of laches from proceeding with this matter before the Commissioner of Education. The essential facts of the matter which do not appear to be in dispute are these:

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Petitioner originally sought relief by the filing of a Complaint in Lieu of Prerogative Writ before the New Jersey Superior Court, Law Division, in Passaic County on March 17, 1976. (C-1) The record of such proceedings indicates that the Board filed an Answer to petitioner's complaint with the Court and, further, that petitioner subsequently attested to the alleged facts of the matter by way of two separate affidavits purportedly filed with the Court in April and May 1976. (C-3-4)

On May 24, 1976 the Honorable Theodore Rosenberg, J.S.C., Law Division, issued an Order (J-1) denying petitioner's Motion for Summary Judgment and granted the Board's Motion to have this matter remanded to the Commissioner. Judge Rosenberg's Order indicated that the Court would retain jurisdiction of this matter pending disposition by the Commissioner.

The Commissioner has accepted the original pleadings by the parties filed before the Court in lieu of a formal Petition of Appeal and Answer pursuant to *N.J.A.C.* 6:24-1.1 *et seq*. These pleadings have been subsequently supplemented by those pertinent Board documents and communications related to the matter controverted herein and are part of the record.

The following facts with respect to petitioner's employment relationship with the Board are not in dispute.

The record of the Board minutes dated March 21, 1973 contains an attached copy of page 6 of the Superintendent's report of March 7, which reads as follows:

> "It is the Superintendent's recommendation that *** [petitioner] be appointed as Attendance Officer under the Emergency Employment Act at a starting salary to be established by the Board of Education effective immediately and terminating June 30, 1973. Creation of the position was approved by the EEA authorities in Clifton in the undetermined category of the EEA positions allotted to the Board of Education and provisions have been made for its funding.
>
> "It is the further recommendation of the Superintendent that following examination of truancy programs in other communities and schedules of assignment of attendance officers, ***the position likewise be established in conformity with the pupil attendance year and be a 10-month position from September through June.
>
> "Details on salaries paid and working arrangements and practices will be provided to the Board of Education for its consideration. The Board has received a previous report containing an attendance officer job description and explanation of procedures now used in the Clifton Public Schools System for the handling of attendance, truancy and excessive absence." (J-2)

The Board minutes (J-2) further indicate that the Board approved the Superintendent's recommendation and established petitioner's starting salary on a salary scale that ranged from a minimum salary of $7,000 to a maximum

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salary of $8,500 per year. The annual increment approved by the Board for this position was $500.

Petitioner was notified of his appointment by the Board as an attendance officer for the 1972-73 academic year by way of a letter dated March 23, 1973 from the Board Secretary/Business Manager which reads as follows:

> "I am pleased to advise you that the Board of Education at its meeting on March 21, 1973, upon the recommendation of the Superintendent of Schools, approved your appointment as Attendance Officer under the Emergency Employment Act (EEA) effective March 23, 1973, and terminating June 30, 1973.
>
> "Also approved was the recommendation that this be a 10-month position from September through June at a starting salary of $7,000 per annum.***" (J-3)

The Board Secretary was notified by letter dated May 1, 1973 (J-4) from the administrator of the Emergency Employment Act that petitioner was not an eligible participant for employment under this program, thus the Board was not eligible to use those funds to pay petitioner's salary as attendance officer.

On June 19, 1973 the Board minutes (J-5) reflect that the Board accepted the attached recommendation of the Superintendent that petitioner's position be transferred to the Board's budget and that petitioner's salary be paid with Board funds commencing with petitioner's initial period of employment for the 1972-73 academic year. Petitioner was subsequently notified in writing by the Board on June 28, 1973 of the Board's action. (J-6)

Thereafter, the Board's records reflect that petitioner was employed as an attendance officer by the Board for the 1973-74 school year (J-7-8) and for the 1974-75 school year. (J-9-10)

The Commissioner observes that on December 31, 1974, an interdepartmental communication was directed to the Assistant Superintendent from Richard J. Tarrant of the Board's Special Services office. (R-7) The subject of this communication specifically referred to a request to add a third social worker to the Child Study Team. One of the requirements suggested for this position was that the person have background and expertise in problems of drug abuse so that he could act as a resource person for the other members of the Team and with parents in dealing with problems of pupil attendance and drug abuse. This communication concludes by stating:

> "***I would like to go on record as saying that I have no complaints whatsoever with the performance of our Attendance Officer. But, I do feel that his work could readily be incorporated into the daily activities of three competent social workers and with more fruitful results.***" (R-7)

The Board minutes of the regular meeting held August 20, 1975 show (J-11) that the Board considered several addenda to the Superintendent's report

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(R-6) which dealt specifically with the consolidation and reorganization of staff positions due to declining pupil enrollment over the recent school years.

Included in the Superintendent's recommendations to the Board at that time was a request for the abolishment of nine teaching positions for the purpose of consolidating these positions with existing teaching positions, the abolishment of the positions of Director of Guidance and the Director of Special Services, thereby creating a new position of Director of Pupil Personnel, which would incorporate the functions of these former positions, and, finally,

> "***Abolition of Attendance Officer position and consolidation of assigned duties with the Social Worker Staff***." (R-6)

The Board minutes of August 20, 1975 (J-11) reflect that the Board had considered and adopted the Superintendent's recommendations for staff reorganization and consolidation by a majority vote and resolved (J-13) that its actions affecting the abolishment and consolidation of certain staff positions, including petitioner's position, become effective as of September 1, 1975. Petitioner was notified by the Board Secretary of the Board's action by way of a registered letter dated August 21, 1975, the body of which reads as follows:

> "Please be advised that the Board of Education at its public meeting last evening [August 20, 1975] abolished the position of Attendance Officer effective September 1, 1975.
>
> "This action was taken due to declining student enrollment and for reasons of economy.***" (J-12)

The Commissioner observes that the Board's resolution (J-13) adopted at its meeting of August 20, 1975 asserted that the abolishment of petitioner's position, as well as certain other offices and positions, was based upon a decline in pupil enrollment and reasons of economy.

It is clear petitioner enjoyed a tenure status in his position as attendance officer by virtue of his having satisfied the employment service requisite set forth in *N.J.S.A.* 18A:38-33 which reads as follows:

> "The services of all attendance officers of the public schools of a city district shall, after employment in such district for one year, be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, conduct unbecoming an officer, or other just cause, and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title."

It is also clear that local boards of education have the authority pursuant to the provisions of *N.J.S.A.* 18A:28-9 to abolish tenured positions under certain circumstances. The applicable statute of reference reads as follows:

> "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

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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.''

In the instant matter the Board's action in abolishing petitioner's position as attendance officer further reveals that said position was not actually abolished but rather the duties of attendance officer were to be assigned to the social worker staff. (J-11)

In the Commissioner's judgment the question of whether a local board of education may combine the duties of attendance officer with the existing duties of another position has been settled in *Georgia L. Johnson v. Board of Education of the Township of West Windsor*, 1964 *S.L.D.* 145, aff'd State Board of Education 1965 *S.L.D.* 174 wherein the Commissioner held that the West Windsor Board of Education could combine the duties of attendance officer with those of its school nurse.

While it is true that the Board in the instant matter delayed taking formal action with respect to the title designation of Social Worker-Attendance Officer until April 26, 1976 (R-4) and that such action was taken subsequent to the time it employed a third social worker on March 25, 1976 (J-11), the Commissioner observes that the Board previously assigned the duties of attendance officer to the social worker staff when it abolished certain staff positions including that of the attendance officer on August 25, 1975 (J-11) for reasons of a decline in pupil enrollment and economy. To hold that the Board's action in this regard is fatal to its attempt to consolidate and reorganize its staff, in the Commissioner's judgment, would be placing form over substance.

The Board did invite public discussion of its determination to abolish certain positions resulting from its staff reorganization at its meetings of September 17 (P-1) and October 15, 1975. (P-2)

The Commissioner finds and determines that the Board's action in combining the duties of attendance officer with those of the social worker staff and its subsequent designation of these positions to be entitled Social Worker-Attendance Officer is proper and legally correct under the circumstances hereinbefore set forth.

The Commissioner holds further that the Board must preserve petitioner's tenure and seniority rights to the position of attendance officer by placing his name on a preferred eligibility list for reemployment to such position in the event that future Board action causes the position of attendance officer to be reestablished in the Clifton School System.

Accordingly, the instant Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

March 2, 1978

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**In the Matter of the Annual School Election Held in the School District of the City of Hoboken, Hudson County.**

## COMMISSIONER OF EDUCATION

## ORDER

The matter of the February 14, 1978 annual Type II school election conducted by the Hoboken Board of Education, hereinafter "Board," having been called to the attention of the Commissioner of Education by the Hudson County Superintendent of Schools; and

It appearing that the Board caused to be set forth on civilian and military absentee ballots and on voting machines used at the election the amount of $6,149,664.56 to be raised by local taxation for current expense of the Board for the 1978-79 school year; and

It appearing that at no time did the Commissioner or the Hudson County Superintendent of Schools approve the Board's proposed 1978-79 budget or the sum to be raised by local taxation for current expense for the ensuing fiscal year, pursuant to *N.J.S.A.* 18A:22-9 (Exhibit G); and

It appearing that the Hudson County Superintendent of Schools by mailgrams dated February 10, 1978 advised and directed the Board Secretary, the Board President and the Superintendent of Schools that $6,149,664.56 was an incorrect amount to place before the voters and that the correct amount should be $3,352,252 (Exhibit A); and

It appearing that the County Superintendent is authorized to approve the amounts to be advertised and placed on the ballot to be raised by local taxation for current expenses of boards within the county; and

It appearing that the Board President notified the County Superintendent on February 14, 1978 that she had twice requested the Board Secretary to change the amount on the ballot to $3,352,252 and that she had been advised that the amount to be placed before the voters would not be changed (Exhibit B); and

It appearing that the County Superintendent has been informed by the Deputy Superintendent of Elections of Hudson County that the amount to be raised for current expenses by local taxation as posted on the voting machines used in the February 14, 1978 election was $4,073,151 (Exhibit F); and

It appearing that the County Superintendent was also notified by the Board President that on February 14 she had voted at the polls on a proposal to raise as a tax levy for current expenses the amount of $4,073,151 (Exhibit C); and

It appearing that the County Superintendent has verified, based upon information printed on civilian absentee and military service absentee ballots used

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in the February 14, 1978 election, that the amount printed on those ballots to be raised by local taxation for current expenses of the Board in the ensuing year was $6,149,664.56 (Exhibit D); and

It appearing that the voters on February 14, 1978 defeated the Board's proposal of the amount to be raised by local taxation by 638 yes votes and 2023 no votes (Exhibit E); and

It appearing that the County Superintendent has recommended that the Commissioner both declare the Board's February 14, 1978 annual school budget election null and void and direct the Board to conduct another election wherein the voters will be afforded opportunity to vote on the correct amount for current expenses (Exhibit H); and

The Commissioner having examined the aforementioned exhibits and the verification of the recommendations of the Hudson County Superintendent of Schools and determined that the errors which appeared on the ballots placed before the voters were so gross as to have deprived the legal voters of the district of a fair opportunity to vote on a valid proposal of the amount to be raised by local taxation for the Board's current expenses for the 1978-79 school year; now therefore

IT IS ORDERED that the Board, forthwith, contact the Hudson County Superintendent of Schools in order to secure approval of a proposed 1978-79 school budget and the proper amount of a proposal which may be placed before the voters to be raised by local taxation for current expenses for the 1978-79 school year; and

IT IS FURTHER ORDERED that the Board conduct a second election no later than March 28, 1978, pursuant to the provisions of *N.J.S.A.* 18A:12-15 as amended by Chapter 324 of the Laws of 1977, whereby the voters will be given opportunity to vote on the Board's forthcoming valid proposal of the amount to be raised by local taxation for current expenses for the 1978-79 school year and that the Board report the results of such election to the Commissioner and, if affirmed, to the County Board of Taxation on or before April 1, 1978.

Entered this 2nd day of March 1978.

COMMISSIONER OF EDUCATION

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**Thomas Smith and the New Brunswick Education Association,**

***Petitioners,***

***v.***

**Board of Education of the City of New Brunswick, Middlesex County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

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

For the Respondent, Murray, Meagher & Granello (Robert J. Hrebek, Esq., of Counsel)

Thomas Smith, hereinafter "petitioner," a teaching staff member in the employ of the New Brunswick Board of Education, hereinafter "Board," is joined by the New Brunswick Education Association in alleging that the Board's notice on May 28, 1976, reducing the period of petitioner's employment for the ensuing school year from eleven months to ten, with corresponding reduction in salary, was illegal pursuant to *N.J.S.A.* 18A:27-10.

The Board avers that its action was a legal exercise of discretion and that it was under no obligation to continue to employ and pay petitioner for the academic year plus one additional month during the summer, as it had since the 1973-74 school year. The Board, contending further that the filing of the Petition of Appeal before the Commissioner of Education on January 21, 1977 was ultimely, filed a Motion to Dismiss on June 29, 1977.

The matter comes before the Commissioner in the form of the pleadings, Motion to Dismiss with supporting Brief and Memorandum and a Memorandum in opposition thereto filed in lieu of Brief by petitioners. The uncontroverted facts are as follows:

Petitioner was notified by letter of the Superintendent dated May 28, 1976 that his position would be merged with that of another teaching staff member with greater length of service in the district. Petitioner was advised that he would be transferred to the English department for the ensuing 1976-77 school year. The Petition of Appeal protesting this action was received by the Commissioner January 21, 1977. At a conference of counsel conducted by a representative of the Commissioner on April 21, 1977, the following was one of the agreed upon issues:

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"***Was the petition timely filed before the Commissioner?***"
(Conference of Counsel Memorandum)

In support of the Motion to Dismiss the Board relies upon *N.J.A.C.* 6:24-1.2 which was promulgated on October 6, 1976 and provides 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 of 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 argues that petitioner not only failed to file the dispute between May 28, 1977 and October 6, 1977, when the above cited rule was promulgated, but also failed thereafter to file the Petition within a further 90 day period. The Board submits that, since the cited rule which requires the filing of a petition within 90 days of the precipitating action replaced a rule which did not specify such time limitation on filing, the 90 day limitation must be considered mandatory by the Commissioner, absent plausible explanation for delay. Accordingly, the Board urges that the Commissioner dismiss the Petition of Appeal as having been untimely filed. (Respondent's Brief, at pp. 1-5; Respondent's Reply Memorandum of August 5, 1977, at pp. 1-3)

Petitioners argue, conversely, that a rigid adherence to *N.J.A.C.* 6:24-1.2 would, in this instance, be unfair since it was not until January 26, 1977 that the revised rule first appeared in print in the New Jersey Administrative Code, Title 6 and that:

"***It would be an unfair burden to place on petitioners to hold them to be barred by a period of limitations when Title 6 of the New Jersey Administrative Code did not reflect this change until after the Petition of Appeal had already been filed.***"
(Petitioners' Memorandum, at p. 3)

Petitioners argue further that the equitable doctrine of laches does not apply merely because of the lapse of time, since there is no showing that the Board has been prejudiced by the delay in filing. *West Jersey Title Company v. Industrial Trust Company*, 27 *N.J.* 144, 153 (1958); *Stroebel v. Jefferson Trucking and Rigging Company*, 125 *N.J.L.* 484, 488 (*E.&A.* 1940); *Auciello v. Stauffer*, 58 *N.J. Super.* 522, 523 (*App. Div.* 1959)

Petitioners, contending that the application of the 90 day period of limitations to a Petition filed only 14 days after codification of *N.J.A.C.* 6:24-1.2 would be unduly harsh and that laches is inapplicable, urge that the Motion to Dismiss be denied.

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The Commissioner has carefully considered the relevant arguments of law advanced by the parties and concludes that the matter is ripe for a determination on the Motion.

It is noted that no claim is advanced either in the pleadings or in Petitioners' Memorandum that petitioner was tenured or held seniority in an eleven month teaching position. Accordingly, no hearing is required to determine whether there was violation of the teacher tenure law.

In regard to the Motion to Dismiss, the Board's cogent arguments of law must prevail. It would have been preferable had petitioner been notified on or before April 30 that he would not be employed for eleven months in the ensuing 1976-77 school year. The Board, however, was not barred, in May 1976, one month later, from effecting economies by combining two eleven month positions into one and transferring petitioner to a ten month position in the English department.

Petitioner argues that laches is inapplicable. The Commissioner holds otherwise in the light of the following citations from New Jersey decisional law:

Justice Heher said in the case of *Marjon v. Altman*, 120 *N.J.L.* 16 (*Sup. Ct.* 1938):

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

In *Park Ridge v. Salimone*, 36 *N.J. Super.* 485 (*App. Div.* 1955), aff'd 21 *N.J.* 28 (1956) the Court said:

> "***The courts have long recognized the need for prompt action by public employees in seeking judicial review of their discharge. The reason is obvious. It is important that public duties be carried on without interruption or with as little interruption as possible. A governing body must be allowed to fill the employment in the public service with all necessary dispatch free from unnecessary risk of double payment of wages.***"(36 *N.J. Super.* at 494-495)

The Supreme Court in its affirmation made this further statement:

> "***But, the time must come when the appointing authority can rely upon the conclusion of the issue and proceed to make arrangements in the interest

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of the public to replace the dismissed employee without fear that its action will be undone.***" (21 *N.J.* at 46)

In *Atlantic City v. Civil Service Commission*, 3 *N.J. Super.* 57 (*App. Div.* 1949) it was said:

"***The law of this State is well settled that in the case *sub judice*, a public employee's right to reinstatement, even assuming, but not deciding, that his removal or other interference with his rights may be unjust and unwarranted, may be lost by his unreasonable delay in asserting his rights. This recognized principle of law is founded upon considerations of public policy and its application is warranted here.***" (at 61)

In the instant matter petitioners, having delayed for a period of almost eight months the filing of the Petition of Appeal, offer in the pleadings or elsewhere no excuse whatsoever for that delay. Such delay acts to bar petitioner from the relief to which he claims entitlement.

Petitioners' argument that *N.J.A.C.* 6:24-1.2 is inapplicable must also fail. When promulgating the revisions which, *inter alia*, placed a 90 day limitation on the period between the complained of action and the filing of a controversy before the Commissioner, the State Board of Education filed the revised rule with the Division of Administrative Procedures, Department of State, on October 6, 1976, thus rendering them effective as of that date. The Commissioner would reject an application to invoke a retrospective application of the 90 day rule as pertaining to the period prior to October 6, 1976. It must be recognized, however, that the proposed rule had been published with the precise provisions it now contains as early as March 4, 1976 in the *New Jersey Register*. Pursuant to the provisions of *N.J.S.A.* 52:14B-10(e) it was effective after that date with or without the release of the printed codification. Had the State Board of Education desired that the rule's effective date be postponed until codification was complete, it would have so declared. The Commissioner so holds.

For a period in excess of 90 days after the effective date of *N.J.A.C.* 6:24-1.2 petitioners delayed filing the dispute. No excuse is offered for this delay or for any portion of the approximate eight month period which elapsed between May 28, 1976 and January 21, 1977. Thus, it is concluded that the filing was untimely. As was stated in *Essex County Welfare Board v. Klein*, 149 *N.J. Super.* 241 (*App. Div.* 1977):

"***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)***." (at 247)

Similarly, it has been said in *Board of Education of Plainfield v. Plainfield Education Association*, 144 *N.J. Super.* 521 (*App. Div.* 1976) that:

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"***It is elementary that a grant of authority to an administrative agency is to be liberally construed so as to enable that agency to discharge its statutory responsibilities. *In re Promulgation of Rules of Practice*, 132 *N.J. Super.* 45, 48-49 (App. Div. 1974).***" (at 524)

A review of the known facts of the herein controverted matter in the light of the body of relevant decisional law leads to the conclusion that petitioners' delay of nearly eight months in filing the Petition of Appeal was contrary to the directive of *N.J.A.C.* 6:24-1.2. The action is also barred by application of the equitable doctrine of laches. Accordingly, because of inexcusable delay, petitioners are estopped from further assertion of entitlement to the relief sought. The respondent Board's Motion to Dismiss is granted. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

March 3, 1978

**North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, AFL-CIO, Nancy Somick, Martin Slutzky, Eleanore Della Torre, Donna Trivisonno, Diann Brauer, Carolyn Bodmer and Karen Cummins,**

***Petitioners,***

***v.***

**Board of Education of the Township of North Bergen, Hudson County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioners, Victor P. Mullica, Esq.

For the Respondent , Joseph V. Cullum, Esq., and Greenwood, Weiss & Shain (Robert H. Greenwood, Esq., of Counsel)

The North Bergen Federation of Teachers, hereinafter "Federation," joins seven of its individual petitioner members who were nontenured teachers in the employ of the North Bergen Board of Education, hereinafter "Board," in alleging that their non-reemployment for the 1973-74 school year was an abuse

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of the Board's discretion, politically motivated, illegal, discriminatory, arbitrary, unreasonable, and violative of both their constitutionally protected rights and those rights set forth in the negotiated agreement. The Board, conversely, denies any impropriety or illegality and has thrice moved for dismissal of the Petition of Appeal.

Thirty-nine days of hearing were conducted between March 20, 1975 and February 10, 1977 at the offices of the County Superintendents of Schools of Hudson, Morris and Union Counties at Jersey City, Morris Plains and Westfield, respectively, by a hearing examiner appointed by the Commissioner of Education. Briefs were filed. The hearing examiner report follows, setting forth first a resume of the principal events which have occurred during litigation:

Petitioners initially sought relief through arbitration but the Board, on December 13, 1973, procured an Order from the New Jersey Superior Court, Chancery Division, Hudson County, (Docket No. C 4443-72) permanently restraining arbitration of the dispute. That Order affirmed the right of petitioners to institute appropriate proceedings before the Commissioner. Forthwith, the within Petition of Appeal and a timely Answer were filed before the Commissioner. Subsequent filing of an Amended Petition of Appeal and Amended Answer was completed on April 2, 1974.

Oral argument was heard at the State Department of Education, Trenton, on May 31, 1974 on the Board's Motion to Dismiss for failure to state a claim upon which relief could be granted and for insufficiently detailed allegations. An Order of the then Acting Commissioner, dated June 18, 1974, denied the Board's Motion. Both the Board's subsequent Motion for severance, asking that the matter be heard as seven separate cases, and a Cross-Motion by petitioners to consolidate a similar Petition of Appeal by three nontenured teachers, who in 1974 were not reemployed by the Board, were denied in the Commissioner's Order dated October 31, 1974.

Hearing dates set down for January 1974 were postponed to March 20, 1975 upon notice from the Attorney General that a related matter in the courts made it advisable to delay the hearing. Numerous subsequent postponements and the reasons they were approved by the hearing examiner are revealed by correspondence in the record and the transcripts of the hearing. Predominant therein were further court requests for delay, extreme illness of the Superintendent of Schools who was called to testify, and appointment of co-counsel by the Board.

At the conclusion of petitioners' case, the Board again moved to dismiss the matter. This Motion was procedurally held in abeyance for final disposition by the Commissioner. (Tr. 19-2-53) When the Board retained co-counsel it again moved for dismissal or, in the alternative, to strike the testimony of certain of petitioners' witnesses. After consideration of the arguments of law set forth in Memoranda and the oral argument held on February 27, 1976 (Tr. 20-1-156), the Commissioner, by an interlocutory Order dated March 25, 1976, struck certain limited testimony from the record but denied the Motion to Dismiss for

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the reason that a *prima facie* case had been established requiring the Board to mount a defense.

Herewith the hearing examiner sets forth those uncontroverted facts which form the contextual setting of the dispute:

The seven individual petitioners were employed by the Board as follows:

Martin Slutzky (H.S.) Order 1972-June 1973 (9 mos.)
Karen Cummins (Elem.) January 1972-June 1973 (1½ yrs.)
Carolyn Bodmer (Elem.) January 1971-June 1971 January 1972-June 1973 (Total—2 yrs.)
Nancy Somick (Elem.) September 1971-June 1973 (2 yrs.)
Diann Brauer (Elem.) September 1971-June 1973 (2 yrs.)
Donna Trivisonno (Elem.) September 1970-June 1973 (3 yrs.)
Eleanor Della Torre (Elem.) September 1970-June 1973 (3 yrs.)

In April 1973 each was notified by the Board in writing that a renewal contract would not be issued for the ensuing school year. An informal appearance before the Board was granted each petitioner after which each was again advised that he/she would not be reemployed. Thereupon, when petitioners' attempts to proceed with arbitration were denied by the Court, the matter was filed before the Commissioner. In paragraphs four and five of the Petition of Appeal, petitioners charge specifically that the Board abrogated its powers and duties in that its determination not to reemploy them was motivated solely by an intent to:

> "***(a) Procure teachers politically aligned with the administration that appointed the members of the Board, which teachers would actively succor the administration, its political organization and views.
>
> "(b) Thwart freedom of speech and expression.
>
> "(c) Deprive teachers of their right to join or assist a union by discriminating against teachers who are members of the Federation.
>
> "(d) Discourage union membership and activity, concomitantly undermining the status of the Federation as a union representative.
>
> "(e) Disregard the *** agreement between the Federation and Board."
> (Petition of Appeal, at p. 3)

The Board, at the time the Petition was filed, was an appointed five member body pursuant to the statutory organization of Type I school districts. *N.J.S.A.* 18A:12-6 *et seq.* Following a public referendum in November 1973, pursuant to *N.J.S.A.* 18A:9-5 *et seq.*, the Board became a nine member body.

Mayor Peter Mocco, about whom many of the allegations of political interference and control of the Board revolve, was first elected as Mayor of North Bergen in 1971 and continues in office to this date.

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The remaining portions of the hearing examiner report are organized as follows:

A. Procedures for Employment and Non-reemployment of Teachers in 1972-73

B. Summary of Testimony and Documents in Evidence Relevant to Petitioners' Employment Status

C. Summary of Testimony and Documents in Evidence Relevant to Five Episodes by which Petitioners Seek to Show that the Board's *Modus Operandi* Improperly Countenanced and Acquiesced to the Control of Mayor Peter Mocco and his Subordinates in the Municipal Government from 1971 through 1973

D. Principal Arguments Set Forth in Briefs of the Litigants

E. Findings of Fact of the Hearing Examiner

F. Recommendations of the Hearing Examiner to the Commissioner

A. *Procedures for Employment and Non-reemployment of Teachers in 1972-73*

The Superintendent testified that beginning in 1972 and continuing to the date of his resignation in August 1976, he was totally removed by the Board from his former participatory rule in the screening of teaching candidates which had previously been conducted as follows:

> "***All the recommendations [were] made through the department chairman, through the vice principals, through the principal, *** through interviews with [the Assistant Superintendent] frequently, through interviews with me one hundred percent of the time, and recommendations to the Board.***
>
> "That is the professional way to hire a teacher.***" (Tr. 36-99)

That such procedure was abandoned in 1972 in favor of direct interviews by the Board President, vice-president and a member of the Federation was corroborated by testimony of the Board President, former Assistant Superintendent and a member of the Federation who was temporarily assigned such responsibility. (Tr. 5-226-231; Tr. 8-4, 14-22; Tr. 9-6-9, 15-19; Tr. 22-97-101)

Certain petitioners and other nontenured teachers were preliminarily notified by their principals in February 1973 pursuant to Article 7(e)(3) of the negotiated agreement that their contracts might not be renewed. Article 7(d) of the agreement also required that:

> "The Board of Education shall offer a written contract or a notice of non-

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renewal of contract to all non-tenure unit members on or before April 15, of each year."

The Board President testified that on or about April 14, 1973, when he returned from California, he realized the imminence of the required notification date. He testified that he promptly conferred with the Superintendent and the Assistant to the Superintendent, Joseph Coviello, who recommended reemployment of all but six nontenured elementary teachers. (R-10) He stated that he thereupon conferred by telephone with the Board's vice-president and one other Board member and directed that nonrenewal notices be sent to the seven individual petitioners herein and numerous other teachers about whom he and the other Board members had reservations. He testified that, of those notified, twenty-seven were later afforded an informal appearance before the Board and that, of this number, only eight, including the individual petitioners herein, did not receive contracts. (Tr. 21-14-25, 38-41; Tr. 22-130-132) The record is replete with sufficient corroborative testimony to conclude that the aforementioned procedure did, in fact, prevail in 1973. (Tr. 25-32-40, 66-82; Tr. 27-4-45, 107)

One member whom the Board President telephoned testified that, without so much as being advised of which teachers the President or vice-president had reservations or what evaluations the teachers had received, he had assented to the sending out of non-reemployment notices. He testified that he had no knowledge of the teachers' abilities but that, since he did not believe in tenure for teachers and that the ultimate decision would in any event be made by the Board at a later date, he felt all nontenured teachers should receive non-reemployment notices. (Tr. 27-26, 35-43)

The Board President, vice-president and Board member Edward Rannou testified that decisions regarding employment, reemployment and non-reemployment of teachers were made solely by the Board without influence, advice, pressure, or directive from the Mayor or his subordinates and without consideration of the political activities or views of teachers. (Tr. 21-45, 60, 69, 77, 82-83; Tr. 25-41; Tr. 27-75) They testified further that such decisions were made after consulting with the Superintendent. Although they testified that the Superintendent's recommendations were seriously considered, none could recall whether he had recommended reemployment of petitioners. (Tr. 23-106, 111-113; Tr. 25-82-84; Tr. 27-23)

Board member Aldo Gennari testified, conversely, that Mayor Mocco had actively sought to oust the Superintendent and others. Gennari testified that he had been advised by the Superintendent and the Board President that lists of names for reappointment had to go to Town Hall for review, that meetings of the Board were called at the direction of the Mayor, and that the Mayor had frequently interceded with the Board regarding appointees whom he favored. (Tr. 6-12-18, 41-44, 67, 100, 127)

Board member Anthony Ruffino, who served from November 1971 through March 1973, testified that he had observed Mayor Mocco in attendance at

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approximately half the caucuses of the Board during that period. He stated that the Mayor "***would come in and direct the Board members that he wanted certain individuals appointed *** in the school system." (Tr. 8-145) He testified that the Mayor told the Board on one occasion that he wanted a certain appointee to the position of elementary school coordinator because that candidate's father had donated to and assisted in his election campaign. Ruffino testified further that, in spite of threats by others in political power, he voted against that appointment and was thereafter subjected to obscenities and harassment which ultimately caused him to resign. (Tr. 8-112-120, 135-145; Tr. 11-8, 11, 16, 57) Ruffino's resignation followed the issuance of the February warning notices to certain petitioners but predated the April notices, *ante*.

The Superintendent testified that contract renewals were delayed in 1971 while waiting for the Mayor's approval. He testified that the Mayor had not only actively supported appointments and reappointments but had also stated that no principal or teacher should be appointed without the approval of a committeeman. (Tr. 33-40-44, 56; Tr. 34-38, 40, 89) Concerning these involvements, the Superintendent testified:

> "***I became dissatisfied because the school system became a political base.***"
>
> (Tr. 36-101)

B. *Summary of Testimony and Documents in Evidence Relevant to Petitioners' Employment Status*

*B-1 Martin Slutzky*

Petitioner Slutzky, who taught from October 1972 to June 1973, testified that he procured his teaching position with the Board after two preliminary meetings with a North Bergen welfare department official, Ronald Jeffery, and an interview with Mayor Mocco in September 1972 at City Hall. Slutzky testified that, although prior to these meetings he had never been interviewed by any professional educator in the North Bergen school system, he was not only advised by the Mayor that he had the job but was also driven by Mr. Jeffery to the Superintendent's office. He testified that the Superintendent, without interviewing him, then advised him that if the principal and the department chairman liked him he would begin to teach immediately. He did so on the following school day. (Tr. 1-33-42)

Slutzky testified that, when he received notice in April of his non-reemployment, he asked Mayor Mocco why, with good evaluations, he was not reemployed. He stated that the Mayor told him he had failed to move into North Bergen, to do sufficient work for the Mayor's "team," and

> "***to remember I was nothing more than a political appointee and there were 250 more people ready to take my place. So I asked him what I would have to do to get my job back. And he said it was out of his hands, it was

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> in the hands of the Board of Education, but that he would leave the final decision up to Mr. Jeffery, since it was through Mr. Jeffery that *** I obtained the position in the first place.***'' (Tr. 1-50)

He testified further that when he queried Mr. Jeffery on the effect of his salutary evaluations he was told that they didn't mean a thing and that in order to keep his job he would have to work in the forthcoming election by being

> ''***in charge of directing people to go out and knock on doors and so on to get people out to vote for Mayor Mocco and his slate.***''
> (Tr. 1-55)

He testified that he was willing to both engage in such political activity and to move into North Bergen if it were the price of keeping his job. (Tr. 1-62, 72-77, 82) Slutzky asserted, however, that he never did perform such political services and stated:

> ''***I believe my rights were violated because the Board didn't have anything to do with my hiring in the first place, and they had nothing to do with my firing in the last analysis. I got hired without any kind of an evaluation or any kind of an interview by the Board solely through my interview with the Mayor and I was dismissed the same way.***''
> (Tr. 1-134)

The Superintendent, who was not called as a witness by either the Board or petitioners but was subpoenaed as the Commissioner's witness over the Board's objections, corroborated that Mr. Slutzky had been escorted to his office from the Mayor's office by Ronald Jeffery. (Tr. 33-18) The Superintendent stated that he had privately recommended to the Board that not only Slutzky but each of the seven petitioners be reemployed. (Tr. 35-109-111)

The Board President testified that he had interviewed Slutzky several months prior to his employment and found him a strong candidate, but that he had no awareness that Mayor Mocco had interviewed him or that he had been escorted to the school by Ronald Jeffery. (Tr. 22-95-113)

Although the Board on the last day of hearing called Mayor Mocco to testify on a single incident, no testimony was elicited from him in regard to events of which Slutzky or the remaining six individual petitioners testified. (Tr. 39-34-76) Nor was Ronald Jeffery called as a witness by either party to the dispute.

A review of Slutzky's evaluation reports reveals that he received no rating of less than satisfactory from the principals or department supervisors. (P-1 through P-4)

*B-2 Karen Cummins*

Petitioner Cummins testified that prior to her employment in January 1972

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she had neither submitted an application form to nor been interviewed by any administrator or Board member. She related that she was directed by her mother, a committeewoman then allied with Mayor Mocco, to report to the Assistant Superintendent who, without an interview, advised her that she would begin to teach the next Monday. (Tr. 17-114-116, 151) She testified that she believed that after harmonious relations between her mother and Mayor Mocco were disrupted, she was evaluated unfairly by her principal and Mr. Coviello as an act of political retaliation.

A review of Petitioner Cummins' evaluations in evidence reveals that numerous critical and constructive comments by her evaluators permeate those reports. (P-90 through P-95) Specifically, they criticized her housekeeping, teaching techniques, pupil grouping, use of English assignments and lack of punctuality. Her principal summarized on March 30 by stating:

> "***I feel that Miss Cummins is somewhat overwhelmed with the extent of work and problems involved with pupils of this age and grade. Possibly Miss Cummins would do better if given the opportunity to teach in the primary or lower elementary grades where she received her initial training." (P-94)

Mr. Coviello recommended that Petitioner Cummins not be reemployed. (R-10) The Superintendent recommended that she be reemployed but assigned to a lower grade. (P-90, 92)

Petitioner Cummins' mother, Irene Cummins, testified that she had indeed interceded with a ward leader, Marvin Diner, on her daughter's behalf prior to her graduation from college. She stated that she was then advised in January 1972 by the Assistant Superintendent that her daughter should report to the Board office regarding a teaching position. (Tr. 18-27-29, 149) This testimony was corroborated by Marvin Diner who testified that his duties as a ward leader included assisting those who needed jobs by screening people for various positions, including teaching positions. He testified that he spoke twice with the Mayor on behalf of Karen Cummins after which she received her teaching position. (Tr. 18-82-89)

Marvin Diner testified further that after Irene Cummins filed to run for office in 1973 the Mayor advised him that:

> "***[H]e should not have let [Miss Cummins' mother] file a petition to let her run on the election. He further went on to say due to that fact she's going to lose her job and [so] will [Miss Cummins]." (Tr. 18-96)

Irene Cummins testified also that, when she queried Mayor Mocco in February as to the reason her daughter had received a letter questioning her teaching performance, the Mayor responded as follows:

> "***He got a file out and he said this is a file on all of the teachers. He showed me a stack of papers with all of their names. He said I have this

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file on every teacher in the school system, and he showed me [Miss Cummins'] name and he said she's not cooperating. She hasn't done anything politically*** [but]—if you're not going to run maybe we can do something about it.***''

Mrs. Cummins testified, however, that she advised the Mayor that it was her intention to run for public office in the June primary in any event. (Tr. 18-30)

*B-3 Carolyn Bodmer*

Petitioner Bodmer testified that she submitted a regular application, was interviewed by a school supervisor and was first employed to fill the position of a teacher on maternity leave from January through June 1971. She testified that she thereafter substituted until January 1972 during which period members of her family sought help from a North Bergen committeeman to procure for her a teaching position. Petitioner Bodmer thereafter taught from January 1972 through June 1973. (Tr. 12-55-58; Tr. 13-105) She testified that when she was given notice of non-reemployment in 1973, she attended a coffee klatch where she inquired of Mayor Mocco the reason for her non-reemployment. She testified that the Mayor advised her that the reasons were her inactivity in campaigning and political events (Tr. 12-130), that her activities as a teacher and Girl Scout leader were insufficient service to North Bergen, and that:

''***[T]he School Board took those people who *** said they were moving into the Town or would be helping out in some other capacity, and as I had not given that inclination that I would do such things, I was not given my teaching position back.***'' (Tr. 12-73)

Petitioner Bodmer, when asked on cross-examination whether her conversations with the Mayor and committeemen were not in fact attempts to utilize political means to procure reemployment, stated:

''***I was not going to take the political path to get my job back when I should get it back because of my teaching performance and not because I did outside activities***.'' (Tr. 12-150-151)

And,

''***I did not go with the idea that by speaking to him I would be getting my job back because I had no intentions of making any political promise.***'' (Tr. 12-152)

And,

''***If I had any hopes of getting my job back, it was with the hopes that maybe somebody would sit down and look at the evaluations and rehire in that respect. Getting my job back politically, I do not want***.'' (Tr. 12-174-175)

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She testified that she believed both her union rights and her constitutional freedom of speech had been violated, as follows:

> "***When I was not able to have my own political feelings; when it came about that I was not able to speak freely, if I wanted to say something against Peter Mocco and his administration *** because I could not remain neutral in it. Yes; it was taken away.***" (Tr. 13-29)

And,

> "***[T]he union is being undermined by the fact that it is not representing you when you have to go to the Mayor to be able to hold your position***." (Tr. 13-29)

Mary Lowenstein, a North Bergen committeewoman in Petitioner Bodmer's district during 1972-73, testified that on approximately six occasions she had given names of prospective teaching candidates to Mayor Mocco with her assurances that they would work for his political organization. She testified that as committeewoman she was provided with lists of these teachers and others who were employed who were thereafter expected by the Mayor to buy tickets to functions sponsored by Mayor Mocco, put "***signs in their windows at election time, hand out campaign literature and ring doorbells.***" (Tr. 10-61)

Committeewoman Lowenstein testified further that in August 1973, when she conferred with Mayor Mocco, she had commended Petitioner Bodmer as being civic minded, a Sunday School teacher, Girl Scout leader and very dedicated teacher, to which the Mayor inquired: "***What did she do for the organization?***" (Tr. 10-69) Committeewoman Lowenstein testified that Petitioner Bodmer, who lived in her constituency, did not, in fact, participate in activities sponsored by the Mayor or his associates. (Tr. 10-110-113)

No testimony was elicited from the Mayor with respect to the foregoing testimony regarding Petitioner Bodmer. (Tr. 39-34-76)

Petitioner Bodmer's evaluations for 1972-73 ranged from satisfactory to excellent with occasional suggestions for improvement. She was recommended for reemployment, without reservations, by each of her three evaluators and the Superintendent. (P-51, 54, 55, 59; R-10; Tr. 35-109-111)

*B-4 Nancy Somick*

Petitioner Somick testified that, although during her senior year of college she had submitted to the school a written application for a teaching position, she was interviewed first for a teaching position by Mayor Mocco at his office in September 1971. She testified that the Mayor then informed her that she had the job and that she should drive to the Board of Education building to see the Superintendent whom he would call and notify in advance of her arrival. (Tr. 2-14-18) She testified that when she arrived the Superintendent advised her as follows:

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> "***He told me that I had the job and he told me that it's the last teaching position in the Town of North Bergen and that it was an E.S.L. position and he asked me if I knew what E.S.L. was and I said no.***"
>
> (Tr. 2-16)

Petitioner Somick testified that, although she taught the English as a Second Language course under three principals in two schools and received favorable evaluations from 1971 through 1973, she was notified in writing in April 1973 that she would not be reemployed for the ensuing year. (P-7; Tr. 2-22) She related that soon thereafter she received an unexpected visit at her home from two municipal officials, one of whom was the Town Clerk, Joseph Mocco, brother of the Mayor. She testified that Joseph Mocco looked at her teaching evaluations and advised her

> "***that he was going to talk to his brother and I shouldn't worry about anything, that I was going to get my job back and he said I had to work for him politically and I said all right, I'll do it and he said that he was going to get in further touch with me, but he never did and he left and he took my evaluations with him.***" (Tr. 2-25-26)

Petitioner Somick testified further that when, at the direction of a municipal commissioner, she met with Mayor Mocco during June of 1973 and showed him her evaluations, the Mayor told her that

> "***he already knew of my evaluations because his brother had shown them to him and he then said to me that these mean nothing *** and he just tossed them aside.***" (Tr. 2-29)

And,

> "***He then told me two of his aides reported back to him I would not campaign on the June 5th election. *** He then said *** if I proved myself to him over the next year by working politically on the campaigns and the projects that he was going to sponsor that I would be returned to a classroom teacher, but not to my E.S.L. position.***" (Tr. 2-32-33)

Petitioner Somick testified, however, that she refused to accept a Title I position offered by the Mayor in lieu of a regular teaching assignment and that she has since worked only as a per diem substitute. (Tr. 2-33, 117)

When asked on cross-examination whether she believed her method of procurement of her teaching position was proper, Petitioner Somick stated:

> "***No. It wasn't all right because this is the only way that you get a job in North Bergen you have to go see the Mayor. There's no other way.***" (Tr. 2-44)

She testified that although an informal appearance was afforded by the Board, she believed this to be a futile attempt because:

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"***The Board of Education doesn't even function as a Board of Education.***" (Tr. 2-75)

And,

"***I got my job from the Mayor and since he did the firing, I had to go back to get rehired from the Mayor.***" (Tr. 2-105)

Petitioner Somick also testified that no professional agent of the Board in an official supervisory capacity had ever encouraged or compelled her participation in politically sponsored events and that she had not voluntarily engaged in such activities. (Tr. 2-82, 93, 95, 104, 128-129)

A review of Petitioner Somick's evaluations in evidence reveals that she received all satisfactory ratings, numerous commendations, occasional suggestions for improvement and recommendations by three evaluators for reemployment for 1973-74. (P-8 through 11; R-10)

*B-5 Diann Brauer*

Petitioner Brauer, who prior to teaching in North Bergen had five years' experience as a teacher of English and remedial reading, testified that she applied and was interviewed and recommended in the usual manner without recourse to political contacts. (Tr. 15(A)-165-196)

She testified that she organized and taught remedial reading at the Board's Franklin Elementary School from September 1971 through June 1973. (Tr. 14-172-188) She testified that when she received notice in April 1973 of non-reemployment she conferred with the Board's elementary coordinator who encouraged her to expect a contract and advised her that two lists would be drawn up as follows:

"***One list would be a list of teachers that were considered anti-Mocco***. They would remain fired. *** The other *** would be approached to work for the administration. And if they then worked for the administration, they would be rehired.***" (Tr. 15(A)-55)

Petitioner Brauer testified that, when she advised the elementary coordinator that she and her family would work in the background but not in a public manner for the Mocco administration, he assured her that "***he was going straight to the Mayor's Office and *** straighten it all out." (Tr. 15(A)-74) She testified further that although she was at one point willing to cast her vote for those on the Mocco ticket in order to keep her job, she ultimately decided not to do so. (Tr. 15(A)-119, 159-60)

Petitioner Brauer testified that she was told by the Superintendent that he had nothing to do with her non-reemployment. (Tr. 15(A)-127-128) That testimony was corroborated by the Superintendent. (Tr. 33-40) She testified that she considered her informal appearance before the Board a mockery and a sham

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for the reason that the Board members were only doing the bidding of Mayor Mocco. (Tr. 15(A)-127-138) She averred that it was for this reason that:

> "***I did not originally go to the union when I *** probably should have. I knew that the avenue to go to was the politician.***"
>
> (Tr. 15(A)-168-169)

The Board's then consultant for its reading program testified that because of Petitioner Brauer's exemplary ability to diagnose reading problems and work effectively with remedial pupils, he had recommended that she be reemployed for the ensuing 1973-74 school year. (Tr. 16-106, 109, 112, 121, 133, 139) Petitioner Brauer's evaluation reports contain constructive criticisms but all ratings are satisfactory, which is the highest category on her evaluation forms. (P-72 through 76)

Although her principal notified her in February 1973 that there were reservations concerning her performance, Petitioner Brauer was recommended without reservation for reemployment in April 1973. (P-77; R-10) There is no documentation in evidence in the record to indicate that her principal disagreed with that recommendation. Nor was the principal, or any other of her supervisors called by the Board as witnesses.

*B-6 Donna Trivisonno*

Petitioner Trivisonno, who taught for the Board from September 1970 through June 1973, testified that she also was employed without recourse to political contacts. She related that when she received notice in February 1973 that she might not be reemployed, she was advised by her principal that although he had been ordered to so notify her, he had in fact recommended her for reemployment. She stated that Mr. Coviello concurred with the principal that she should be reemployed. (Tr. 17-44) She testified that the Superintendent advised her in April that he was unaware of why she was not reemployed. (Tr. 17-63)

Petitioner Trivisonno, testifying that she made no attempt to use political contacts to regain her position, stated:

> "***[S]ince my uncle was a commissioner, I might have asked him to help, but since he and the mayor weren't getting along, there was nothing he could do for me.***" (Tr. 17-76)

She testified further of an incident during June 1971 when she applied for a summer school teaching position as follows:

> "Joseph Mocco, Jr. came to my house in June and said to me 'Why didn't you tell me you applied for a summer position[?]' I said 'I didn't think there was any need to speak to you. I went through channels.' He said 'My brother and I are going over the list of teachers that applied, and we saw your name on the list. Don't worry, we'll make sure you have a position

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for the summer,' and I did teach during the summer.***'' (Tr. 17-37)

Petitioner Trivisonno was highly recommended by her principal and Mr. Coviello both of whom commended her in teacher evaluations for her fine rapport with pupils, her teaching skills, and her classroom management and preparation. Both they and the Superintendent recommended reemployment. (P-12; P-81 through 88; R-10; Tr. 35-109-111)

*B-7 Eleanor Della Torre*

Petitioner Della Torre, who worked as an elementary guidance counselor for the Board from September 1970 through June 1973, also testified that she used no political means to gain her employment. She stated that, when in 1972 she failed to receive a contract for the ensuing year, she contacted her union representative who told her that

> ''***he had to work behind the scenes to straighten out my contract. He had to see Peter Mocco.***'' (Tr. 10-165)

She testified that soon thereafter she was visited at her home by a North Bergen committeeman who not only assured her that she would soon receive a contract but solicited her assistance in various youth and community projects. (Tr. 10-174-175)

Petitioner Della Torre testified that in April 1973, when her contractual status was again in doubt, she was interrupted during a teacher conference and queried at her school by Ronald Jeffery, the ward leader in her district, about her participation in projects sponsored by the Mayor and her intentions as to future residency. (Tr. 10-189-194) She testified that, after that conversation, Ronald Jeffery stated that he would report the conversation to the Mayor and write an unsolicited letter of recommendation on her behalf to the Superintendent. (P-42, 43; Tr. 10-194-195) She testified that, after she related in detail this conversation with Ronald Jeffery to her union representative, Jeffery later told her that the reason she did not get her 1973-74 contract was that she had ''***ratted on him***'' by revealing their conversation to the teachers' union. (Tr. 11-80, 110-111)

Petitioner Della Torre related that when she asked Jeffery why her contract had not been renewed she was told that:

> ''***It was because your father-in-law ran against the Mayor. Mayor Mocco never forgives and he never forgets.***
>
> ''***He said, 'The Mayor doesn't look at you as a person, he looks at you as a vote' *** and he also indicated that if he were questioned, under oath, he would have to admit that there was a great deal of political influence in the North Bergen School System.***'' (Tr. 11-84-85)

Petitioner Della Torre testified further as follows:

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"***I didn't have the freedom to act as a free citizen *** a club was being held over my head that if I didn't do these things, I was going to lose my job.***"

(Tr. 11-121)

Ronald Jeffery was not called as a witness by either party.

Teacher evaluations of Petitioner Della Torre were all in the good or satisfactory range with highly complimentary comments and recommendations for reemployment by her supervisors. (P-43 through 49; R-10) The Superintendent testified that he had advised Petitioner Della Torre in 1971 that if it had been up to him she would have been reemployed. (Tr. 33-40)

C. *Summary of Testimony and Documents in Evidence Relevant to Five Episodes by which Petitioners Seek to Show that the Board's Modus Operandi Improperly Countenanced and Acquiesced to the Control of Mayor Peter Mocco and his Subordinates in the Municipal Government from 1971 through 1973*

*C-1 The Termination of School Employees on May 22, 1971*

Members of the then five-member appointed Board were called by petitioners to testify regarding events surrounding the termination of school employees. Three members of that Board testified that, following the May 11 election of Mayor Peter Mocco, they were notified by the Board Secretary of a special meeting which the Mayor had requested. They testified that at that meeting the Mayor had advised them that he desired that certain teacher aides, attendance officers, medical inspectors and clerks employed by the Board be terminated. They testified that the Board acquiesced to that request and by resolution terminated those employees by passing resolutions which the Mayor himself had previously prepared. The minutes of the Saturday, May 22, 1971 special meeting of ten minutes' duration list resolutions that were passed, terminating, forthwith, the services of twenty-five employees. (C-9) One clerk among those terminated, who was determined to have been tenured, was reinstated pursuant to the Commissioner's opinion in *Irene Cummins v. Board of Education of the Township of North Bergen*, 1975 *S.L.D.* 271. Board members who testified stated that the Mayor had given as reasons for his request that he wanted his own people in the school system and wanted those against him ousted. It is noted that the resolutions passed on May 22, 1971 stated that the terminations were for reasons of economy. (Tr. 5-119-125, 173-178; Tr. 6-12-15, 100-104) Testimony of those Board members was corroborated by the Superintendent. (Tr. 33-9-10; Tr. 34-54-56) The Board elicited no testimony from the Mayor on this subject. (Tr. 39-33-40)

*C-2 The Alleged Forced Resignations of Board Members in 1971*

The same three Board members testified that they were shocked and dumbfounded when, at a caucus meeting of the Board held a few days after the May 22, 1971 special meeting, Mayor Mocco entered and stated:

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> "***I am a politician. I have to take advantage of this position. And I want each of you to resign tonight *** because I want my people on the board.***" (Tr. 5-126-127)

The Board members testified that the Mayor also told them that if they did not resign he would have them indicted for overexpending the school budget and that, even though such charges might not be proven true, they should consider the attendant publicity and its effect on their families and jobs. The Board members testified that, although they knew of no budget overexpenditure, they conferred privately and agreed to resign, whereupon the Mayor took from his briefcase typed resignations which they then signed. (Tr. 5-123-168, 179-212; Tr. 6-17-33, 117-120, 125-136) They testified that the Mayor then proceeded to date one resignation per month until four members had left the Board. (C-5, 13, 14, 16) The fifth Board member, Aldo Gennari, testified that he received a letter from the Mayor dated November 5, 1971, which stated:

> "Please be advised that I am in receipt of your letter of resignation from the North Bergen Board of Education.
>
> "Kindly be advised that I hereby accept the said resignation." (P-17)

Gennari testified that he then confronted the Mayor as follows:

> "***I told him, I said I'll be damned if I was going to let him go and better his career at my expense, and I told him *** that I had a little girl who was in school *** who could read newspapers***. I said I never took a dime, I was never involved in anything of that kind and I said if he in turn was to try to press that resignation, I would immediately go to the Prosecutor's office***." (Tr. 6-27-28)

He testified that, after further discussion, the Mayor stated:

> "***[S]uppose I tell them [the news media] I received a letter from you and misinterpreted the letter. I said okay, and he then typed a letter [P-18] *** in his office that I could go back on the Board. (Tr. 6-31)

Mr. Gennari continued to serve as a member of the Board and was a member at the time he testified on May 29, 1975.

The Superintendent testified that he believed the alleged overexpenditure of the 1970-71 budget to be a contrived issue since the annual audit revealed no such overexpenditure. (Tr. 33-11) He testified, however, that the Board Secretary had advised the Board that certain line items were overexpended as the result of increased special education tuition charges and unanticipated negotiated benefits for employees. (Tr. 34-43-56)

The Superintendent, whose testimony corroborates in all essential elements that of the three Board members, *ante*, stated that the Board's attorney had

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privately advised those members that they had done nothing that should compel them to resign. (Tr. 35-11)

No testimony was elicited from Mayor Mocco on this matter when the Board called him as its witness. (Tr. 39-33-40)

*C-3 The January 1973 Meeting of the Mayor, Board President and the Assistant to the Superintendent*

Mr. Coviello, whose duties during 1972-73 included the evaluation of nontenured elementary teachers, testified that he was summoned to meet with Mayor Mocco at the home of the Board President in January 1973. He stated that the Mayor "***requested that 30-32 teachers be put on probation or not be evaluated satisfactorily." (Tr. 3-16-17) He testified further that the Mayor told him that Petitioners Della Torre and Trivisonno should be included in that group and that Coviello's "***ability as an evaluator would be determined by the number of people that would be turned down***." (Tr. 3-40) He testified also that he disregarded the Mayor's advice, evaluated nontenured teachers as he saw fit and reported only six in the unsatisfactory category to the Superintendent. (Tr. 3-58, 91-93) He testified also that the Superintendent then told him that the list of evaluations "***had to be sent to Town Hall." (Tr. 3-54, 101) That testimony was corroborated by the Superintendent who stated that he told Coviello that the list of nontenured teacher recommendations must go to the Mayor or City Hall for review and that the final decisions "***would be made outside of the Board of Education." (Tr. 33-6)

Coviello testified further that the Board President thereafter advised him that Mayor Mocco was dissatisfied that there were not enough unsatisfactory ratings. (Tr. 3-149; Tr. 4-112) He testified that he expressed to the Superintendent his dissatisfaction that the Board sent non-reemployment notices to over thirty teachers whom he, in consultation with principals, had rated satisfactory. (Tr. 4-115) He testified that although it was not his responsibility to evaluate Slutzky who taught in the high school, he had recommended the employment of each of the remaining petitioners, except Petitioner Cummins. (Tr. 3-92-93) The Superintendent testified that his recommendation was that each of the seven petitioners be reemployed with the proviso that Petitioner Cummins be reassigned to a lower grade. (Tr. 35-69-70, 92-93, 109-111)

The Board President testified conversely that at that January meeting in his home the Mayor had asked Coviello for budget data which would be helpful in estimating the effect on the forthcoming municipal tax rate. The Board President stated that when it became evident that Coviello did not possess the desired information because of his unfamiliarity with the budget and when Coviello persisted in questioning the Mayor about his own status in the school district, the meeting was terminated. Coviello, on rebuttal, categorically denied that the preparation of the budget was his responsibility or that it was even discussed at the meeting with the Mayor. A proposed list of duties drawn up by Coviello, indicating that he was to assist the Superintendent in preparation of the budget, is in evidence. There is no reliable evidence, however, upon which to base a

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conclusion that that job description was ever promulgated by the Superintendent or approved by the Board. (R-37)

The Board President averred that there was no discussion, directive or interference by the Mayor at the controverted January meeting or at any other time about the evaluation or reemployment of nontenured teachers or the status of petitioners. (Tr. 21-45, 61-63, 67-69; Tr. 22-53, 58, 69-75) He testified that the ultimate decision of the Board not to reemploy petitioners was based on a review of their personnel folders, unfavorable reactions to their presentations at their informal appearances before the Board, and the Superintendent's recommendations. He averred that the Board's decision was in no way influenced by the Mayor or other outside agents. (Tr. 21-60, 70-75, 80-82, 96) Testimony of Mayor Mocco, corroborating that of the Board President, was limited solely to the January meeting at the home of the Board President. (Tr. 39-33-39)

The vice-president of the Board also testified that the Board had not been influenced by the Mayor in determining not to reemploy petitioners. He stated that the Board relied on petitioners' informal appearances, the Superintendent's recommendations, and a review of relevant documents in arriving at the decisions not to reemploy petitioners. He testified, however, as did the Board President, that he had no specific recall of what the Superintendent's recommendation had been for any one of the petitioners. (Tr. 25-41, 54-58, 72-84, 98, 104)

*C-4 The Alleged Political Interference with the Awarding of Nontenured Teacher Contracts and Summer School Appointments*

The then Federation of Teachers President testified that Mayor Mocco called him in May 1971 to set up a meeting concerning the appointment of teachers to summer school positions. He testified that, while discussing a list of prospective summer school teachers which had previously been posted at the schools and which the Mayor had in his possession, he queried the Mayor about numerous nontenured teacher contracts which had not yet been awarded. (Tr. 4-126-127, 135) He testified that, in regard to Petitioner Della Torre's contract, the following dialogue ensued:

> "***I mentioned these contracts, and the comment he made to me again was, 'Don't tell me about the Della Torre's because the father ran against me,' *** and I said, 'In other words, you are telling me the children have to pay the price because of their father's sins?' and he said, 'Well, that's the way it goes. That's how life is.'***" (Tr. 4-135)

The Federation President testified that during the ensuing conversation the Mayor asked him if he wanted a summer school job and that when he declined, the Mayor stated:

> "***'Look. Let's not be crazy. These jobs are available, period. They are here. Somebody has got to fill them. I would rather see people who work for us fill these jobs than give them to anybody else.***' " (Tr. 4-137)

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The Federation President testified that he then told the Mayor that if a Title I position were available he would probably be interested. He testified that, although he had at no time applied for a Title I position to the Board or its professional administrators, he was subsequently summoned by the Superintendent and advised that he had been approved for a Title I position that summer. (Tr. 4-139) The Superintendent confirmed that the Federation President had made no application to him for that appointment. (Tr. 33-53)

The Federation President testified that numerous conversations and meetings with the Mayor ensued regarding the issuance of teacher contracts which ultimately occurred in August 1971. He testified that, after discussions with the Superintendent and members of the Board, he had concluded that it was futile to discuss the matter with anyone but the Mayor. (Tr. 4-145-146, 159, 170-178; Tr. 5-18, 23, 35-44)

The then chief negotiator for the Federation testified that, after he had supported Mayor Mocco in the 1971 election, he was asked by the Mayor to discuss prospective summer school and Title I employees. He related that the Mayor had told him that

> "***these jobs were to be given to the people who had worked with him, his allies, his associates, people who helped him in his campaign.***" (Tr. 7-169)

He testified that, when the Mayor offered him the position of director of the summer school, for which he had made no application, he refused and that, when the list of summer school employees was posted later with his name thereon, he directed that it should be removed. (Tr. 7-172-176)

The chief negotiator testified that when he met with the Mayor at numerous times in 1971 to discuss lists of applicants for full-time teaching positions, the Mayor sought assurances that persons whom he recommended would support him politically. (Tr. 7-189) He testified that when he recommended one candidate for employment, the Board President advised him that he would have to discuss her candidacy with Mayor Mocco. (Tr. 8-23) He testified that on another occasion the Board President said to him regarding a candidate:

> "***I can't make the decision on that, tell him he is going to have to make an appointment to see the Mayor***." (Tr. 8-24)

See also Tr. 8-29-30. The chief negotiator testified also that he served for a period as an interviewer of teacher candidates at the Mayor's request. (Tr. 8-76; Tr. 31-110) He testified that on one occasion the Board President advised him that a list of candidates "***had already gone down to Town Hall to the Mayor's office.***" (Tr. 8-30) He stated that the Superintendent had on numerous occasions told him that

> "***he had nothing to do with it, that the applications were down in Town Hall, and he had waited for word from the Mayor.***" (Tr. 8-31)

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He testified further that on a number of occasions the Mayor had discussed with him proposals for administrative changes in the schools. (Tr. 8-37-40)

Another classroom teacher testified that he also was called in May 1971 and told by the Mayor that "***he had decided to put my name on the summer school list for that summer." (Tr. 13-128)

Yet another classroom teacher testified that after he had supported Peter Mocco in his campaign for election in 1971, the Mayor called in June 1971 and "***offered me the title one coordinator's job at Lincoln School.*** And since I was a friend of his, he was offering me this job as a reward for helping him get elected." (Tr. 9-80-81) That teacher also testified that he had not previously applied for the Title I Coordinator position to which he was in fact appointed. (Tr. 9-106-109)

The Superintendent testified that the revision of the list of 1971 summer school teachers was made under Board auspices, without his input or consultation. (Tr. 33-48)

The Board President testified that the Board was not responsible for the posting or revision of any summer school list of teachers in 1971, since it was customary that it approved teachers only after summer school had already begun and a list of teachers was presented for approval by the summer school director. He testified also that he had no knowledge that Mayor Mocco had reviewed lists of summer school employees. (Tr. 23-103)

*C-5 The Selection of National Youth Corps Participants in 1972*

The National Youth Corps Coordinator, who is also a guidance counselor employed by the Board, testified that in June 1972, after he had selected 80 percent of the eligible youths to participate in the summer work program, he was summoned on June 23, 1972 to the Superintendent's office to explain the program to Mayor Mocco. He related that, at the Mayor's request, he allowed the Mayor to take for review the folders of pupil applicants, which folders were returned the following Monday. He testified that he was on that day approached at the school by the Mayor's brother who asked him to delete sixty names of pupil applicants. The coordinator stated that he would not do so, whereupon he was told that he would be sorry. (Tr. 6-173-186)

The coordinator testified that on June 27 about 100 youths appeared at the school accompanied by a municipal official and presented completed applications for Youth Corps participation. He testified that, after numerous applications had been rejected because the family income thereon made the applicants ineligible, he and his assistants observed the city official inserting lower family income figures on the rejected applications. He related that he then told that official:

> "***I'm too old to go to jail. I think you are too. You get your kids and get out of here***." (Tr. 6-193)

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He testified that the official did so and that he took no more applications. That testimony was corroborated by the coordinator's assistant. (Tr. 9-166-173)

The coordinator testified that, although he had been advised in writing on June 23, 1972 that he would be assigned as a high school guidance counselor in the ensuing year (P-21), he was then involuntarily transferred by the Board to an elementary guidance position on June 28, 1972. (P-23 through 26) He related that, when he objected to the transfer and the Superintendent stated that he knew nothing about it, he then protested at a Board meeting and filed a grievance. (Tr. 7-30-47) He testified that the matter proceeded to an arbitration hearing on October 13, 1972 and that in accord with the arbitrator's award he was transferred back to the high school in November 1972. (Tr. 7-59-63)

The Superintendent testified that the school system provided a base of operations for the Youth Corps program but that the Board did not employ its supervisors who were paid from federal funds. He testified, however, that the Mayor had called him and stated that the pupils being selected were not satisfactory and that if the coordinator "***did not change his mind, he would be transferred. I should let him know he would be transferred *** or some other punitive measures taken." (Tr. 34-33)

The Superintendent also testified that following the arbitration hearing, *ante*, at which he had testified, the Board President said to Mayor Mocco that "***I had made a fool out of him in my testimony***." (Tr. 33-42) The Superintendent testified that the Mayor then said to him:

> "***I should have gotten you out of here last summer. I didn't do it, but now I'll crush you. I'll get you out of here***." (Tr. 33-42)

Board member Gennari corroborated that there was verbal castigation of the Superintendent by the Mayor on that occasion. (Tr. 6-70)

The Board President, conversely, testified that he was not present at any castigation which the Mayor may have directed at the Superintendent but that he had heard loud voices following the arbitration hearing. (Tr. 24-83-85, 93-95) He testified that he was unaware of why the guidance counselor had been transferred but considered it a perfunctory year end transfer. (Tr. 24-93-109) He asserted that the Board, in any event, had no responsibility for the operation of the Youth Corps program in the area. (Tr. 23-100, 106-109)

The hearing examiner, having reviewed testimony adduced by both petitioners and the Board concerning events which occurred subsequent to 1973 when the Board determined not to reemploy petitioners, declines to summarize that testimony since it could not have, retrospectively, affected the Board's decision.

*D-1 Principal Arguments Set Forth in Petitioners' Memorandum of Law*

Petitioners contend that the Board abrogated its powers and duties by allowing Mayor Mocco to control and influence its determinations of whom to

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employ and not to reemploy, as well as the terms and conditions of employment within the district. It is argued that such acquiescence encouraged the settlement of employment matters and grievances in the political arena and violated *N.J.S.A.* 34:13A-1 *et seq.* which guarantees the rights of employees to organize and conduct negotiations and process grievances with employers, thus rendering the negotiated agreement between the Federation and the Board a meaningless instrument. (Petitioners' Memorandum, at pp. 140-143)

Petitioners assert that such acquiescence is also violative of their constitutionally guaranteed rights of free speech and their rights to engage or not engage in political activity as citizens. *Perry v. Sindermann*, 408 *U.S.* 593, 92 *S.Ct.* 2694 (1972) is cited which states, *inter alia*:

> "***[T]he nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights.***" (at 2698)

Petitioners argue, in the instant matter, that:

> "***[D]early cherished and constitutionally protected rights—the right of association, or not, as you will, and the right of political affiliation, or not, as you will, could not be exercised save with the sanction of dismissal from the System. This is abhorrent***."
>
> (Petitioners' Memorandum, at p. 138)

Contending that the Board's action must be overturned, petitioners cite, *inter alia, Donaldson v. Board of Education of North Wildwood*, 65 *N.J.* 236 (1974) and *Cullum v. Board of Education of the Township of North Bergen*, 15 *N.J.* 285 (1954), wherein it was stated:

> "***The members of the respondent Board of Education hold positions of public trust and must at all times faithfully discharge their functions with the public interest as their polestar.*** Amongst their most vital and responsible duties is the proper selection of personnel.***" (at 292)

In opposition to the Board's announced affirmative defense of the equitable doctrine of clean hands, petitioners cite, *inter alia, Laurino v. Laurino*, 28 *N.J. Super.* 119 (*App. Div.* 1953) wherein it was said:

> "***[T]he doctrine of clean hands has its logical justification only in considerations of good conscience and natural justice. And so a court of equity may, in furtherance of justice and sound public policy aid one who is comparatively the more innocent and grant such an one affirmative relief.***" (at 124)

In this regard petitioners argue that it was Mayor Mocco's intermeddling with Board affairs that precipitated and necessitated their involvement with the Mayor and his subordinates as prospective Board employees in pursuit of their livelihood.

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Petitioners argue that, in violation of their statutory and constitutional rights, the Board arbitrarily, discriminatorily, and unreasonably terminated their employment. They seek an order of the Commissioner directing the Board to pay their costs of litigation and to restore them to their teaching positions, together with such lost salary and emoluments as they would have received had they been reemployed.

*D-2 Principal Arguments Set Forth in Respondent's Brief*

The Board argues, conversely, that petitioners have failed to meet their burden to prove that because of improper political interference they were deprived of recognized statutory or constitutional rights. It is argued that, in spite of its sheer volume, much of the testimony adduced by petitioners is not credible because those testifying themselves had political motives, that it fails to prove the truth of petitioners' allegations, or that it was effectively discredited by testimony of the Board's witnesses. (Respondent's Brief, at pp. 1-55)

The Board avers that petitioners have failed to prove that the Board acceded to any political directive not to renew their employment, or that any such political mandate existed. (*Id.*, at pp. 56-57) The Board contends that if such statements allowed into the record were actually made by Mayor Mocco, it does not follow that the contents of those statements were true or binding on the Board. (*Id.*, at pp. 58-60)

It is also argued that it would be inappropriate to draw inferences, as petitioners suggest, from the Board's decision not to call Mayor Mocco to testify about numerous events. The Board argues that any assumption that the Mayor would not have denied the testimony of other witnesses or that his testimony would have been unfavorable to the Board, is groundless. *O'Neil v. Bilotta*, 18 *N.J. Super.* 82 (*App. Div.* 1952) The Board also argues that, since petitioners themselves did not call the Mayor, much of that attributed to him as improperly allowed into the case as hearsay testimony and the Board was under no obligation to remedy that alleged procedural defect. (Respondent's Brief, at p. 63)

The Board avers that the calling of the Superintendent as the Commissioner's witness was improper and that his testimony should be stricken from the record and/or excluded from consideration to preserve respondent from prejudice. *State v. Kuznitz*, 105 *N.J. Super.* 33, 42 (*Law Div.* 1969)

Finally, the Board contends that the doctrine of clean hands is applicable and cites in this regard *Eric Beckhusen et al. v. Board of Education of the City of Rahway et al.*, 1973 *S.L.D.* 167, 177 and *Board of Education of Union Beach v. New Jersey Education Association et al.*, 96 *N.J. Super.* 371, 386 (*Chan. Div.* 1967), aff'd 53 *N.J.* 29 (1968). The Board argues that the doctrine of clean hands is appropriate because there is no overriding state interest barring its applicability. In this regard the Board avers petitioners

> "***unabashedly take the position *** that the system they complain of is perfectly all right so long as they are the recipients of its bounty, but reprehensively illegal when they are not.***

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"Their own conduct indicates their beliefs that their version of the system in and of itself is acceptable. It is its particular application they object to.***" (Respondent's Brief, at pp. 72-73)

For the above reasons, the Board requests that the relief sought by petitioners be denied.

*E. Findings of Fact*

The hearing examiner has thoroughly reviewed the pleadings, exhibits in evidence, Briefs and transcripts of testimony. Faced with numerous instances of irreconcilable testimony on matters of pronounced relevance, the hearing examiner has also carefully considered the demeanor and forthrightness of witnesses, as well as the consistencies and inconsistencies within the testimony of individual witnesses and between witnesses. The hearing examiner's findings, based on the evidence within the record and his observations throughout the thirty-nine days of hearing, are as follows:

1. Donna Trivisonno, Diane Brauer and Eleanor Della Torre procured their teaching positions without soliciting or accepting patronage from officials in the municipal governing body of North Bergen. Brauer was recommended as a satisfactory teacher; Trivisonno and Della Torre were recommended as good teachers. Although each made inquiries of officials in the municipal government as to why they were not reemployed and what they could do to regain their teaching positions, there is, in the record, no evidence on which to base a conclusion that they at any time performed political services either to gain, retain or regain their employment with the Board.

2. Petitioners Slutzky, Cummins, Bodmer and Somick, either themselves or through members of their families, sought and received assistance in the procurement of their teaching positions from Mayor Mocco or other persons of political influence in North Bergen. Somick was recommended for reemployment as a good teacher. Slutzky and Bodmer were recommended as satisfactory teachers. Cummins was not recommended for reemployment by Mr. Coviello but was recommended for assignment to a lower grade by the Superintendent.

While certain of these four petitioners inquired of Mayor Mocco or others politically active in North Bergen the reasons they were not reemployed and the manner in which they could regain employment, there is no evidence on which to base a conclusion that for those purposes they performed political services in an effort to retain or to regain their employment.

3. The Board, in considering the matter of reappointments of petitioners, as in numerous other matters, acceded to the active influence and control of Mayor Peter Mocco. The hearing examiner finds unconvincing the testimony of the Board President, vice-president and Board member Rannou wherein they stated that the Board at all times made independent decisions without direction, control or interference from Mayor Mocco. By contrast, the record is replete with forthright, credible contravening testimony of petitioners, Board members who resigned in 1971, Board members Gennari and Ruffino, the Superintendent,

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the Assistant Superintendent, the assistant to the Superintendent, the coordinator of the National Youth Corps and his assistants, the chief negotiator and the president of the Federation, Committeewoman Mary Lowenstein, and ward leaders Irene Cummins and Marvin Diner. It is the cumulative weight of their credible testimony supported by documentary evidence upon which the hearing examiner bases his finding that the Board, rather than making independent judgments as envisioned by *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:27-4, submitted to Mayor Mocco lists of prospective employees, received directives from Mayor Mocco regarding reappointments, and acquiesced to those directives in the making of numerous decisions, including the non-reemployment of petitioners.

The above findings are in no way predicated on inferences drawn by the hearing examiner concerning the fact that Mayor Peter Mocco was not called upon by the Board to testify regarding matters opened by the testimony of petitioners' witnesses or the Superintendent. They are based solely on the preponderance of the credible evidence in the record, which the hearing examiner deems amply sufficient to buttress his findings.

The basis of authority on which the hearing examiner relied in calling the Superintendent as the Commissioner's witness over the objections of the Board are amply set forth in the record. (Tr. 4-93-94; Tr. 33-2) That authority, flowing from *N.J.S.A.* 18A:6-9 *et seq.*, is found in *N.J.A.C.* 6:24-1.12 which authorizes the Commissioner to "***examine witnesses *** whenever the ends of justice would be served thereby***" and from *N.J.A.C.* 6:24-1.1 which states that:

> " 'Commissioner' as used in these rules *** shall mean the Commissioner of Education *** or a hearing officer assigned to conduct the proceedings in any case."

*F. Recommendations to the Commissioner*

1. It is recommended that the Commissioner determine that the Board, by acquiescing to politically motivated directives from Mayor Peter Mocco failed to make independent judgment regarding the reemployment of the seven individual petitioners and thus abused its discretionary authority.

2. It is recommended that the Commissioner determine that the Board's non-reemployment procedure in 1973, *ante*, was contrary both to the provisions of the then existing negotiated agreement with the Federation and to the long-recognized legal concept that neither an officer nor member of a board, acting individually or in concert with other member(s) or officer(s) in other than a duly constituted meeting with a majority of members present, may conduct official business of a board of education. *Cullum v. Board of Education of North Bergen*, 15 *N.J.* 285 (1954)

3. It is recommended that the Commissioner determine that the Board's *modus operandi*, which improperly countenanced and acquiesced to political influence, was not only violative of the Federation's rights to organize and

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resolve employment matters with the Board, pursuant to *N.J.S.A.* 34:13A-1 *et seq.*, but that petitioners' protected rights of freedom to speak or not to speak and to engage or not to engage in political activities were violated.

4. The hearing examiner leaves to the Commissioner the consideration of relevance of the doctrine of clean hands as it may apply to the prayers for relief of Petitioners Slutzky, Cummins, Bodmer and Somick.

5. It is recommended that an order be issued directing the Board to restore Petitioners Della Torre, Trivisonno and Brauer to their teaching positions together with lost salary and emoluments less mitigation in the amount of their earnings during the academic years from September 1973 to the date of reinstatement.

6. It is further recommended that, in the event the Commissioner determines that the doctrine of clean hands is inapplicable, he issue an order extending those identical benefits to Petitioners Slutzky, Bodmer, Cummins and Somick.

7. In consideration of the Commissioner's and the courts' consistent denial that the Commissioner has authority to award counsel fees and costs, it is recommended that that portion of petitioners' prayers for relief be denied. *Fred Bartlett, Jr. v. Board of Education of the Township of Wall*, 1971 *S.L.D.* 163, aff'd State Board of Education 166; *John Romanowski v. Board of Education of the City of Jersey City*, 1966 *S.L.D.* 219

This concludes the report of the hearing examiner.

* * * *

The Commissioner has carefully reviewed the extensive record of the controverted matter including the documents in evidence, testimony of witnesses, Briefs of counsel, report of the hearing examiner, and the exceptions filed thereto by both parties pursuant to *N.J.A.C.* 6:24-1.17(b).

Petitioners' exceptions consist primarily of an amplification of the legal arguments advanced in their Memorandum of Law in which they contend that the doctrine of clean hands is inapplicable.

Respondent's exceptions, conversely, expound on those legal arguments previously set forth in respondent's Brief in which it is argued that the doctrine of clean hands is invocable within the factual context presented. (Respondent's Exceptions, at pp. 65-72) Additionally, the Board, excepting to the findings of fact set forth by the hearing examiner, argues that such findings were based upon irrelevant and incompetent evidence; that the testimony introduced into the record by petitioners to show a *modus operandi* should have been ruled inadmissible; and that the calling by the hearing examiner of the Superintendent as the Commissioner's witness was improper. (*Id.*, at pp. 2-20) The Board's further exceptions charge, *inter alia*, that the hearing examiner failed to take sufficient account of the personal and political bias of witnesses, lost sight of the essential

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elements petitioners were required to prove, gave undue weight to the testimony of the Superintendent, and based his findings and recommendations on insufficient evidence. (*Id.*, at pp. 21-63)

The Commissioner, having thoroughly examined the exceptions of the respective parties, rejects the Board's contention that the calling by the examiner of the Board's chief school officer to testify was improper. Early notice of his intent to do so, absent his being called by either party, was provided. Authority for such calling of witnesses by a hearing examiner acting on behalf of the Commissioner pursuant to *N.J.A.C.* 6:24-1.1(a) is authorized by rule of the New Jersey State Board of Education "***whenever the ends of justice would be served thereby***." *N.J.A.C.* 6:24-1.12 The calling of the chief school officer as a witness was not only proper but essential both to preclude the admission of a surfeit of hearsay testimony from petitioners and others while establishing a record including essential information concerning district procedures utilized in the employment of petitioners and others. The Commissioner so holds.

The review of the entire record leads to the conclusion that such record fully supports the hearing examiner's findings of fact which the Commissioner herein adopts as his own.

Having carefully weighed and balanced those respective arguments of law concerning applicability of the equitable doctrine of clean hands, the Commissioner determines that the facts established are such that this equitable doctrine need not be applied herein. The doctrine may not be invoked in such manner as to sanction an unconscionable practice by one party to the detriment of another party to a dispute. As was stated by the Court in *Medical Fabrics Co. v. D. C. McClintock Co.*, 12 *N.J. Super.* 177 (*App. Div.* 1951):

> "***The clean hands doctrine is an ethical concept long applied in courts of equity although not peculiar thereto. *Chafee, Some Problems of Equity* (1950), pp. 1, 94. In general, its requirement is not that suitors seeking relief in equity 'shall have led blameless lives' (*Loughran v. Loughran*, 292 *U.S.* 216, 229, 78 *L.*Ed. 1219, 1227 (1934)), but rather that they shall not have acted fraudulently or unconscionably with respect to the particular controversy in issue. *Precision Instr. Mfg. Co. v. Automotive M. Mach. Co.*, 324 *U.S.* 806, 815, 89 *L.Ed.* 1381, 1386 (1945); *Neubeck v. Neubeck*, 94 *N.J.Eq.* 167, 170 (*E.&A.* 1922). When applicable it is invoked not out of regard for the defendant or to punish the plaintiff but upon larger considerations 'that make for the advancement of right and justice.' *Johnson v. Yellow Cab Transit Co.*, 321 *U.S.* 383, 387, 88 *L.Ed.* 814, 819 (1944). *Cf. Casini v. Lupone*, 8 *N.J. Super.* 362, 365 (*Ch. Div.* 1950); *Hansen v. Local No. 373*, 140 *N.J.Eq.* 586, 589 (*Ch.* 1947).
>
> "While the doctrine is firmly rooted and naturally appeals to persons of good conscience, it may well disserve the interests of justice if applied oversensitively or as a rigid formula restraining the court's just exercise of discretion. *Precision Instr. Mfg. Co. v. Automotive M. Mach. Co., supra; Chafee, supra*, p. 99. Accordingly, there has been a recent wholesome

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tendency amongst courts to apply the doctrine flexibly in the light of the particular circumstances presented. See 60 *Harv. L. Rev.* 980, 981 (1947); *Rasmussen v. Nielsen*, 142 *N.J.Eq.* 657, 661 (*E.&A.* 1948); *A. Hollander & Son, Inc., v. Imperial Fur Blending Corp.*, 2 *N.J.* 235, 247 (1949); *Hansen v. Local No. 373, supra.****''

(at 179-180)

In the present matter, the inherent evil was the acquiescence of the Board to the influencing and intermeddling by the Mayor in the Board's employment practices. Such involvement was not envisioned by the Legislature when it provided for autonomous boards of education to implement the constitutional requirement that a thorough and efficient system of free public schools be established and maintained. Nor has it since been sanctioned by statutory enactment. Rather, local education boards are established by law as corporate entities separate and apart from municipal governing bodies. *Merrey v. Board of Education of the City of Paterson*, 100 *N.J.L.* 273 (*Sup. Ct.* 1924) Whatever the classification of a school district, it is required by law to be governed by a board of education whose actions are distinct from those of municipal governing bodies, except as the law allows. Intrusion into the affairs of a board of education, except as the law provides by a municipal official, is not only illegal but also requires that a board desist from acquiescing thereto. *Botkin v. Westwood*, 52 *N.J. Super.* 416 (*App. Div.* 1958)

Among those broad powers of boards of education into which municipal governing bodies may not intrude is the discretionary authority to employ and discharge teaching staff members.

*N.J.S.A.* 18A:11-1 provides, *inter alia*, that:

''The board shall ***

> c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service*** 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.''

Also, *N.J.S.A.* 18A:27-4 set forth certain rule-making powers of local boards of education as follows:

> ''Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of

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payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto."

In *Porcelli et al. v. Titus et al.*, 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert* den. 55 *N.J.* 310 (1970), the Appellate Court stated:

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

As was stated in *Board of Education of the City of Burlington v. Board of Education of the Township of Edgewater Park*, 1974 *S.L.D.* 692, aff'd State Board of Education, 1975 *S.L.D.* 1074, aff'd Docket No. A-2292-74, New Jersey Superior Court, Appellate Division, June 23, 1976:

> "***[L]ocal boards are non-continuous bodies, and each board is responsible to the citizens and taxpayers for the wise and prudent management of the fiscal affairs of the school district***." (at 704)

Nowhere do the statutes or dicta from decisional law countenance the acquiescence of a board to employment practices whereby interviews conducted by a mayor or other agents of a municipal government either preceded, supplemented or supplanted the processes by which a board and its professional administrators either screen prospective candidates or determine who is to be reemployed.

It is in this regard that the Board herein perpetrated the greater evil by its acquiescence. The record supports the conclusion that this acquiescence so permeated the system that Candidates Slutzky, Bodmer, Cummins and Somick could not have gained employment through regular channels because of circumstances over which they had absolutely no control. The Board, by acquiescing to political interference, abused its discretionary authority in such a shocking manner that the application of the doctrine of clean hands would be inequitable. The Commissioner so holds. *Laurino, supra*

The record further demonstrates that the Board in April 1973 through the improper actions of its president failed, in such a significant matter as the notification of non-reemployment of teachers, to make its determination in a legal manner. In order to make such determinations in a legal manner pursuant to *N.J.S.A.* 18A:27-10, the Board must meet and reach a consensus by a majority of a quorum. This the Board failed to do. See *Patricia Bolger et al. v. Board of Education of the Township of Ridgefield Park*, 1975 *S.L.D.* 93, aff'd State Board of Education 98, aff'd Docket No. A-3214-74 New Jersey Superior Court, Appellate Division, April 21, 1976 (1976 *S.L.D.* 1122) and *Iris Sachs v. Board of Education of the East Windsor Regional School District et al.*, 1976 *S.L.D.*

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170, aff'd State Board of Education 175, aff'd Docket No. A-62-76 New Jersey Superior Court, Appellate Division, March 10, 1977. As was said in *Nicholas P. Karamessinis v. Board of Education of the City of Wildwood*, 1976 *S.L.D.* 473:

> "***The Commissioner is duly concerned that, pursuant to statute, no board of education make important official decisions in a forum from which one or more of its members has been arbitrarily excluded. *Peter Contardo v. Board of Education of the City of Trenton, Mercer County*, 1974 *S.L.D.* 650 The function of local boards of education is of such paramount importance in developing and implementing programs of education to serve the youth of our State and nation that they must be ever guided by the principle that ***it is of the very essence that justice avoid even the appearance of injustice***. *James v. State of New Jersey*, 56 *N.J. Super.* 213, 218 (*App. Div.* 1959); *Hoek v. Board of Education of Asbury Park*, 75 *N.J. Super.* 182, 189 (*App. Div.* 1962) A reading of the statutes and case law can lead only to the conclusion that official acts of boards of education must not be reduced to a sham by the predetermined actions of factual segments of boards without full, frank, and open discussion and full knowledge of all *bona fide* members.***" (at 478)

See also *Cullum, supra.*

In such matters a board is to act circumspectly and to shoulder its own burdens in service to the public in which it stands in a fiduciary relationship as an instrumentality of the State. *Durgin v. Brown*, 37 *N.J.* 189 (1962) Such service was described by Judge Lane in *Township Committee of the Township of Hazlet v. Morales*, 119 *N.J. Super.* 29 (*Law Div.* 1972) as follows:

> "***A public officer has the duty of serving the public with undivided loyalty, uninfluenced in his official actions by any private interest or motive whatsoever. He holds a position of public trust. He is under an inescapable obligation to serve the public with the highest fidelity, good faith and integrity. The law tolerates no mingling of self-interest; it demands exclusive loyalty. *Driscoll v. Burlington-Bristol Bridge Co.*, 8 *N.J.* 433, 474-475 (1952), cert. den. *Burlington County Bridge Commission v. Driscoll*, 344 *U.S.* 838, 73 *S.Ct.* 25, 97 *L.Ed.* 652 (1952); *Newton v. Demas*, 107 *N.J. Super.* 346, 349 (App. Div. 1969), cert. den. 55 *N.J.* 313 (1970); *Aldom v. Roseland*, 42 *N.J. Super.* 495, 500-501 (App. Div. 1956).***" (at 33)

When confronted at the hearing with a *prima facie* case with detailed testimony of numerous witnesses, the Board failed to present sufficient credible evidence in its own behalf. As was aptly stated in *Preston K. Mears et al. v. Board of Education of the Town of Boonton*, 1968 *S.L.D.* 108:

> "***[T]he Commissioner recognizes the practical problems confronting boards of education in creating a record of all its discussions and formulating a statement of its reasons for all of its decisions, as if to anticipate a need

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> to defend itself in litigation such as that herein. The evidence of reasonable action is not always so formally generated. But in the absence of such evidence, the Commissioner cannot discharge his duty to examine the exercise of a board's discretion where, as here, it is challenged, unless at the hearing or in some other proper manner the board is willing to come forward with appropriate evidence that it acted with reason and not in an arbitrary, capricious, unreasonable, or discriminatory manner. Thus, while the burden of proof initially and in the ultimate sense rests with the petitioner in an action such as the instant matter, the Commissioner must be able to determine that some reasonable basis exists for the board's actions. Therefore, unless such basis appears to the Commissioner, the board's actions cannot be sustained.***'' (at 111)

Similarly, herein, the Commissioner, finding the Board's defense unconvincing, reaches the inescapable conclusion that the Board acquiesced to political interference thereby tainting its hiring and reemployment practices by injecting improper elements, political in origin, into its considerations of petitioners' reemployment. This conclusion is buttressed by a preponderance of credible evidence not only as summarized by the examiner but otherwise found within the voluminous record.

Apropos is that which was stated in *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County*, 1968 *S.L.D.* 7:

> ''***The Commissioner agrees that boards of education may not act in an unlawful, unreasonable, frivolous, or arbitrary manner in the exercise of their powers with respect to the employment of personnel. Thus a board of education may not resort to statutorily proscribed discriminatory practices, *i.e.*, race, religion, color, etc., in hiring or dismissing staff. Nor may its employment practices be based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served. Such a *modus operandi* is clearly unacceptable and when it exists it should be brought to light and subjected to scrutiny.***'' (at 10)

Although the seven petitioners herein, as nontenured teachers, had no property rights to continued employment, they could not be denied continued employment for proscribed reasons. In *North Bergen Federation of Teachers, Local 1060 and Beth Ann Prudente v. Board of Education of the Township of North Bergen*, 1975 *S.L.D.* 138 a nontenured teacher who had been denied continued employment because of pregnancy was ordered reinstated. Similarly, when it was determined that nontenured teachers were not reemployed because of their exercise of free speech they were ordered reinstated with lost pay by the Commissioner in *Marilyn Stein v. Board of Education of the Township of North Bergen*, 1975 *S.L.D.* 524, dis. State Board of Education 531, dis. Docket No. A-587-75 New Jersey Superior Court, Appellate Division, February 18, 1976 and in *Elizabeth Rockenstein v. Board of Education of the Borough of Jamesburg*, 1974 *S.L.D.* 260, 1975 *S.L.D.* 191, aff'd State Board of Education 199, aff'd Docket Nos. A-3916-74, A-4011-74 New Jersey Superior Court, Appellate Division, July 1, 1976.

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The Commissioner, having determined that the Board's refusal to reemploy petitioners was tainted by acquiescence to political control, directs that all seven petitioners be reinstated forthwith to comparable teaching positions to those which they held in June 1973 at salaries and with emoluments which they would have received had they been continuously employed with satisfactory service for the intervening period. It is further directed that the Board compensate petitioners for the salary and emoluments which they would have received in the intervening period in such amounts as they would have received had they been continuously employed with satisfactory service, less any earnings in mitigation. Such restoration will make petitioners whole in substantial part for the Board's violation of their constitutional and statutory rights of freedom of speech and to engage or refrain from engaging in political activity.

This award does not automatically confer tenure on petitioners since only the passage of time while working for the Board satisfies the precise requirement for achievement of a tenured status. While the passage of time from June 1973 to the date of petitioners' restoration to teaching positions may not be counted as time served toward attaining a tenured status, it shall not be considered to have interrupted petitioners' continuous service to the Board. *N.J.S.A.* 18A:28-5

To this extent the relief sought by petitioners is granted. Their remaining prayer for relief seeking counsel fees and costs is denied as being beyond the scope of authority of the Commissioner. *Raymond Winter v. Board of Education of the Township of North Bergen*, 1975 *S.L.D.* 236; *Jackson v. Concord Company*, 54 *N.J.* 113 (1969); *Bartlett supra; Romanowski, supra*

The Commissioner deplores both the illegal intermeddling of municipal government officials in the district's educational affairs and the acquiescence of the Board thereto. The result has been both a shattering of otherwise well laid professional plans for petitioners whose careers have been wantonly interrupted and long and costly litigation. The Commissioner forwards this decision and the record herein for review by the offices of the Attorney General of New Jersey and the Public Prosecutor of Hudson County.

COMMISSIONER OF EDUCATION

March 3, 1978

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## STATE BOARD OF EDUCATION

## DECISION

Decided by the Commissioner of Education, March 3, 1978

For the Petitioners-Appellees, Victor P. Mullica, Esq.

For the Respondent-Appellant, Joseph V. Cullum, Esq. and Greenwood, Weiss & Shain (Robert H. Greenwood, Esq., of Counsel)

This controversy arose on a petition by seven former teachers in the North Bergen School System alleging that in declining to reemploy them the Board of Education failed to make independent judgments but, instead, acquiesced to politically motivated directives from the Mayor.

The Commissioner found this allegation to be true. Specifically, he adopted the finding of the hearing examiner that "the Board, rather than making independent judgments as envisioned by *N.J.S.A.* 18A:11-1 and *N.J.S.A.* 18A:27-4, submitted to Mayor Mocco lists of prospective employees, received directives from Mayor Mocco regarding reappointments, and acquiesced to those directives in the making of numerous decisions, including the non-reemployment of petitioners." The Commissioner thereupon determined that such acquiescence by the Board in political interference with its hiring and reemployment practices was improper and illegal and constituted an abuse of the Board's discretionary authority.

We believe that the extensive record amply supports the foregoing finding and the Commissioner's legal conclusion therefrom.

The Commissioner also adopted the following two findings of the hearing examiner:

1. Petitioners Trivisonno, Brauer and Della Torre "procured their teaching positions without soliciting or accepting patronage from officials in the municipal governing body of North Bergen." Brauer was recommended for reemployment as a satisfactory teacher, while the other two were recommended as good teachers.

2. "Petitioners Slutzky, Cummins, Bodmer and Somick, either themselves or through members of their families, sought and received assistance in the procurement of their teaching positions from Mayor Mocco or other persons of political influence in North Bergen. Somick was recommended for reemployment as a good teacher. Slutzky and Bodmer were recommended as satisfactory teachers. Cummins was not recommended for reemployment by Mr. Coviello (Assistant to the Superintendent) but was recommended for assignment to a lower grade by the Superintendent."

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Despite the Board's contention that the second group of petitioners above mentioned should be barred from relief by the equitable doctrine of "clean hands", the Commissioner declined to apply the doctrine in this case. He directed that all seven petitioners be reinstated forthwith to teaching positions comparable to those which they held in June 1973, and further that the Board compensate petitioners for the salary and emoluments which they would have received in the intervening period less any earnings in mitigation.

The State Board directs that the Commissioner's decision be completely affirmed with respect to the Petitioners Trivisonno, Della Torre and Brauer, but with respect to the remaining petitioners the mandate of clean hands should be applied. The Commissioner's decision should accordingly be reversed, and only partial relief should be granted to those petitioners as hereinafter set forth.

The long-established equitable principle of "clean hands" applies to administrative proceedings as well as law cases. In the courts it means that "equity refuses to lend its aid in any manner to one seeking its active interposition who has been guilty of unlawful or inequitable conduct in the matter with relation to which he seeks relief." 30 *Corpus Juris Secundum*, Equity, § 93, p. 1009 The same principle applies by analogy to persons applying for relief from an administrative tribunal. See *Beckhusen v. Board of Education of Rahway*, 1973 *S.L.D.* 167, 177-178.

We are of the opinion that those petitioners who sought and obtained assistance in procuring their teaching positions from the Mayor or other persons of political influence of North Bergen should not, because of such unprofessional and improper conduct, be accorded the full relief granted to the other petitioners who did not obtain their positions in this improper way. As the brief of the respondent-appellant well argues, the use of political influence in securing employment by a teacher is inconsistent with selection purely on the basis of merit, and accordingly it damages the process of securing the best qualified teachers for the school system. It also constitutes an injury to other and perhaps more qualified teachers who are not willing to abase their profession by resorting to politics in order to obtain employment in a school district.

On the other hand we do not believe that the Board of Education should be able to avoid altogether its obligation to the guilty petitioners. In *A. Hollander & Son, Inc. v. Imperial Fur Blending Corp.*, 2 *N.J.* 235, 247, the Supreme Court observed that the doctrine of unclean hands "is not so rigid nor should it be so construed as to allow or permit an unconscionable gain to the wrongdoer at the complainant's expense." The doctrine should be applied "flexibly in the light of the particular circumstances presented." *Medical Fabrics Co. v. D. C. McClintock Co.*, 12 *N.J. Super.* 177, 180 (*App. Div.* 1951)

For the foregoing reasons, the State Board of Education reverses the decision of the Commissioner with respect to the relief granted to Petitioners Slutzky, Bodmer, Cummins and Somick; and directs respondent Board of Education to pay to said petitioners the respective salaries, minus mitigation, which they

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would have received for the school year 1973-74 if their respective contracts had been renewed; and further directs that said petitioners shall have no further relief. In all other respects the decision of the Commissioner is affirmed.

November 8, 1978

Pending New Jersey Superior Court

**Francis A. Caputo,**

***Petitioner,***

***v.***

**Board of Education of the City of Trenton, Mercer County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Anton J. Hollendonner, Esq.

For the Respondent, Merlino & Andrew (Robert B. Rottkamp, Jr., Esq., of Counsel)

Petitioner, a member of the Trenton Board of Education, hereinafter "Board," alleges that an agent of the Board engaged in unethical and unprofessional conduct damaging to the professional and technical reputation of the Educational Consulting Service, hereinafter "ECS." Petitioner further charges that, when he repeatedly requested the Board to investigate this and his further allegation that important information had been improperly concealed from the Board, he met with repeated rebuffs culminating in a five to four vote defeating his motion on January 23, 1975 to order an investigation. (J-13) Petitioner characterizes the Board's inaction as arbitrary, capricious and a clear abuse of its discretionary authority, pursuant to *N.J.S.A.* 18A:11-1 *et seq.*

The Board states that it did, in fact, properly consider petitioner's allegations and asserts that it has in no way abused its discretionary authority.

A hearing in the matter was conducted on September 30, 1975 and December 2, 1976 at the State Department of Education, Trenton, by a hearing

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examiner appointed by the Commissioner of Education. The report of the hearing examiner follows setting forth first those uncontroverted facts which provide the contextual basis of the dispute:

ECS was engaged at a fee of $4,000 to conduct a hard-data based, statistically oriented evaluation of the effectiveness of the Board's reading program under Title I of the Elementary and Secondary Education Act during the spring of 1973. This was accomplished by comparing the reading skills development during 1972-73 of a selected group of pupils eligible for and receiving Title I reading services with the scholastic development of a similarly eligible group who were not receiving Title I reading services. (J-1, 2, 12, 26, 27) One conclusion set forth in the evaluation report was as follows:

> "*There is no significant difference* in the mean increments in reading levels, whether averaged by school, by grade or over all schools and grades, of the eligible Title I children who met regularly with the reading resource teachers and received special Title I Reading Tutoring Services and the mean increments in reading levels of students who are also eligible for receiving Title I services, attend the same schools, are at the same grade level and who obtained similar pretest scores."
>
> (*Emphasis in text.*) (J-28 at 169)

It is the distribution and use made of that report which is at the center of the instant controversy.

Petitioner testified that, as chairman of the Board's curriculum committee, he first became aware that the ECS report had been completed when he noted an invoice for services rendered by ECS among the Board's list of bills for May 1974. He stated that he requested a copy of the report and was provided one on May 25, 1974 by the Superintendent. (Tr. 1.32-35, 89) Petitioner testified that the principals of schools who could have profited from the report and its recommendations were not provided copies but that the report was intentionally suppressed. (Tr. 1.38, 44, 66) He testified further that he had reason to believe that the director of the Board's Title I program, hereinafter "director," was responsible for that suppression. Petitioner testified that he had been informed by ECS that the director had threatened to blemish the reputation of ECS and prevent its procurement of future contracts.

Petitioner testified that he recommended that the director be removed from the Title I program and that thorough investigation be conducted. He testified that, although the executive director of ECS appeared twice before the Board and the Board on various occasions discussed the matter and directed its Superintendent to make inquiries, he believed no appropriate independent investigation had been conducted. (Tr. 1.91, 95, 98)

The executive director of ECS testified that, at the conclusion of the reading component study, he had provided the director with twelve copies of his report. He stated that he later provided the Board's Assistant Superintendent with one copy, at his request, which action angered the director who proceeded to castigate

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him for releasing a copy to a person outside the Title I office. He stated that, when he inferred from those remarks that ECS would be "blackballed" from receiving further contracts, he wrote a series of four letters to the Board and in person emphasized the contents thereof to the Board at two meetings. (Tr. 2.13-24) Those letters dated May 23, 27, July 29, and November 11, 1974 state that ECS believed the Assistant Superintendent was authorized to receive an official report. (J-4, 5, 6, 7)

Those letters further related what was perceived as threats to the professional standing of ECS by the director and stated that, if such materialized, retaliatory legal action would result. The letters also stated, *inter alia*, that ECS had reason to believe the report was intentionally suppressed because of a statement of the director made upon its receipt as follows:

> "***[D]o you know what I am going to do with this? I am going to bury it—because if the Board sees this they will bury me.***" (J-4, at p. 3)

The Board moved to dismiss the Petition of Appeal at the conclusion of petitioner's case, which Motion was held in abeyance for disposition by the Commissioner.

The director testified that the study of the reading component was ordered with the express intent of finding out whether Title I reading teachers' effectiveness was being diminished by assignment of duties other than reading instruction in the Board's elementary schools, thus possibly weakening their effectiveness as reading teachers. He testified that he, two coordinators in the Title I program and the director of elementary education, after study of the report, concluded that Title I teachers were being used improperly for general duties and ordered corrective action. (Tr. 1.135-138)

The director testified that in addition to those officials and the Superintendent who had received the report, he provided petitioner, upon request, with a copy in both November 1973 and May 1974. (Tr. 1.137)

The director, while admitting that he expressed extreme displeasure at the fact that a copy of the report was provided to an office other than the Title I office, stated:

> "***I didn't threaten to blacklist him; that's not within my power.***" (Tr. 1.150)

The director testified that he also discussed the report with the Title I office of the Department of Education and the Assistant Superintendent and that:

> "***We used the material to begin a diagnostic remedial component in our following year program. We also used it to begin in-service training***. We also used it to *** insist that our reading teachers begin to work just with the Title I youngsters and not with all the youngsters in an elementary school.***" (Tr. 1.152)

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The director testified further that he is cautious about the release of such technical reports even to Board members without thorough explanation of their contents. In this regard he admitted stating to the executive director of ECS:

> "***'A Board Member not knowing what he was talking about, not understanding the situation, could bury us.' I did, in fact, use the word[s] 'bury us.'***" (Tr. 2.59)

While admitting that in a display of temper he had advised the executive director of ECS that he would notify others of what he perceived to be an unauthorized and unethical distribution of the report, the director stated that he had never in fact done so. (Tr. 2.64) He testified, however, that he had not recommended ECS to the Board after its complaining letters were sent to the Board. (Tr. 2.73-80) He averred that the contents thereof showed a lack of objectivity and stated that:

> "***the author of these letters had very obviously expressed preconceived opinions about the Title I Program. That defies all logic that the Director would ask someone who had preconceived notions***." (Tr. 2.73)

A member of the Board testified that the Board at numerous executive and official sessions entertained comments from the executive director, the Superintendent, petitioner, the director and others concerning the continuing controversy. The Board member testified that, after he had personally discussed the matter with the Superintendent, he impartially concluded as follows:

> "***I heard the allegations and the complaints so frequently and it hadn't been substantiated and I felt that further delay [of] the Board's regular business meeting was not warranted.***" (Tr. 2.135)

The hearing examiner, having carefully reviewed the pleadings and the testimony of witnesses and documents entered into evidence, makes the following findings of fact:

1. The director, in anger, spoke injudiciously, threatening to discredit ECS because of what he believed to be an unethical distribution of one copy of its report to a recipient other than the Board's Title I office which had authorized the report and received all other copies thereof. The director did not carry through on that threat but, following the letters of complaint from ECS, has since neither forwarded to ECS requests for proposals nor recommended that firm for consultative Title I contracts with the Board.

2. There is insufficient evidence in the record to resolve the conflicting testimony or to reach a conclusion as to whether petitioner received from the director a copy of the report in November 1973 with the numerous other reports which he had requested for other years. He was furnished one within the hour upon request in May 1974.

3. The report, predicated upon severely limited sampling techniques of

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hard data supplied by the schools was used for its limited intended purpose of strengthening the effectiveness of the Title I reading program. As such it was shared in timely fashion with the Title I coordinators, the director of elementary education and the Superintendent. That report was never intended to be a comprehensive evaluation of the total reading component of the Title I program, nor could it legitimately be used for that purpose.

4. The Board considered on numerous occasions the written and spoken allegations by petitioner and the executive director of ECS. Likewise on numerous occasions it considered the responses to those allegations by the director, the Superintendent and others. Although at no time, from May 1974 to the filing of the Petition of Appeal, did the Board order a formal independent investigation, consideration of the matter by the Board, its committees and its administrative staff consumed many hours. (J-8, 9, 13, 23; Tr. 1.85-86, 95-98, 147, 153; Tr. 2.20, 118-127, 130-152)

5. Although ECS has no existing contracts with the Board for consultative work, it was the recipient of contracts with the Board totaling approximately $71,000 from September 1973 through June 1976. (J-15, 16, 17, 18, 20, 21, 22, 29, 30, 33; Tr. 2.37)

In consideration of the above findings, the hearing examiner recommends that the Commissioner make the following determinations:

1. Petitioner has failed to present a preponderance of credible evidence that would support a conclusion that the Board abused its discretionary authority. The Board had given much attention to the matter over many months prior to its vote defeating petitioner's motion to order further investigation.

2. There was no deliberate suppression by the Board or its administrative staff of a report which from its inception was, in any event, intended only as a diagnostic tool to be used to secure full compliance with the valid principle enunciated in federal Title I regulations that Title I teachers should teach only pupils eligible to participate in the Title I program.

Petitioner is not entitled to the relief he seeks wherein he requests that the Board's action of January 23, 1975, be set aside and the Commissioner interpose his authority by conducting his own independent investigation. *Boult and Harris v. Board of Education of Passaic*, 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.&A.* 1948)

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the controverted matter and observes that no exceptions to the hearing examiner report were filed by either litigant, pursuant to the provisions of *N.J.A.C.* 6:24-1.17(b). The record supports the hearing examiner's findings which the Commissioner hereby adopts as his own.

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Members of local boards of education as individuals and as minority factions have on occasion appealed majority decisions of their boards before the Commissioner and the courts. In certain instances they have been successful in obtaining orders overturning those majority decisions. *Samuel E. Appel v. Board of Education of the City of Camden et al.*, 1975 *S.L.D.* 562; *Cullum v. Board of Education of North Bergen*, 15 *N.J.* 285 (1954); *Joseph G. and Irene R. Hudak v. Board of Education of the Township of East Brunswick*, 1971 *S.L.D.* 493 As was stated by the Commissioner in *George A. Ruch v. Board of Education of the Greater Egg Harbor Regional High School District*, 1968 *S.L.D.* 7:

> "***A board of education's discretionary authority is not unlimited, however, and it may not act in ways which are arbitrary, unreasonable, capricious or otherwise improper.***" (at 9)

In such instances, however, as in all matters before the Commissioner, the petitioning board member(s) must bear the burden of proof that the majority decision was contrary to law or improperly motivated. Herein, petitioner has failed to carry that burden of proof. Absent a sufficient quantity of credible evidence that the Board in any way abused its discretionary authority or acted contrary to statutory or constitutional requirement, it is determined that petitioner has failed to show entitlement to the relief which he seeks. Absent verification that its actions were illegal, the Board's review and determination are entitled to a presumption of correctness. *Boult, supra; Quinlan v. Board of Education of North Bergen Township*, 73 *N.J. Super.* 40 (*App. Div.* 1962); *Schinck v. Board of Education of Westwood Consolidated School District*, 60 *N.J. Super.* 448, 476 (*App. Div.* 1960); *Thomas v. Morris Township Board of Education*, 89 *N.J. Super.* 327 (*App. Div.* 1965), aff'd 46 *N.J.* 581 (1966); *Joseph J. Dignan v. Board of Education of the Rumson-Fair Haven Regional High School*, Docket No. A-444-74 New Jersey Superior Court, Appellate Division, October 10, 1975 (1975 *S.L.D.* 1083) Accordingly, the Petition of Appeal, herein, is found to be without merit and is dismissed.

COMMISSIONER OF EDUCATION

March 6, 1978

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**Louise Battle,**

***Petitioner,***

***v.***

**Board of Education of the City of Newark, Essex County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Oscar J. Miller, Esq.

For the Respondent, Pickett & Jennings (Gary H. Shapiro, Esq., of Counsel)

Petitioner is a teacher who was employed for the academic years 1974-75 and 1975-76 by the Board of Education of the City of Newark, hereinafter "Board," and was not reemployed for 1976-77. She prays for reinstatement alleging that her termination was arbitrary, capricious and improper because it was grounded upon biased unsatisfactory evaluations by her building principal. She further alleges that such biased evaluations are violative of her right to due process as embodied in the Fifth and Fourteenth Amendments to the United States Constitution.

The Board denies that any of petitioner's rights have been violated and has filed a Motion to Dismiss with accompanying Brief stating that petitioner has failed to state a claim upon which relief could be granted. Petitioner filed a Brief in opposition to the Motion with supporting addenda.

The salient facts are not in dispute except for petitioner's evaluations which she contends are arbitrary and capricious; therefore, the matter is ripe for Summary Judgment by the Commissioner of Education.

The litigants agree that petitioner was evaluated pursuant to *N.J.S.A.* 18A:27-3.1, 3.2 and 3.3 and was given timely notice and an informal appearance before the Board pursuant to *N.J.S.A.* 18A:27-10 *et seq.*, and the rules of the State Board of Education codified as *N.J.A.C.* 6:1.19 and 1.20.

Petitioner admits that she has been afforded all of her statutory and administrative protections; nevertheless, she states that a review of her 1975-76 evaluations, which she filed with the Commissioner, will disclose the bias exhibited by her principal particularly when compared to evaluations given her the year before by her vice-principal. (Conference Agreements; Petitioner's Brief)

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The record reveals that petitioner was not only evaluated by her building principal but also by two other school administrators. (Exhibits B, C, D, F, G, H)

There has been no showing by petitioner that her right to due process has been violated or that the Board has engaged in a subterfuge to preclude her employment for the 1976-77 academic year. Likewise, there is no showing that the Board's action was arbitrary or capricious. See *Donaldson v. Board of Education of the City of North Wildwood*, 65 *N.J.* 235 (1974) and *Barbara Hicks v. Board of Education of the Township of Pemberton*, 1975 *S.L.D.* 332.

When a teaching staff member alleges that a local board of education has refused reemployment for proscribed reasons (*i.e.* race, color, religion, etc.) or in violation of constitutional rights such as free speech, or that the board was arbitrary, capricious or abused its discretion, and is able to provide adequate detailed specific instances of such allegations, then the teaching staff member may file a Petition of Appeal before the Commissioner which will result in a full adversary proceeding. *Winston v. Board of Education of Borough of South Plainfield*, 125 *N.J. Super.* 131 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974)

In *Winston, supra*, the Court stated that:

> "***It may be acknowledged that the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions. *Cf. Trap Rock Industries, Inc. v. Kohl*, 63 *N.J.* 1 (1973).***" (125 *N.J. Super.* at 144)

In the judgment of the Commissioner, the record does not support petitioner's contention that her termination was based on proscribed reasons, nor has she shown that her due process rights have been violated.

In *Donaldson, supra*, the Court cited *George Ruch v. Board of Education of Greater Egg Harbor*, 1968 *S.L.D.* 7, dis. State Board of Education 11, aff'd New Jersey Superior Court, Appellate Division, 1969 *S.L.D.* 202 in support of an argument that "***the fears of tenure impairment and undue burden expressed by those who have thus far insisted on the withholding of reasons***" was an indication of how negligible such fears were. (65 *N.J.* at 248) In *Ruch*, as in the matter herein, the Commissioner and the Court were concerned with a subjective judgment made by a local board of education. Likewise, reasons for non-retention had been afforded a nontenured teacher and an adversary hearing was requested to disprove their validity. The Commissioner, however, found no reason in *Ruch* to order an adversary hearing and said:

> "***The fact that respondent made available to petitioner the report of his supervisor which was adverse to petitioner's interest, does not open the door automatically to a plenary hearing on the validity of the 'reasons' for nonrenewal of employment. To hold that every employee of a school district, whose employment is not continued until he acquires tenure status,

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> is automatically entitled to an adversary type hearing, such as petitioner demands, would vitiate the discretionary authority of the board of education and would create insurmountable problems in the administration of the schools. It would also render meaningless the Teacher Tenure Act for the reason that the protections afforded thereby would be available to employees who had not yet qualified for such status.***'' (1968 *S.L.D.* at 10)

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

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

In the instant matter, petitioner is not satisfied with the evaluations made by her principal. As stated earlier there are other administrative evaluations and they also are negative. Petitioner did not mention these additional evaluations.

The Commissioner finds that petitioner has been afforded all her rights to due process and that the Board has met its responsibility to give her notice, reasons for non-reemployment and an informal appearance as the statutes and State Board rules demand.

The Commissioner determines, therefore, that petitioner has failed to state a claim upon which relief can be granted. The Petition of Appeal is accordingly dismissed.

COMMISSIONER OF EDUCATION

March 6, 1978

You are viewing an archived copy from the New Jersey State Library.

**Board of Education of the Town of Belleville,**

***Petitioner,***

*v.*

**Mayor and Board of Commissioners of the Town of Belleville, Essex County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Gaccione & Pomaco (Frank Pomaco, Esq., of Counsel)

For the Respondent, John R. Scott, Esq.

Petitioner, the Board of Education of the Town of Belleville, hereinafter "Board," appeals from an action of the Mayor and Board of Commissioners of the Town of Belleville, hereinafter "Commissioners," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Essex County Board of Taxation a lesser amount of appropriations for school purposes for the 1977-78 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on December 14, 1977 at the office of the Union County Superintendent of Schools, Westfield, before a hearing examiner appointed by the Commissioner of Education. Briefs were filed after the hearing. The report of the hearing examiner follows:

At the annual school election held March 29, 1977, the Board submitted to the electorate proposals to raise $6,529,266 by local taxation for current expense and $197,011 for capital outlay costs of the school district. These items were rejected by the voters and, subsequent to the rejection, the Board submitted its budget to the Commissioners for their determination of the amounts necessary for the operation of a thorough and efficient school system in Belleville for the 1977-78 school year, pursuant to the mandatory obligation imposed on the Commissioners by *N.J.S.A.* 18A:22-37.

After consultation with the Board, the Commissioners certified to the Essex County Board of Taxation an amount of $6,342,696 for the current expense costs and $127,581 for capital outlay. The pertinent amounts in dispute are shown as follows:

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| | CURRENT EXPENSE | CAPITAL OUTLAY |
|---|---|---|
| Board's Proposal | $6,529,266 | $197,011 |
| Commissioners' Proposal | 6,342,696 | 127,581 |
| Amount Reduced | $ 186,570 | $ 69,430 |

In their Answer and Brief, the Commissioners assert that they certified an amount necessary to operate a thorough and efficient system of schools in Belleville after being notified by the Board president that the majority of the Board had agreed to the amount so certified. The Commissioners argue, therefore, that the Board is now estopped from appealing its decision to the Commissioner. (Tr. 4-5, 24-26) The Commissioners submit in evidence a copy of their resolution in that regard which is reproduced in part as follows:

***

"BE IT FURTHER RESOLVED, that by unanimous decision of the Board of Commissioners and the majority vote of the Board of Education that there will be no appeals taken from these cuts.

"NOW, THEREFORE, BE IT RESOLVED, that a copy of this resolution be immediately forwarded to the said Essex County Board of Taxation by [the] town clerk." (Exhibit A)

The Board concedes that it met with the Commissioners after its budget was rejected and that subsequent to that meeting the Board president polled the Board members individually and notified the Commissioners that a majority of the Board agreed with the proposed reduction of its budget. The Board concedes, also, that the Commissioners acted in good faith. (Tr. 6-7, 23)

The Board argues, however, that it conducted no formal meeting, nor did it pass any resolution that an appeal would not be taken, and that its appeal was made in a timely manner pursuant to *N.J.S.A.* 18A:22-37. (Tr. 5-6, 26; Board's Brief, at pp. 1-2) Neither does the Commissioners' resolution, *ante*, bar its appeal, argues the Board.

The Board president, although advised that a telephone poll of Board members was not proper, nevertheless conducted a telephone poll, and the vote of the seven member board to appeal to the Commissioner was 4 to 3. (Tr. 19-22) The instant dispute arises from a misunderstanding between the Board president and one of the Board members polled while away on a business trip, as to whether or not that member agreed to the Commissioners' proposed cuts. (Tr. 19-22)

The hearing examiner finds that a president of a board of education has no special powers pursuant to Title 18A, Education, and that he clearly lacked authority to represent to the Commissioners any position of the Board without first conducting a proper public meeting to determine the Board's sentiment regarding the proposed budget reduction. (*N.J.S.A.* 18A:22-37; *N.J.S.A.* 18A:11-1)

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It is conceded that the Commissioners acted in good faith and believed they had reached a settlement with the Board. The hearing examiner believes it is fair to assume that both sides retreated a degree from previously held positions in reaching this alleged settlement. If this assumption is correct, it is fair to conclude that had the Commissioners not understood that a settlement had been reached, their budget reduction might have been greater. Assuming that conclusion to be a fact, and if the Commissioners' estoppel argument is denied, it is only fair to direct another meeting between the Board and the Commissioners to set the school budget for 1977-78 commensurate with the full statutory prescription as set forth in *N.J.S.A.* 18A:22-37 and the guiding principles set forth by the Court in *Board of Education of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966) wherein the Court stated as follows:

> "***The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons.***"
>
> (at 105-106)

The Court also defined the functions of the Commissioner, when, after the governing body has made its determinations, the Board appeals from such actions:

> "***[T]he Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R.S.* 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness.***"
>
> (at 107)

The hearing examiner finds that the estoppel argument advanced by the Commissioners is persuasive. Their action was not arbitrary, nor was a detailed statement necessary because they had good reason to believe a settlement had been reached. They acted in good faith and were so induced to act by the conduct

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of the Board as represented by the Board president. In *Summer Cottagers' Ass'n of Cape May v. City of Cape May*, 19 *N.J.* 493 (1955), the Court commented as follows:

> "***The essential principle of the policy of estoppel here invoked is that one may, by voluntary conduct, be precluded from taking a course of action that would work injustice and wrong to one who with good reason and in good faith has relied upon such conduct. *** The doing or forbearing to do an act induced by the conduct of another may work an estoppel to avoid wrong or injury ensuing from reasonable reliance upon such conduct. The repudiation of one's act done or position assumed is not permissible where that course would work injustice to another who, having the right to do so, has relied thereon. *New Jersey Suburban Water Co. v. Harrison*, 122 *N.J.L.* 189 (*E&A*. 1939). An estoppel arises 'where a man is concluded and forbidden by law to speak against his own act or deed; yea, even though it is to say the truth.' *Termes de la Ley*, title *Estoppel*.***"
>
> (at 503-504)

In *Skulski et al. v. Nolan*, 68 *N.J.* 179 (1975) the Court stated the following:

> "***The foregoing should serve to illustrate that even with respect to public entities, equitable considerations are relevant in evaluating the propriety of conduct taken after substantial reliance by those whose interests are affected by subsequent actions.***" (at 198)

In good faith, the Commissioners relied on the representation of the Board president. To direct them now to make line item reductions with supporting reasons, as the Board demands, would unfairly compromise their position.

For these reasons, the hearing examiner finds and recommends that the Board is estopped from appealing its budget reduction and he recommends that the Petition of Appeal be dismissed.

If the Commissioner does not accept the hearing examiner's aforementioned recommendations, a review of the Board's free balances is in order.

Because there were no recommended economies by budget line item, agreement was reached to await the completion of the annual audit report so that the Board's free appropriations balances could be reviewed. (Conference Agreements, August 31, 1977) That audit report was not available until the day of the hearing, December 14, 1977.

A review of the annual audit report discloses that a sum of $507,640.97 is available for several accounts. (A-1, A-2, Audit of Accounts, 1976-77) The Board secretary testified that several expenditures had been planned from this balance so that the actual free appropriations balance in current expenses is only $212,790.08.

In *Board of Education of the Town of Nutley v. Mayor and Commissioners*

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*of the Town of Nutley, Essex County*, 1978 *S.L.D.* (decided January 13, 1978) the Commissioner quoted as follows a court decision, *Board of Education of the Borough of Fair Lawn v. Mayor and Council of the Borough of Fair Lawn, 143 N.J. Super.* 259 (*Law Div.* 1976), concerning the practice of committing free appropriations balances:

> "***Patently, the whole purpose of the board's maintenance of a surplus would be defeated if it were required to be expended for regularly budgeted and appropriated purposes. It is thus clear that surplus funds, not being legally available for regular budgeted expenses, could hardly be compelled by the municipality to be used to offset anticipated regular expenditures for purposes of the *N.J.S.A.* 54:4-75 requisition.***" (at 273)

Even after its proposed expenditures of free balances, the Board will have a current expense free appropriations balance of $212,790.08. The hearing examiner finds that there are sufficient funds available to operate the schools of the district for the 1977-78 school year; therefore, he recommends that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and has been advised that the litigants have waived their privilege to file exceptions thereto pursuant to *N.J.A.C.* 6:24-1.17(b). The Commissioner said in *Board of Education of the Township of Madison v. Mayor and Council of the Township of Madison*, 1968 *S.L.D.* 139:

> "***The problem is one of total revenues available to meet the demands of a school system***." (at 142)

It is apparent from the auditor's report, as set forth, and the transcript (Tr. 28-29) that there are sufficient funds available to meet the demands required to operate a thorough and efficient system of public schools in the Town of Belleville for the 1977-78 school year.

Having made this determination the Commissioner finds it unnecessary to reach any conclusion regarding the argument of estoppel.

For these reasons the budget will stand as certified to the Essex County Board of Taxation and the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

March 6, 1978

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**Education Association of Paramus,**

***Petitioner,***

*v.*

**Board of Education of the Borough of Paramus, Bergen County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## CONSENT ORDER

This matter having been opened to the Commissioner of Education by the filing of a Petition by the Education Association of Paramus, and the parties having heretofore agreed, as set forth more fully in the Transcript of Proceedings held on June 16, 1977 before Hearing Officer Daniel B. McKeown, that the issues raised by the within Petition are, in certain relevant respects, similar to certain of the issues raised in a Petition pending before the Commissioner of Education, in the case of *Joan Scrupski and Laura Soden v. Board of Education of the Township of Warren*, 1977 *S.L.D.* and the parties having heretofore further agreed that within a two-week period subsequent to the determination of the Commissioner of Education with respect to the *Scrupski* matter the parties will arrive at a Stipulation of Fact upon which a Consent Order would be executed between the parties and filed with the Commissioner of Education for approval, and the Commissioner of Education having rendered a determination with respect to the *Scrupski* matter, and counsel for the parties hereto having conferred as to the preparation of a Consent Order containing appropriate relief consistent with the Commissioner's holding in *Scrupski*, and the parties hereto having reached agreement as to the resolution of all issues of the within matter, and good cause having been shown,

IT IS, on this 8th day of March 1978

ORDERED that Respondent Paramus Board of Education shall take such steps as are necessary, including the adoption of a Resolution adopted by majority vote of the Respondent Paramus Board of Education, to abolish the position of nurses' aide, which position shall be abolished no later than January 13, 1978; and

IT IS FURTHER ORDERED that, upon the adoption of the Resolution abolishing the position of nurses' aide, Respondent Paramus Board of Education shall cause its Director of Personnel to serve notice upon Virginia Latchford, the employee holding the position of nurses' aide, of the abolishment of said nurses' aide position as of January 13, 1978 and of the termination of her employment as of said date; and

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IT IS FURTHER ORDERED that the entry of the within Consent Order shall not be construed to prohibit Respondent Paramus Board of Education from creating, in the future, such aide positions as it may deem necessary and appropriate, so long as the creation of any such aide positions is consistent with applicable law and State Department of Education rules and regulations.

COMMISSIONER OF EDUCATION

**Stanley A. Szymanski and South River Education Association,**

***Petitioners,***

***v.***

**Board of Education of the Borough of South River, Middlesex County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

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

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

Petitioner Szymanski, formerly employed by the Board of Education of South River, hereinafter "Board," alleges that the reasons afforded him by the Board for his non-reemployment are false. Petitioner prays for immediate reinstatement to his former position of employment with all back pay and emoluments otherwise withheld from him. The Board denies the allegations and moves for dismissal of the matter for failure of petitioner to state a cause of action upon which relief could be granted. In the alternative, the Board seeks dismissal on the grounds that petitioner is guilty of laches and that he failed to exhaust his remedies at the local level. Petitioner opposes the Board's Motion to Dismiss.

The matter is referred directly to the Commissioner of Education for adjudication on the record, including the pleadings, exhibits, letter memoranda and Briefs of counsel. The salient facts of the matter are these:

Petitioner was first employed by the Board between April and June 1974.

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Thereafter, he was regularly employed by the Board as a teaching staff member for the 1974-75 and 1975-76 academic years.

The Board notified petitioner by letter dated April 13, 1976 that he would not be offered employment for the 1976-77 academic year because of a decrease in pupil enrollment. (J-1) Petitioner submitted a written request to the Board on April 19, 1977 for a statement of specific reasons for its determination not to reemploy him for the following year. (J-2) The Superintendent advised petitioner by letter dated May 18, 1976 that the specific reasons for his non-reemployment were as follows:

***

"1. Failure to respond satisfactorily to suggestions made to improve planning to insure full use of class time.

"2. Failure to respond satisfactorily to improve classroom order, structure and organization.

"3. Failure to respond satisfactorily to suggestions to give greater attention to punctuality.

"4. Failure to follow through on repeated promises to be diligent.

"5. Decline in pupil enrollment." (J-3)

Petitioner did not request the Board to grant him an informal appearance before it to establish that it erred in not reemploying him based on the five stated reasons. Rather, petitioner filed the instant Petition of Appeal on June 29, 1976.

Petitioner grounds his allegation that the five stated reasons are not the real reasons for his non-reemployment on the fact that a vice-principal, who had been employed by the Board as a teaching staff member for twenty-one years and a vice-principal for two years, desired to return to the classroom. Petitioner maintains there was no decrease in pupil enrollment.

The Superintendent attests that the decrease in pupil enrollment was caused by the withdrawal from the Spotswood School District of pupils who had been attending the South River Schools on a sending-receiving basis.

The Commissioner observes that *In the Matter of the Application of the Board of Education of the Borough of South River for the Termination of the Sending-Receiving Relationship with the School District of Spotswood*, 1975 *S.L.D.* 787 confirms the fact that the sending-receiving relationship between these two school districts would commence to be terminated during the 1975-76 school year and be effectively concluded at the close of the 1976-77 school year. Consequently, a decrease in pupil enrollment in the South River School System did occur. The Commissioner so holds.

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The Superintendent attests that he and the principal of the school to which petitioner had been assigned discussed with petitioner the deficiencies observed in his teaching performance. These deficiencies are articulated in the first four reasons for non-reemployment in the statement afforded petitioner on May 18, 1976, *ante*.

The Superintendent attests that the vice-principal did return to teaching and did assume the position formerly held by petitioner. This necessitated the reduction of one teaching staff member. The Superintendent attests, however, that independent of the vice-principal's return to teaching duties, petitioner was not going to be continued in employment for the other four reasons.

Petitioner submitted copies of six evaluations of his teaching performance in support of his opposition to the Board's Motion to Dismiss. (C-1, 2, 3, 4, 6) The Commissioner finds no inconsistency between the statement of reasons afforded petitioner and the recommendations set forth therein. It is obvious that petitioner's teaching performance did cause concern to the principal and the Superintendent.

The Commissioner has thoroughly reviewed the record herein and finds no basis upon which the matter should proceed. The Board gave proper notification of petitioner's non-reemployment prior to April 30. *N.J.S.A.* 18A:27-10 The Board also provided its reasons simultaneously. Thereafter, petitioner requested a more detailed statement of reasons which was subsequently provided by the Board. Petitioner failed to take the next step afforded him by law which was to seek an informal appearance before the Board.

In the instant matter, the Board fully complied with the statutory requirements set forth in *N.J.S.A.* 18A:27-10 *et seq.*, as well as complying with all procedural directives of the New Jersey Supreme Court in *Donaldson v. Board of Education of North Wildwood*, 65 *N.J.* 236 (1974) and *Barbara Hicks v. Board of Education of the Township of Pemberton*, 1975 *S.L.D.* 322.

The Commissioner finds and determines that petitioner has failed to state a cause of action upon which relief could be granted.

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

March 8, 1978

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**In the Matter of the Annual School Election Held in the School District of the Sussex County Vocational School, Sussex County.**

## COMMISSIONER OF EDUCATION

## DECISION

The announced results of the balloting for three seats on the Board of Education of the Vocational School in the County of Sussex for terms of one year each at the annual school election held on February 14, 1978 were as follows:

| | *AT POLLS* | *ABSENTEE* | *TOTAL* |
|---|---|---|---|
| William M. Cox | 1933 | 29 | 1962 |
| George H. Barlow | 1429 | 18 | 1447 |
| John McCann | 1218 | 22 | 1240 |
| Mary Gail Menzel | 1223 | 13 | 1236 |
| J. Herbert Schaeffer | 977 | 10 | 987 |
| Edward J. Muller, Jr. | 971 | 6 | 977 |
| Robert R. Lane | 809 | 6 | 815 |
| Joseph G. Schiro | 770 | 10 | 780 |

In addition there were fifteen candidates who each received one write-in vote.

A total of 4581 ballots were counted and three ballots were voided.

Pursuant to a letter request dated February 17, 1978, from Candidate Mary Gail Menzel, the Commissioner of Education directed that a recount of the votes cast at the polling places in Sussex County be conducted. The recount was conducted by an authorized representative of the Commissioner on March 2, 1978 at the Department of Education office in Sussex County and on March 3, 1978 at the State Department of Education in Trenton. The recount was confined to a check of votes cast for Candidates McCann and Menzel, who received 1240 and 1236 votes respectively.

The Commissioner's representative found that in eleven of the thirty polling places there were defective ballots which could not be counted for one or both of the candidates.

At the conclusion of the recount with none of the ballots having been contested the tally of the ballots was as follows:

| | *AT POLLS* | *ABSENTEE* | *TOTAL* |
|---|---|---|---|
| John McCann | 1218 | 22 | 1240 |
| Mary Gail Menzel | 1215 | 13 | 1228 |

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Accordingly, the Commissioner's representative finds that while the results of the recount for the above candidates reflect some change from that originally announced at the annual school election on February 14, 1978, such results do not alter the final outcome of the balloting for these seats on the Board.

In conclusion, the Commissioner's representative finds that William M. Cox, George H. Barlow and John McCann have been elected to full terms of one year each on the Board of Education of the Sussex County Vocational School.

* * * *

The Commissioner has reviewed the report of his representative pertaining to the recount of the ballots of the annual school election held in the school district of the Sussex County Vocational School held on February 14, 1978 and concurs with the findings therein. Accordingly, the Commissioner determines that William M. Cox, George H. Barlow and John McCann have been elected to full terms of one year each on the Board of Education of the Sussex County Vocational School.

COMMISSIONER OF EDUCATION

March 14, 1978

**In the Matter of the Annual School Election Held in the Constituent District of Freehold Township, Freehold Regional High School District, Monmouth County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

The announced results of the balloting for one member of the Board of Education of the Freehold Regional High School District for a full term of three years at the annual school election held on February 21, 1978 in the constituent district of the Township of Freehold were as follows:

*For Three-Year Term*

| | *At Polls* | *Absentee* | *Total* |
|---|---|---|---|
| Louis Goselin | 88 | 4 | 92 |
| Edward McCloskey | 85 | 7 | 92 |

Pursuant to *N.J.S.A.* 18A:12-15 the Commissioner of Education directed

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that the ballots cast on the four voting machines used in the election be recounted. The recount was conducted on March 1, 1978 at the warehouse of the Monmouth County Board of Elections, Freehold, by an authorized representative of the Commissioner.

At the conclusion of the recount it was determined that the announced results were true, in fact, and that the ballots cast had resulted in a tie vote for Candidates Louis Goselin and Edward McCloskey.

The Commissioner determines that, in the instant matter, the Board of Education of the Freehold Regional High School District shall conduct a special election, restricted to Candidates Goselin and McCloskey, within sixty days of the annual school election held on February 21, 1978, pursuant to *N.J.S.A.* 18A:12-15.

Accordingly, the Commissioner orders the Board Secretary of the Freehold Regional High School District to immediately advertise such notices for the special election to be held on or before April 24, 1978.

COMMISSIONER OF EDUCATION

March 16, 1978

**In the Matter of the Annual School Election Held in the School District of the Borough of Victory Gardens, Morris County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

The announced results of the voting for one seat on the Board of Education of the Borough of Victory Gardens for a full term of three years at the annual school election held on February 14, 1978 were as follows:

| | *At Polls* | *Absentee* | *Total* |
|---|---|---|---|
| Jesse Adams | 14 | -0- | 14 |
| Betty Owens | 14 | -0- | 14 |
| Ann Phillips | 1 | -0- | 1 |

A total of 30 ballots were cast at the polls with no ballots voided. A total of 29 votes were cast for candidates.

Pursuant to *N.J.S.A.* 18A:12-15 the Commissioner of Education directed that the ballots cast at the Borough of Victory Gardens polling place be recounted.

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The recount was conducted on March 1, 1978 by an authorized representative of the Commissioner at the Department of Education office in Morris County.

At the conclusion of the recount of the uncontested ballots the tally for the three above named candidates stood as follows:

| | *Uncontested* | *Absentee* | *Total* |
|---|---|---|---|
| Jesse Adams | 14 | -0- | 14 |
| Betty Owens | 13 | -0- | 13 |
| Ann Phillips | 1 | -0- | 1 |

One ballot was marked as an Exhibit and reserved for the Commissioner's determination. This concludes the report of the Commissioner's representative.

The Commissioner has reviewed the report of his representative and has examined the ballot referred to him for final determination.

He observes that the ballot marked Exhibit A contains a write-in vote for Candidate Owens written as "B. Owens" and the Commissioner determines that this contested ballot be counted for Candidate Betty Owens. In arriving at this determination, the Commissioner relies upon *In re: Fifteen Registered Voters County of Sussex*, 129 *N.J. Super.* 296 (*App. Div.* 1974) wherein the Court held:

> "***A number of earlier cases dealing with the absence or abridgement of given names need no longer be considered in view of the enactment of *L.* 1930, *c.* 187, para. 205, to be found now in *N.J.S.A.* 19:16-4 in which the following appears:
>
> > 'No ballot cast for any candidate shall be invalid by reason of the fact that the name of such candidate may be misprinted, or his Christian name or his initials may be omitted.
> >
> > 'No ballot cast for any candidate shall be invalid by reason of the use of any paster permitted by this Title on which the title of office may be printed or the name of such candidate may be misprinted or part of his Christian or surname or initials may be omitted, or because the voter in writing the name of such candidate may misspell the name or omit part of his Christian name or surname or initials.'
>
> Clearly, the Legislature has mandated a search for the real intention of the voter no matter how crudely it is expressed, provided only, of course, that there is a reasonable expression of that intent on the ballot. *** As related above, we do not equate the casual vote—or even four—with candidacy. We are of the opinion that the record supports the conclusion that there was only one candidate named Wright—Harry Wright—and that any other conclusion is unsupported by the record.***" (at 300-301)

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When the ballot, Exhibit A, is added to the recount total as set forth above, the results are as follows:

| | *Uncontested* | *Exhibit A* | *Total* |
|---|---|---|---|
| Jesse Adams | 14 | | 14 |
| Betty Owens | 13 | 1 | 14 |
| Ann Phillips | 1 | | 1 |

The Commissioner finds and determines that the balloting has resulted in a tie vote for Candidates Jesse Adams and Betty Owens.

The Commissioner further determines that the Board of Education of the Borough of Victory Gardens shall conduct a special election, restricted to Candidates Adams and Owens, within sixty days of the annual school election held on February 14, 1978, pursuant to *N.J.S.A.* 18A:12-15 as amended by *c.* 324, *L.* 1977, effective January 10, 1978.

Accordingly, the Commissioner orders the Board Secretary of the Board of Education of the Borough of Victory Gardens to immediately advertise such notices for the special election to be held on or before April 17, 1978.

COMMISSIONER OF EDUCATION

March 16, 1978

**In the Matter of the Annual School Election Held in the Constituent District of Atlantic Highlands Borough, Henry Hudson Regional School District, Monmouth County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

The announced results of the balloting for two members of the Board of Education of the Henry Hudson Regional School District for full terms of three years each at the annual school election held on February 21, 1978 in the constituent district of the Borough of Atlantic Highlands were as follows:

| *For Three-Year Terms* | *At Polls* | *Absentee* | *Total* |
|---|---|---|---|
| Louis V. Papa, Jr. | 231 | 9 | 240 |
| Eugene J. Bannon | 199 | 19 | 218 |

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| | | | |
|---|---|---|---|
| Margaret Scales | 199 | 19 | 218 |
| Janice Hogan (write-in) | 145 | 6 | 151 |

Pursuant to *N.J.S.A.* 18A:12-15 the Commissioner of Education directed that the ballots cast for Candidates Bannon and Scales on the two voting machines used in the election be recounted. The recount was conducted on March 1, 1978 at the warehouse of the Monmouth County Board of Elections, Freehold, by an authorized representative of the Commissioner.

At the conclusion of the recount it was determined that the announced results were true, in fact, and that the ballots cast had resulted in a tie vote for Candidates Eugene J. Bannon and Margaret Scales.

Prior to the recount of the ballots, Candidate Bannon filed a letter on February 27, 1978 with the Commissioner stating that he fully understood the provisions of *N.J.S.A.* 18A:12-15 and with that knowledge waived all rights to membership on the Henry Hudson Regional Board of Education and relinquished any claim, presently or in the future, to this position in favor of Candidate Margaret Scales.

The Commissioner determines, therefore, that a second election as provided by *N.J.S.A.* 18A:12-15 is not necessary. Accordingly, he determines that Louis V. Papa, Jr. and Margaret Scales were elected to full terms of three years each on the Board of Education of the Henry Hudson Regional School District.

COMMISSIONER OF EDUCATION

March 16, 1978

**In the Matter of the Petition of the Township of Egg Harbor for Withdrawal from the Greater Egg Harbor Regional High School District, Atlantic County.**

**DECISION OF THE BOARD OF REVIEW**

For the Petitioner, Perone and Perone (A. Ralph Perone, Esq., of Counsel)

For the Respondent Greater Egg Harbor Regional Board of Education, Champion and Champion (Edward W. Champion, Esq., of Counsel)

For the Respondent Egg Harbor City Board of Education, Kears and Gronlund (Glenn R. Gronlund, Esq., of Counsel)

For the Respondent Egg Harbor City, Patrick McGahn, Esq.

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For the Respondent Galloway Township Board of Education, Feinberg, Lashman & Kupperman (Shelly B. Lashman, Esq., of Counsel)

Petitioner, the Board of Education of the Township of Egg Harbor, hereinafter "Township Board," has filed an application pursuant to law (*N.J.S.A.* 18A:13-51 *et seq.*) with the Commissioner of Education and the Board of Review for permission to submit to the legal voters of the Township and the remaining constituent school districts within the Greater Egg Harbor Regional High School District, hereinafter "Regional District," the question whether the Township Board shall be permitted to withdraw from the Regional District. The Board of Education of the Regional District and the Board of Education of Egg Harbor City oppose the application for withdrawal citing disadvantages to their respective school districts and factors which they aver are unknown to any of the concerned parties. The Board of Education of Galloway Township neither favors nor disapproves of the proposed withdrawal application. Mullica Township Board of Education did not offer an official position.

The Petition for withdrawal considered herein is presented directly to the Commissioner, the State Treasurer and the Director of the Division of Local Government Services, who comprise the Board of Review, in the manner set forth in *N.J.S.A.* 18A:13-56 on the pleadings, a report of the Atlantic County Superintendent of Schools and the record of a hearing conducted on September 2, 1977 in the office of the Atlantic County Superintendent of Schools, Mays Landing. The hearing was held pursuant to a request by the Board of Education of Egg Harbor City and was conducted by representatives of the Commissioner, the State Treasurer and the Director of the Division of Local Government Services. Additional information was requested from the parties by the Board of Review subsequent to the hearing.

The findings and determination of the Board of Review are set forth, *post,* within the limits of the criteria of the applicable statute, *N.J.S.A.* 18A:13-56, which states:

> "***The board of review shall consider the effect of the proposed withdrawal upon the educational and financial condition of the withdrawing and the remaining districts and shall schedule and hold a public hearing on the petition upon the application of any interested party. In considering the effect of the proposed withdrawal upon the educational and financial condition of the withdrawing and remaining districts the board of review shall:
>
> a. Consent to the granting of the application; or
>
> b. Oppose the same because, if the same be granted—
>
> 1. An excessive debt burden will be imposed upon the remaining districts, or the withdrawing district;
>
> 2. An efficient school system cannot be maintained in the remaining districts or the withdrawing district without excessive costs;

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3. Insufficient pupils will be left in the remaining districts to maintain a properly graded school system; or

4. Any other reason, which it may deem to be sufficient; or

c. Request that if the petition be granted, the amount of debt which the remaining districts would be required to assume, calculated as hereinbefore provided, be reduced for the reason that—

1. Such amount of indebtedness, together with all other indebtedness of the municipalities or school districts would be excessive;

2. The amount of expenditure for debt service which would be required would be so great that sufficient funds would not be available for current expenses without excessive taxation; or

3. Such amount of indebtedness is inequitable in relation to the value of the property to be acquired by the remaining districts and would materially impair the credit of the municipalities or such districts and the ability to pay punctually the principal and interest of their debt and to supply such essential educational facilities and public improvements and services as might reasonably be anticipated would be required of them.

"The board of review shall make its findings and determination, by the recorded vote of at least two of the three members of the board, within 60 days of the receipt of the petition and answers."

The findings and determination herein have been delayed pending receipt of the additional information requested from the interested parties subsequent to the hearing.

The Regional District is comprised of five constituent districts as a Type II limited purpose regional high school district for the provision of educational programs in grades nine through twelve. The Regional District is presently operating two approved high schools, in one building; they are Absegami and Oakcrest. One high school attends in the morning and the other in the afternoon. The high school building is located in Hamilton Township which will remain contiguous to the remaining districts if the Township withdraws.

The five constituent districts comprise the largest school district in area in the State of New Jersey, 339.15 square miles. The districts and their respective areas are shown below:[1]

| *Constituent Districts* | *Area (square miles)* |
|---|---|
| Egg Harbor City | 11.09 |
| Egg Harbor Township | 66.54 |
| Galloway Township | 91.75 |

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| | |
|---|---|
| Hamilton Township | 115.05 |
| Mullica Township | 54.72 |
| Total | 339.15 |

If Egg Harbor Township withdraws with its area of 66.54 square miles, the remaining districts would total 272.61 square miles. The number of school buildings owned by the regional and constituent districts are:

| | *Building(s)* | *Grades* |
|---|---|---|
| Greater Egg Harbor Regional | 1 | 9-12 |
| Egg Harbor City | 2 | K-8 |
| Egg Harbor Township | 10 | K-8 |
| Galloway Township | 6 | K-8 |
| Hamilton Township | 4 | K-8 |
| Mullica Township | 3 | K-8 |

The regional district is located in the central area of Atlantic County bordered on the north by Port Republic and Burlington County, on the west by the communities of Hammonton, Folsom, and Buena Vista, on the south by the communities of Weymouth and Estell Manor, and on the east by Brigantine, Absecon, Pleasantville, Northfield, Linwood, and Somers Point. Atlantic County Community College and Stockton State College are found within the area serving the regional district and the Atlantic County Vocational School is located in the district. Four major highways cross the regional district: the White Horse Pike, Black Horse Pike, Atlantic City Expressway, and the Garden State Parkway. The area within the Regional District is for the greater part pinelands, orchards, vineyards, and truck farms. A major portion of the area is undeveloped.

The record shows that the Township is rapidly changing from a rural area to a suburban community due partially to an excellent highway system, the movement of population from urban areas, the expansion of the Naval Aviation Facility Experimental Center which has created an out-of-State influx of new residents and the proximity of shore resorts. The Township has land available for development and it anticipates rapid growth in population.

*Population of the Constituent Districts*[2]

| | *1960* | *1970* | *1971* | *1972* | *1973* | *1974* | *1975* | *Provisional 1976* |
|---|---|---|---|---|---|---|---|---|
| Egg Harbor City | 4,416 | 4,304 | 4,410 | 4,415 | 4,435 | 4,440 | 4,455 | 4,470 |
| Egg Harbor Twp. | 5,593 | 9,882 | 10,625 | 11,265 | 11,780 | 12,230 | 12,470 | 12,680 |
| Galloway Twp. | 5,634 | 8,276 | 8,380 | 8,470 | 9,535 | 9,645 | 9,725 | 9,795 |
| Hamilton Twp. | 6,107 | 6,445 | 6,760 | 6,865 | 7,405 | 7,670 | 7,740 | 7,760 |
| Mullica Twp. | 2,944 | 3,391 | 3,435 | 3,475 | 3,510 | 3,540 | 3,555 | 3,595 |

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Comparison of the population growth of the various constituent districts shows the following:

| | *1960* | *1970* | *1975* | *1976* | *Percentage of Growth 1960/76* |
|---|---|---|---|---|---|
| Egg Harbor Twp. | 5,593 | 9,882 | 12,470 | 12,680 | 126.7% |
| Remaining Districts | 19,011 | 22,416 | 25,475 | 25,620 | 34.8% |

The record reveals that the Regional District had a combined pupil enrollment of 3145 as of October 1976. Of this total, 2994 pupils are from constituent districts, the remaining are pupils received from Washington Township, Burlington County and out-of-district vocational school pupils.

*Prior Enrollments of the Regional District*

| | *Total Enrollment* | *Constituents Only* |
|---|---|---|
| 1974-75 | 2914 | 2594 |
| 1975-76 | 3083 | 2735 |
| 1976-77 | 3145 | 2994 |

The table above reveals an increase of seven percent for the total enrollment between the 1974-75 school year and the present. A comparable increase of thirteen percent is shown for the constituent districts.

Enrollment projections for five years for the Regional District, the Township, and the remaining constituents follow:

*Greater Egg Harbor Regional High School*

| *Class of* | *Present Grade* | *Present Enrollment* | *As Compared to Class of 1975* | *Diff. + or −* | *% Change* |
|---|---|---|---|---|---|
| 1977 | 12 | 572 | 569 | + 3 | + .5% |
| 1978 | 11 | 723 | 580 | +143 | +19.7% |
| 1979 | 10 | 798 | 661 | +137 | +17.1% |
| 1980 | 9 | 896 | 784 | +112 | +12.5% |
| 1981 | 8 | 760 | 783 | − 23 | − 3.0% |
| 1982 | 7 | 832 | 849 | − 17 | − 2.0% |

As can be seen, enrollments should increase for the next four years until a leveling takes place. This is based upon actual enrollments without consideration of any drastic changes in the various district population totals.

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*Egg Harbor Township*

| *Class of* | *Present Grade* | *Present Enrollment* | *As Compared to Class of 1975* | *Diff. & + or −* | *Change* |
|---|---|---|---|---|---|
| 1977 | 12 | 165 | 177 | −12 | − 7% |
| 1978 | 11 | 227 | 163 | +64 | +39% |
| 1979 | 10 | 273 | 205 | +68 | +33% |
| 1980 | 9 | 324 | 260 | +64 | +25% |
| 1981 | 8 | 265 | 286 | −21 | − 7% |
| 1982 | 7 | 327 | 308 | +19 | + 6% |

Enrollment figures (actual) show an average of 30% increase in enrollments for the next four years as compared to the same grade levels of two years ago.

*Remaining Constituent Districts*

| *Class of* | *Present Grade* | *Present Enrollment* | *As Compared to Class of 1975* | *Diff. + or −* | *% Change* |
|---|---|---|---|---|---|
| 1977 | 12 | 407 | 392 | +15 | + 4.0% |
| 1978 | 11 | 496 | 417 | +79 | +19.0% |
| 1979 | 10 | 525 | 456 | +69 | +15.0% |
| 1980 | 9 | 572 | 524 | +48 | + 9.0% |
| 1981 | 8 | 495 | 497 | − 2 | − .5% |
| 1982 | 7 | 505 | 541 | −36 | − 7.0% |

Enrollment figures (actual) show an average of 14% increase in enrollments for the next four years as compared to same grade levels of two years ago.

*Projected Enrollments for Five Years Greater Egg Harbor Regional High School District:* (A) *Remaining Constituent Districts,* (B) *Withdrawing District—Egg Harbor Township:*

| | *1977-78* | *1978-79* | *1979-80* | *1980-81* | *1981-82* | *% + or −* |
|---|---|---|---|---|---|---|
| A. | 2005 | 2088 | 2097 | 2086 | 1968 | − 2% |
| B. | 989 | 1089 | 1189 | 1237 | 1191 | +20% |
| Totals: | 2994 | 3177 | 3286 | 3323 | 3159 | + 5% |

Enrollment data regarding the racial composition of the withdrawing district and the remaining districts is as follows:

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| *District (9-12)* | *White* | *Minorities* | = | *Total Enrollment* | *Minorities Percentage of Total* |
|---|---|---|---|---|---|
| Egg Harbor City | 218 | 79 | = | 297 | 26% |
| Egg Harbor Twp. | 827 | 182 | = | 1009 | 18% |
| Galloway Twp. | 652 | 71 | = | 723 | 10% |
| Hamilton Twp. | 531 | 121 | = | 652 | 19% |
| Mullica Twp. | 266 | 116 | = | 382 | 30% |
| Total All Districts | 2494 | 569 | = | 3063 | 19% |
| Remaining Districts | 1667 | 387 | = | 2054 | 19% |

Thus it can be observed that there will be no increase in minority enrollment in the Township if it is authorized to withdraw. Neither will the remaining districts show any increase in the percent of minority enrollment. The K-8 constituent districts are not affected by the withdrawal. (County Superintendent's Report, at p. 8; Tr. 45-49)

The Township Board paid a proportional share of approximately 31.65 percent of the current expense costs of the Regional District in the 1976-77 school year. The total budget for current expenses was $3,713,670. The dollar share of the budget borne by the Township Board was $1,175,444, and the remaining districts assumed the remainder of $2,538,225, or approximately 68 percent of the total current expense costs.

The equalized valuations of the constituent districts of the Regional District follows:

*Equalized Valuation*[3]

| | |
|---|---|
| Egg Harbor City | $ 31,523,092 |
| Egg Harbor Township | 207,898,045 |
| Galloway Township | 128,520,317 |
| Hamilton Township | 143,922,260 |
| Mullica Township | 47,397,977 |

*Average Equalized Valuations (Real Property)*
(1975-1976-1977)

| | |
|---|---|
| Egg Harbor City | $ 32,533,311.33 |
| Egg Harbor Township | 196,500,807.00 |
| Galloway Township | 123,064,262.66 |
| Hamilton Township | 132,584,008.00 |
| Mullica Township | 44,604,856.66 |

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*Borrowing Capacity Of Each Constituent District*

| *District* | *Equalized Valuation* |
|---|---|
| Egg Harbor City | $ 32,533,311.33 |
| Egg Harbor Township | 196,500,807.00 |
| Galloway Township | 123,064,262.66 |
| Hamilton Township | 132,584,008.00 |
| Mullica Township | 44,604,856.66 |
| | $529,287,245.65 |

Thus, the Regional District has a borrowing power of $15,878,617.36 based on 3 percent of the equalized valuation of $529,287,245.65 (*N.J.S.A.* 18A:24-19)

With the withdrawal of Egg Harbor Township, the equalized valuation of the remaining districts would be $332,786,438.65. The borrowing power of the remaining districts would be $9,983,593.15 based upon 3 percent. (*N.J.S.A.* 18A:24-19)

Egg Harbor Township's borrowing power would be $7,860,032.28 based upon 4 percent of its equalized valuation of $196,500,807.00.

The 1976-77 debt service of the districts was apportioned as follows:

| | *Debt Service* | *Percentage* |
|---|---|---|
| | $ 9,219.94 | 6.146627% |
| Egg Harbor City | 55,688.33 | 37.125551% |
| Egg Harbor Township | 34,876.41 | 23.250940% |
| Galloway Township | 37,574.31 | 25.049538% |
| Hamilton Township | 12,641.02 | 8.427344% |
| Mullica Township | | |
| Total | $150,000.00 | 100. % |

The Township's share of debt service for 1976-77 is $55,688.33 or 37.125551 percent. The remaining districts' share of the debt service for 1976-77 follows:

| | | | |
|---|---|---|---|
| Egg Harbor City | $ 9,219.94 | or | 6.146627% |
| Galloway Township | 34,876.41 | | 23.250940% |
| Hamilton Township | 37,574.31 | | 25.049538% |
| Mullica Township | 12,641.02 | | 8.427344% |

The effect of deregionalization on the apportionment of debt service for 1976-77 based upon the percent of equalized valuations for the remaining districts would have been:

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| | *Percent* | *Amount* |
|---|---|---|
| Egg Harbor City | 9.776024% | $ 14,664.05 |
| Galloway Township | 36.979951% | 55,469.93 |
| Hamilton Township | 39.840548% | 59,760.80 |
| Mullica Township | 13.403477% | 20,105.22 |
| Total | 100. % | $150,000.00 |

Pursuant to *N.J.S.A.* 18A:13-62, the County Superintendent of Schools is required, in a written report at the end of the school year preceding that in which the withdrawal is to become effective, to make a division of the assets and liabilities between the withdrawing District and the Regional District as provided by *N.J.S.A.* 18A:8-24. (*N.J.A.C.* 6:3-2(a)11)

*N.J.S.A.* 18A:8-24 provides, in part, that the division of assets

> "***except school buildings, grounds, furnishings and equipment, and of the liabilities, other than the bonded indebtedness of the original district, between the new district and the remaining district on the basis of the amount of the ratables in the respective districts on which the last school tax was levied, and in determining the amount of assets to be divided, he shall take into account the present value of the school books, supplies, fuel, motor vehicles and all personal property other than furnishings and equipment.***"

The present apportionment, 1976-1977, would call for the division of such assets and liabilities as follows:

| | | | |
|---|---|---|---|
| Egg Harbor Township | (Total) | 37.13% | |
| Egg Harbor City | | 6.15% | |
| Galloway Township | | 23.25% | |
| Hamilton Township | | 25.05% | |
| Mullica Township | | 8.43% | |
| | (Total) | 62.88% | approximate |

It would be appropriate for the division of assets and liabilities to be made based upon the following:

1. The remaining Districts would assume the remaining debt service and liabilities of the District.

2. The remaining Districts would assume the buildings, grounds, and assets of the District.

3. The withdrawing District would relinquish any claim to any assets of the District, including buildings and grounds.

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4. The withdrawing District would not be responsible for any debt service or liabilities.

The Township Board does not seek to acquire any building, furnishings, or equipment assets if it is permitted to withdraw; therefore, it assumes that it will not incur any liabilities and that all remaining assets and liabilities will be assessed proportionally to the remaining District. (County Superintendent's Report, at p. 24)

*PROPOSED EDUCATIONAL PLAN FOR THE WITHDRAWING DISTRICT*

A. The Egg Harbor Township educational plan is to assume full responsibility for all pupils grades K-12. Its intention is to build a high school for grades 9-12, and its K through 8 pupils will be housed in its existing facilities.

B. The proposed new high school would be built on a seventy-six (76) acre plot which is owned by the Township.

The County Superintendent set forth several advantages and disadvantages to the Regional District and the Township Board if the proposed withdrawal is made effective. (County Superintendent's Report, at pp. 26-29)

The Regional District opposes the withdrawal of the Township Board on several grounds. Initially, the Regional District questions the enrollment figures as set forth in the County Superintendent's Report stating its figures project a significantly higher enrollment in the Regional District by 1981. Secondly, the Regional District states that it has hired an architect to develop plans for housing all pupils on a single session basis making withdrawal unnecessary if such plans are carried to fruition. Thirdly, the Regional District believes that the Township cannot afford to assume 100 percent of both debt and operation of a new high school together with additional costs which may be incurred for possible expansion of K-8 facilities and staff, and it believes the financial burden left on the remaining districts will be unbearable. Finally, the Regional District asserts that there is great uncertainty by all concerned regarding the effect of withdrawal on budget cap formulas and state aid, the possible loss of federal impact aid, and whether or not the Regional District budget will decrease in proportion to the decrease in pupil population after the withdrawal.

Egg Harbor City generally opposes the withdrawal for several reasons. First it believes that enrollment statistics in the County Superintendent's Report are incomplete, asserting that they do not include such factors as:

1. projected enrollment from parochial schools

2. projections on transfers

3. vocational/agricultural transfers

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4. the effect of casino gambling in the area and the resultant changes in countywide enrollment.

Egg Harbor City further asserts that:

1. An additional building will be needed in the remaining district even if the Township Board withdraws.

2. No savings would be noticed in transportation costs since the same number of pupils would have to be bused with or without withdrawal.

3. The report fails to consider the effect of withdrawal on all sports programs and uniforms.

Subsequent to the hearing the Board of Review requested answers to several questions from the interested parties which are reproduced as follows:

***

"1. What is the estimated net current expense budget for grades 9-12 in Egg Harbor Township?

"2. What is the financial capability of Egg Harbor Township to initiate a K-8 building program, as well as a 9-12 building program?

"3. What is the debt of Egg Harbor Township at the present time?

"4. What do you compute to be the actual loss of Federal impact aid if the Township withdraws (*P.L.* 874) and, will the resultant reduction in the number of pupils off-set this loss?***"

In response to the first question the Township Board estimated its net operating budget for grades 9-12 in a new high school at $2,104,000. This is delineated as $2,104 average per pupil expenditure for 1,000 pupils in grades 9-12. The Township Board estimates $1,600,000 of this total will be supported by local tax revenue appropriated to the Regional District ($1,006,000 according to the Regional District), and the remainder is to be provided by state aid, the amount of which is still undetermined. (Exhibit C)

The Township Board's financial capability to initiate a K-8 building program as well as a 9-12 building program was answered as follows:

***

"(a) A local governmental unit's bonded indebtedness is determined by applying a specific percentage to the average equalized valuation of taxable property in the community. The figures relating to our situation is (sic) as follows:

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| | |
|---|---|
| As a K-8 District | 3% |
| As a K-12 District | 4% |
| Egg Harbor Township Municipality | 3½% |
| Average Equalized Valuation | $176,987,652 |

"(b) The following computations are used to determine our capability to float future bond issues.

| *"As a K-8 District* | *3%* | *3½%* | *Less Existing Debt* | *Bonded Indebtedness Limitation* |
|---|---|---|---|---|
| Egg Harbor Township School District | $5,309,629 | | $4,013,000 | $1,296,629 |
| Egg Harbor Township Municipality | | $6,194,567 | $1,150,000 | $5,044,567 |
| TOTAL available to the schools for future bonded indebtedness | | | | $6,341,196 |

| *"As a K-12 District* | *3½%* | *4%* | *Less Existing Debt* | *Bonded Indebtedness Limitation* |
|---|---|---|---|---|
| Egg Harbor Township School District | | $7,079,506 | $4,013,000 | $3,066,506 |
| Egg Harbor Township Municipality | $6,194,567 | | 1,150,000 | 5,044,567 |
| TOTAL available to the schools for future bonded indebtedness | | | | $8,111,073 |

"*SPECIAL NOTE:* A number of sources have indicated that the Egg Harbor Township Municipality will probably *not* issue bonds. Due to a technicality, they must list this amount as an existing debt. However, they will probably retire this debt with federal grants and short term notes. Obviously, our bonded indebtedness limitation would then increase by $1,150,000.00.

"(c) We may exceed the above debt limitations by petitioning the Commissioner to hold an extension of credit hearing.***"

(EXHIBIT C)

The Township Board's existing debt is $4,013,000.00. In response to the final question posed by the Board of Review, the Township stated that it would experience an increase in its federal impact aid (*P.L.* 874) if withdrawal were approved. (Exhibit C)

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The Regional District asserts that it will lose 40 percent of its pupils eligible for federal impact aid in the amount of $30,091. It asserts that this loss, coupled with the loss of Township pupils, will cause the resultant per pupil cost in the remaining District to be so prohibitive so as to invite educational disaster. (Exhibit D)

Finally, it must be pointed out that a primary reason for submission of the withdrawal question may be the frustration of the Township which voted overwhelmingly to pass three referenda to build another school on another site in the Regional District. Their efforts have been thwarted by a negative vote in the Regional District as a whole with the resultant two session day for two high schools in one building which has now lasted for six years. (Tr. 37-39)

The Board of Review has considered the statements and the positions of the constituent districts and those who accepted the opportunity to express their views at the hearing, as addenda to the Petition of Appeal, the Answers, the Report of the County Superintendent of Schools, and the information received subsequent to the hearing. Its findings support the Township Board's application for withdrawal from the Regional District. The following factors weigh heavily in reaching this determination:

1. The existing facility is so overcrowded that two sessions are held in one school building.

2. The construction of a new high school in the Township would allow it and the remaining district to have a normal school day.

3. The Township Board has the financial ability to initiate a school building program.

4. A new high school or an addition in the Regional District will be needed in any event if the withdrawal is not approved.

5. The geography of the area lends itself naturally to a withdrawal. No geographical disjunction will occur.

6. Current expense and debt service costs will be reasonable and not excessive in the Township and in the Regional District.

7. The area population is increasing rapidly.

Accordingly, the Board of Review hereby authorizes the Atlantic County Superintendent of Schools to fix an early date pursuant to law for the election on the proposed withdrawal of Egg Harbor Township from the Greater Egg Harbor Regional High School District. The Board of Review further authorizes the submission of a question therein to the voters of the Township and of the Regional District which shall contain a statement that, subsequent to withdrawal, the Township Board shall not assume any further debts or liabilities of the

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Regional District; neither shall it acquire any of the assets of the Regional District, and that all remaining assets, debts and liabilities shall be shared proportionally among the remaining constituents in the Regional District.

The percentage of debt assumption will increase for the remaining constituents, but not so much so as to be declared excessive or unreasonable. (Table, *ante*)

The costs for the conduct of the election are clearly prescribed by statute as are the division of assets and liabilities and the seniority entitlement for teaching staff members of the withdrawing and remaining districts. All special elections "***shall be called in the manner provided for the calling of the annual school election.***" *N.J.S.A.* 18A:14-3.2 Tenure of office and rights pertinent thereto are subjects of legislative determination specifically regarding withdrawals by a constituent district from a regional district. *N.J.S.A.* 18A:13-64 The County Superintendent is authorized to divide assets and liabilities. *N.J.S.A.* 18A:13-62.

The effective date of withdrawal of Egg Harbor Township from the Greater Egg Harbor Regional School District shall be determined, in the event of a favorable vote on the referendum question, by the Commissioner pursuant to *N.J.S.A.* 18A:13-59. The Commissioner shall issue his own directive with respect to such effective date.

COMMISSIONER OF EDUCATION

STATE TREASURER

DIRECTOR, DIVISION OF LOCAL GOVERNMENT SERVICES

March 17, 1978

[1]All statistical data was compiled in March 1977 unless otherwise noted.

[2]*Population Estimates for New Jersey, July 1972, 1974,* and *1976*. Office of Business Economics, Department of Labor and Industry, State of New Jersey, Trenton, New Jersey. July 1972, 1974, 1976.

[3]*Certification of Table of Equalized Valuations-1976*. Department of the Treasury, Division of Taxation, State of New Jersey, Trenton, New Jersey, 1976.

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## COMMISSIONER OF EDUCATION

## ORDER

This matter having been the subject of a decision of the Board of Review issued on March 17, 1978, pursuant to *N.J.S.A.* 18A:13-51 *et seq.*, incorporated herein by reference; and

That decision having authorized a referendum affording opportunity to the voters of the Greater Egg Harbor Regional High School District, hereinafter "Regional District," to determine whether the proposed withdrawal of the Township of Egg Harbor from the Regional District should be effected pursuant to law; and

The Commissioner of Education, in an opinion dated March 17, 1978, incorporated herein by reference, having determined that in the event of a successful referendum the effective date of withdrawal of the Township of Egg Harbor from the Regional District would be thereafter determined; and

The voters of both the Township of Egg Harbor and of the remaining municipalities of the Regional District having held a special school election on June 27, 1978 and cast a majority of votes in favor of withdrawal of the Township of Egg Harbor from the Regional District; and

There being scheduled on February 6, 1979 an annual school election in the Regional School District; and

There being seated on the Regional District Board of Education from the Township of Egg Harbor one member whose term will expire at the reorganization meeting of the Regional District Board following the annual school election on February 6, 1979; and

The Commissioner having considered the questions of whether the voters of the Township of Egg Harbor should vote at the February 6, 1979 election for candidates to fill the aforesaid vacancy or on the Regional District's proposed 1979-80 school budget; and

The Commissioner finding even in these special circumstances no authority to set aside the statutory requirement that voters be provided opportunity to elect those who shall represent them on said boards; and

The Commissioner having determined that, since the voters of the Township of Egg Harbor will have opportunity to vote on budgetary matters affecting the Township of Egg Harbor's secondary pupils at the February 13, 1979 election conducted by the Egg Harbor Board of Education and since the Township of Egg Harbor's pupils will no longer be affected by the Regional District's budget after July 1, 1979, there remains no valid reason why the voters of the Township of Egg Harbor should be allowed to cast votes for or against the Regional District's proposed 1979-80 school budget on February 6, 1979; now therefore

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IT IS ORDERED that the Regional District provide at its annual school election on February 6, 1979 that voters of the Township of Egg Harbor shall have opportunity to vote for one qualified person to represent them on the Regional District Board of Education from the date of the Board's organization meeting until June 30, 1979, after which date all terms of the Township of Egg Harbor members of the Regional District Board shall expire pursuant to *N.J.S.A.* 18A:13-60; and

IT IS FURTHER ORDERED that no provision be made at the February 6, 1979 election for the voters of the Township of Egg Harbor to cast votes for or against the Regional District's budget for the fiscal year 1979-80.

ORDERED this 25th day of October 1978.

COMMISSIONER OF EDUCATION

**Board of Education of the Matawan Regional School District,**

*Appellant,*

*v.*

**Mayor and Council of the Borough of Matawan and Mayor and Council of the Township of Matawan, Monmouth County,**

*Appellees,*

**and the Commissioner of Education,**

*Respondent.*

## COMMISSIONER OF EDUCATION

## DECISION

For the Appellant, DeMaio & Yacker (Vincent C. DeMaio, Esq., of Counsel)

For the Appellees, Feldman & Schwartz (Robert Feldman, Esq., of Counsel)

For the Respondent, Vincent Calabrese, Assistant Commissioner of Education, Division of Administration and Finance, New Jersey State Department of Education

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This matter has been remanded to the Commissioner of Education by the State Board of Education for a statement of factual findings supporting the certification of taxes for the municipalities of the Borough and the Township for the 1977-78 school year.

Subsequent to the defeat of the budget by the voters at the annual school election held on March 22, 1977, the governing bodies of the Borough of Matawan and the Township of Matawan failed to determine an amount of money to be certified to be raised by taxation for school purposes for the 1977-78 school year. *N.J.S.A.* 18A:13-19 The Assistant Commissioner of Education, Division of Administration and Finance, hereinafter "DAF," conducted a conference between representatives of the parties on April 21, 1977 at the State Department of Education, Trenton, pursuant to the statutory authority imposed by *N.J.S.A.* 18A:13-20 which reads as follows:

> "Should said governing bodies fail to so certify or fail to agree and certify different amounts for said purposes, then *the commissioner shall determine and certify the amount or amounts which in his judgment shall be necessary to provide a thorough and efficient system of schools* in such regional district, to the board of education of the regional district." *(Emphasis added.)*

The amounts proposed to be raised by local taxation for school purposes by the Regional District Board of Education, hereinafter "Board," and the amount certified for such purposes by the Commissioner are shown as follows:

*CHART I*

| | *Current Expense* | *Capital Outlay* |
|---|---|---|
| Board's Proposal | $5,398,354 | $94,319 |
| Commissioner's Cert. | 5,364,354 | 63,319 |
| Reduction | $ 34,000 | $31,000 |

Additionally, DAF notified the Board by letter dated April 26, 1977, as follows:

> "We have reviewed the proposed school budget and the tax levy for current expenses and capital outlay of the school year 1977-78, pursuant to Title 18A:13-20. You will find enclosed a copy of the letter forwarded to the Monmouth County Board of Taxation certifying the amounts which, in the Commissioner's judgment, will be necessary to provide a thorough and efficient system of public schools in your district for the fiscal year beginning July 1, 1977 and ending June 30, 1978.
>
> "In addition, it is *recommended* that no transfers be made from accounts 110B, 110F, 110J, 130N, Transportation, and accounts 630 and 640. Any surpluses realized from these accounts should be used for tax reduction in the 1979-80 school year.

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*"This certification was made after a review of the information presented at the conference on April 21, 1977." (Emphasis added.)* (Exhibit A)

The Board appeals both as to the amount certified to be raised by taxation and to the restrictions imposed upon transfer of funds in Exhibit A.

A review of the transcript of that conference held on April 21, 1977 shows that the budget was reviewed by DAF and that a determination was made to make itemized reductions as follows:

*CHART II*

*CURRENT EXPENSE*

| *ACCOUNT* | *ITEM* | *AMOUNT* |
|---|---|---|
| J130N | Data processing* | $12,000 |
| J720 | Drapery replacement & carpeting | 4,000 |
| J720 | Central Office, Replacement of Equipment | 4,300 |
| J720A | Tree planting | 300 |
| J730B | Noninstructional equipment | 13,600 |
| | Total | $34,200 |

*CAPITAL OUTLAY*

| | | |
|---|---|---|
| L1220, 1230 | Sites, Buildings** | $31,000 |

* This amount presumed conversion to Program Oriented Budgeting and its involved costs. (Tr. 18-21)

** No satisfactory explanation was given for this expenditure. (Tr. 7-12, 33-36)

When defeated budgets are appealed, the Commissioner has repeatedly held that the test for allowing an expenditure of money by a board of education is the need and not the desirability of the expenditure. *Board of Education of the Black Horse Pike Regional School District v. Mayors and Councils of the Boroughs of Bellmawr and Runnemede, and the Mayor and Township Committee of the Township of Gloucester,* 1970 *S.L.D.* 227, 238; *Board of Education of the Borough of Totowa v. Mayor and Council of the Borough of Totowa,* 1976 *S.L.D.* 300

In his review of the record of the instant matter, the Commissioner is satisfied that the Board has not demonstrated a need for the line items reduced by DAF. Further, the annual audit report of June 30, 1977, not available at the April 21, 1977 conference, reveals a current expense free appropriations balance in the amount of $133,477.

The Commissioner finds and determines that the evidence clearly shows

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that the items rejected by DAF were not necessary in order for the Board to provide a thorough and efficient system of schools in the district. See also Tr. 7-12, 18-21, 33-36.

Regarding the Board's appeal of the restriction on the transfer of funds as set forth in Exhibit A, the Commissioner notices that DAF forwarded a second letter to the Board on June 13, 1977 which states in part as follows:

> "The decision of the Commissioner of Education was based on my recommendation to his office that certain accounts should not be subject to a transfer in the event that the budgeted amounts were greater than actual need. Although the Commissioner did not so state in his letter, we were not convinced by arguments advanced by the Board of Education concerning the amounts budgeted in those accounts.
>
> "As you know, in the prior year, balances of the Matawan Regional School district actually increased after a reduction made after a hearing before me on the prior municipal reduction. It is important that school districts maintain credibility with their taxpayers and their municipalities. The budget of the Matawan Regional School district, when prepared, should reflect the actual needs of the district. At the end of any budget period, there should not be material differences between the amounts budgeted and the amounts finally expended.
>
> "In any event, the letter [April 26, 1977] contained a recommendation which the board is free to follow if it does not materially impair [its] ability to operate a thorough and efficient system of education. It is important, however, to note that the board has a responsibility to satisfy itself that compliance with the recommendation would result in a negative impact on the educational system before deciding to ignore the Commissioner's recommendation. Such negative impact should be documented.***"

From his review of these letters, the Commissioner finds further that DAF *recommended* that specific transfers not be made and that such recommendations are not binding on the Board.

For these reasons the Commissioner confirms his earlier determination that the budget certification previously made is sufficient to provide a thorough and efficient system of schools in the district.

COMMISSIONER OF EDUCATION

March 11, 1978

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**Betty Jane Shaw,**

*Petitioner,*

*v.*

**Board of Education of the Township of Union, Ocean County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Starkey, White & Kelly (James M. Blaney, Esq., of Counsel)

For the Respondent, Tanner & Tanner (Brant S. Collins, Esq., of Counsel)

Petitioner is a teacher who was employed by the Board of Education of the Township of Union, hereinafter "Board," beginning November 1973. She was reemployed for the 1974-75 and 1975-76 academic years, but was not reemployed thereafter. Petitioner avers that she openly criticized the action of the Board in appointing the vice-principal who is her immediate supervisor and challenged his qualifications. His appointment, she avers, is illegal. Petitioner avers that because she disagreed with her vice-principal's evaluations of her classroom performance, the Board's determination not to reemploy her is arbitrary, capricious, unreasonable and made in direct retribution because she exercised her constitutional rights of freedom of speech and freedom of expression. Petitioner prays for an evidentiary hearing to prove her allegations. The Board denies petitioner's allegations and states that it has acted lawfully and within its discretionary authority.

Briefs and other documents have been submitted in evidence for the sole determination of whether or not petitioner is entitled to a hearing.

The Commissioner has held consistently that when a teaching staff member alleges that a local board of education has refused reemployment for proscribed reasons (*i.e.* race, color, religion, etc.) or in violation of constitutional rights such as free speech, or that the board was arbitrary and capricious or abused its discretion, and is able to provide adequately detailed specific instances of such allegations, then the teaching staff member may file a Petition of Appeal before him which will result in a full adversary proceeding. *Marilyn Winston et al. v. Board of Education of Borough of South Plainfield,* 1972 *S.L.D.* 323, aff'd State Board of Education 327, reversed and remanded 125 *N.J. Super.* 131 (*App. Div.* 1973), aff'd 64 *N.J.* 582 (1974)

The Commissioner has at various times reviewed the actions of local boards

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of education and in certain instances, finding that the protected rights of teaching personnel were violated, has set aside the actions of boards wherein they violated those protected rights of nontenured employees or otherwise abused their discretionary powers. *Elizabeth Rockenstein v. Board of Education of the Township of Jamesburg,* 1974 *S.L.D.* 260 and 1975 *S.L.D.* 191, aff'd State Board of Education 199, aff'd Docket Nos. A-3916-74, A-4011-74 New Jersey Superior Court, Appellate Division, July 1, 1976 (1976 *S.L.D.* 1167); *North Bergen Federation of Teachers, Local 1060, American Federation of Teachers, AFL-CIO,* and *Beth Ann Prudente v. Board of Education of the Township of North Bergen,* 1975 *S.L.D.* 138

At other times the Commissioner has upheld the actions of boards of education when no abuse of discretion was found. *Nicholas P. Karamessinis v. Board of Education of the City of Wildwood.* 1973 *S.L.D.* 351, affirmed Docket No. A-1403-73 New Jersey Superior Court, Appellate Division, March 24, 1975 (1975 *S.L.D.* 1087)

It was said in *John J. Kane v. Board of Education of the City of Hoboken,* 1975 *S.L.D.* 12 that:

> "***[T]he Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when it is affirmatively shown that the action was arbitrary, capricious, or unreasonable. See *Eric Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County,* 1973 *S.L.D.* 167; *James Mosselle v. Board of Education of the City of Newark, Essex County,* 1973 *S.L.D.* 176; *Luther McLean v. Board of Education of the Borough of Glen Ridge et al., Essex County,* 1973 *S.L.D.* 217, affirmed State Board of Education March 6, 1974.***" (at 16)

See also *Sally Klig v. Board of Education of the Borough of Palisades Park, Bergen County,* 1975 *S.L.D.* 168.

A careful review of the documents in evidence leads to the conclusion that petitioner has not been denied any of her constitutional rights and that the Board's determination not to reemploy her was made properly.

In *Roger Tesi v. Board of Education of the Township of Union, Ocean County,* 1977 *S.L.D.* 504 the qualifications of petitioner's vice-principal and immediate supervisor were challenged and it was further alleged that his appointment by the Board was improper. The Commissioner concluded that the vice-principal was properly certified and that his appointment to the position was proper and in no way violative of any statutory or administrative procedure. That petition was dismissed. In the instant matter, petitioner's challenge to her supervisor's appointment and qualifications must likewise be set aside.

The documents in evidence show, *inter alia,* performance test results of petitioner's first grade classes, her evaluations by her vice-principal and ad-

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ministrative principal, her plan book, and her self evaluation (attached to the Brief). (Exhibits A, B, C, D, E, F, G, H, I, O) One page of the plan book discloses that in early September 1975, the first year of employment for the vice-principal, he was critical of petitioner for sacrificing special subjects for reading. At the bottom of the same page, petitioner disagreed with his evaluation comments. The vice-principal evaluated petitioner in writing on December 9, 1975 and February 18, 1976. Petitioner was evaluated as being weak in several categories and the latter evaluation concluded with the comment that petitioner had not responded well to recommendations outlined in the previous evaluation. At petitioner's request, the administrative principal observed her and evaluated her performance on March 3, 1976. The conclusion of his evaluation was concurrence with the vice-principal's earlier evaluations. Petitioner freely admits that she disagreed with such evaluations and she submitted written contradictions. (Attached to Petitioner's Brief, at pp. 13-14)

There is no evidence that the Board's determination not to reemploy petitioner was retaliatory because she criticized its action employing the vice-principal. Nor is there any evidence that her non-reemployment by the Board was grounded on anything other than her classroom performance. The administrative principal's evaluation concurred with the vice-principal's evaluations. (Exhibit H) The administrative principal summarized the Board's reasons for non-reemployment by letter dated April 6, 1976, as follows:

> "Therefore, the reasons for non-renewal of your contract are:
>
> 1. Failure to recognize deficiencies as noted in evaluations.
>
> 2. Failure to follow administrative recommendations designed to correct deficiencies.
>
> 3. Failure to correct deficiencies." (Exhibit N)

Petitioner subsequently requested and was granted an appearance before the Board, but the Board did not alter its earlier determination. (Exhibits J, K, L, M) Thus, the instant matter is similar to *Ruch, supra,* wherein the Commissioner commented:

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

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"While petitioner has charged respondent with arbitrary, frivolous and discriminatory conduct with respect to his further employment, such a bare allegation is insufficient to establish grounds for action. *U.S. Pipe and Foundry Company v. American Arbitration Association,* 67 *N.J. Super.* 384 (*App. Div.* 1961) Petitioner does not allege that race or religion or any other kind of unlawful bias influenced respondent's failure to reappoint him. Nor does he claim that respondent was motivated by frivolous considerations. *Petitioner's charge of unreasonable and arbitrary action rests on the unfavorable report of his superior. But examination of the report, which petitioner attached to his pleadings, reveals that it is nothing more than his supervisor's written evaluation of petitioner's classroom performance and teaching competence. Supervisory evaluations of classroom teachers are a matter of professional judgment and are necessarily highly subjective.* There is no allegation that the supervisor's report was made in bad faith, the result of personal animosity or bias, or in other ways improper. What is plain is that the supervisor, in the normal course of her duties, rendered a report of her evaluation of petitioner's competence as a teacher to the administration, that a copy was furnished to petitioner for his knowledge, that the administration and the Board of Education considered the report and although it did not conduct an adversary type hearing such as petitioner demands, it did afford petitioner an opportunity to meet with the Board and express his point of view, and that as a result and with this information before it the Board simply chose not to reemploy petitioner. Under such circumstances the Commissioner finds no vestige of any unlawful, arbitrary or capricious motivation. The Commissioner cannot agree that because respondent made information underlying its decision not to place petitioner in a tenure status available to him, it bound itself to accord him a plenary hearing as a matter of right.***" *(Emphasis added.)*
(1968 *S.L.D.* at 10-11)

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

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

In the instant matter there is no showing that petitioner has been deprived of a constitutional right. In *Winston, supra,* the Court stated that:

"***It may be acknowledged that the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions. *Cf. Trap Rock Industries, Inc. v. Kohl,* 63 *N.J.* 1 (1973)***" (125 *N.J. Super.* at 144)

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Petitioner alleges that her evaluations were not made strictly in accordance with the provisions in *N.J.A.C.* 6:3-1.19 to the degree that there is no evidence that a composite total performance written evaluation was ever made. *N.J.A.C.* 6:3-1.19(d) There is evidence of at least three observations followed by conferences and written evaluations. (See Petitioner's Brief, at p. 1.) (Exhibits F, G, H, I) The Commissioner is constrained to point out that the evaluation of a teaching staff member's total performance may be included as part of each of the three evaluations required by statute, instead of a fourth composite written evaluation report. The record does not disclose whether or not the Board has adopted a policy for the supervision of instruction as required in *N.J.A.C.* 6:3-1.19(c). If it has not, it is hereafter directed to do so.

The record discloses that petitioner received three or more observations as required by law and that she received written evaluations of those observations. The fact that the Board did not give her a separate written total performance evaluation is not sufficient reason to set aside its determination.

The Commissioner cannot find that the Board was arbitrary, capricious, unreasonable, or that petitioner's constitutional rights have been violated. Absent such a showing there are no grounds on which a hearing can be granted, nor is there any other relief to which petitioner is entitled.

For these reasons, the Petition of Appeal is hereby dismissed.

.COMMISSIONER OF EDUCATION

March 20, 1978

**In the Matter of the Annual School Election Held in the Borough of Ogdensburg, Sussex County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

The announced results of the balloting for three seats on the Board of Education of the Borough of Ogdensburg for full terms of three years each at the annual school election held on February 14, 1978 were as follows:

| | *At Polls* | *Total* |
|---|---|---|
| Wasco Hadowanetz | 109 | 109 |
| Charles T. Redden | 101 | 101 |
| Arleigh J. Sliker | 78 | 78 |
| Michael E. Lucas | 78 | 78 |
| Raymond Alfano, Sr. | 1 | 1 |

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A total of 139 ballots were cast at the polls with one ballot voided. The voided ballot was not noted in the "Combined Statement of Results of School Election."

Pursuant to *N.J.S.A.* 18A:12-15 the Commissioner of Education directed that the ballots cast at the polling place of the Borough of Ogdensburg for Candidates Sliker and Lucas be recounted. The recount was conducted on March 2, 1978 at the Department of Education office in Sussex County by an authorized representative of the Commissioner.

At the conclusion of the recount, the tally of the ballots stood as follows:

| | *Recount Tally* | *Total* |
|---|---|---|
| Arleigh J. Sliker | 78 | 78 |
| Michael E. Lucas | 78 | 78 |

Since the one voided ballot could change the resultant tie vote, the Commissioner's representative returned the ballot as an Exhibit for the Commissioner's determination.

* * * *

The Commissioner makes the following determination regarding the ballot referred to him:

Exhibit A—This ballot has completely filled-in squares to the left of the names of Candidates Redden and Lucas. The Commissioner cannot reconcile a voter indicating his choice of candidate by completely filling in the squares to the left of the selected candidate's name, with the statutory requirement for the mark to be "***substantially a cross X, plus + or check √ ***." *R.S.* 19:16-3(g) Accordingly, this ballot shall not be counted as a vote for any of the candidates. See *Petition of Wade,* 39 *N.J. Super.* 520 (*App. Div.* 1956); *In re Keogh-Dwyer,* 85 *N.J. Super.* 188 (*App. Div.* 1964), 45 *N.J.* 117 (1965).

The Commissioner finds and determines that the announced results were true in fact and that the election had resulted in a tie vote between Candidates Sliker and Lucas.

Prior to the recount of the ballots, on February 15, 1978, Candidate Sliker filed a letter stating that he fully understood the provisions of *N.J.S.A.* 18A:12-15 and with such knowledge waived all rights to membership on the Board of Education of the Borough of Ogdensburg and thus withdrew as a candidate, relinquishing any claim, presently or in the future, to this position, in favor of Candidate Lucas.

The Commissioner determines, therefore, that a second election as provided

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by *N.J.S.A.* 18A:12-15, as amended by *c.* 324, *L.* 1977, effective January 10, 1978, is not necessary. Accordingly, he determines that Wasco Hadowanetz, Charles T. Redden, and Michael Lucas were elected to full terms of three years each on the Board of Education of the Borough of Ogdensburg.

COMMISSIONER OF EDUCATION

March 20, 1978

**Upper Freehold Regional Education Association, New Jersey Education Association and the Boards of Education of the Townships of Washington, Millstone and Plumsted,**

*Petitioners,*

*v.*

**Board of Education of the Upper Freehold Regional School District, Monmouth County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

## ORDER

For the Upper Freehold Regional Education Association and the New Jersey Education Association, Greenberg and Mellk (William S. Greenberg, Esq., of Counsel)

For the Board of Education of the Township of Washington, John P. Scozzari, Esq.

For the Board of Education of the Township of Millstone, Cerrato, O'Connor, Mehr & Saker (William J. Mehr, Esq., of Counsel)

For the Board of Education of the Township of Plumsted, Kessler, Tutek & Gottlieb (Henry G. Tutek, Esq., of Counsel)

For the Respondent, Malsbury, Armenante & Gerepka (Barclay P. Malsbury, Esq., of Counsel)

For the New Jersey School Boards Association, *Amicus Curiae,* Nathanya G. Simon, Attorney at Law

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This matter having been opened by the filing with the Commissioner of Education on January 5 and 6, 1978 of a Petition of Appeal by the Boards of Education of the Townships of Washington, Mercer County, Millstone, Monmouth County and Plumsted, Ocean County, hereinafter "sending district Boards," and a Petition of Appeal by the Upper Freehold Regional Education Association and the New Jersey Education Association, hereinafter "Associations"; and

The aforementioned sending district Boards, and the Associations having therein petitioned the Commissioner to enjoin the Upper Freehold Regional Board of Education, hereinafter "Regional Board," from taking action to reduce its complement of teaching staff members or to terminate the 1977-78 academic year prior to the completion of 180 school days; and

The Assistant Commissioner of Education in charge of Administration and Finance having on December 2, 1977 conducted a special audit of the Regional Board's financial status, which audit revealed that the Board is faced with a potential deficit on June 30, 1978 in its current expense accounts of $305,612.25, absent additional revenue and/or economies of operations; and

It appearing that the Regional Board's budgetary crisis was principally engendered by overestimation of tuition income ($110,000), State transportation aid ($25,000), appropriation to 1977-78 current expense revenue of a sum greater than the unappropriated balance available ($90,000) and overcharges for tuition which must be refunded ($80,000); and

The Regional Board having considered at various times alternative proposals of its Superintendent to solve its financial crisis, which proposals, *inter alia,* included a reduction in force of approximately forty professional staff members or the shortening of the school year upon expenditure of all available funds; and

The Regional Board, in consideration of offers by the municipal governing bodies of the Borough of Allentown and the Township of Upper Freehold and by the Upper Freehold Education Association to assume responsibility for deferring $205,000 of the aforementioned deficit, having on January 3, 1978, submitted to the voters of the Regional District a special referendum proposal to raise $106,750 of additional taxes, which proposal was defeated (Affidavit of Superintendent); and

The aforementioned offers by those municipal governing bodies and the Association having been withdrawn upon the defeat of the referendum proposal; and

The Regional Board having voted 5-4 on January 4, 1978 to submit a special referendum question to the voters on February 7, 1978 to raise by public taxation for current expenses of the 1977-78 school year the supplemental amount of $311,750; and

The Regional Board having filed on January 6, 1978, a Petition of Appeal

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requesting that the Commissioner conduct a plenary hearing and make available such aid as is commensurate with his authority to insure a thorough and efficient program of education within the Regional District; and

Oral argument having been conducted by the Commissioner's representative on January 27, 1978 at the State Department of Education on the question of whether the Regional Board should be restrained from shortening the 1977 academic year or reducing its complement of teaching staff members; and

The arguments of the Association and the sending district Boards as set forth both in Brief and by oral argument having been considered wherein it is contended that drastic curtailment of the academic year or the instructional staff in an attempt to solve the Regional Board's financial dilemma would violate the pupils' rights to a thorough and efficient educational program (*Robinson v. Cahill,* 69 *N.J.* 133 (1975), *N.J.S.A.* 18A:7A-5 *et seq.*); and

The Commissioner having considered petitioners' further argument contending that the Regional Board has demonstrated an inability to cope with the financial and educational crisis with which it is confronted; and

Petitioners' further arguments having been considered wherein it is contended that irreparable harm has been done and continues to be done by the aura of uncertainty and doubt with which pupils and the general citizenry are confronted daily because of the Regional Board's alleged emotional reaction to its financial crisis; and

The Commissioner having considered petitioners' contentions that, even absent specific statutory authorization, he has broad inherent authority flowing from the New Jersey Constitution, statutory and decisional law to take immediate steps to solve the Regional Board's financial dilemma without recourse to staff reduction and/or shortening the 1977-78 academic year (*Robinson, supra; Jenkins et al. v. Morris Township School District et al.*, 58 *N.J.* 483 (1971); *Board of Education of the Township of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966); *N.J.S.A.* 18A:7A-2 *et seq.*); and

The Commissioner having similarly considered the Regional Board's contentions that it has acted responsibly in requesting the aforementioned independent audit of its financial records, in exploring all alternatives to its present budget dilemma, in placing before the voters too supplemental budget referenda questions and in filing a Petition of Appeal before the Commissioner on January 6, 1978 enlisting his aid in maintaining a thorough and efficient educational program; and

The Commissioner having also considered the Regional Board's contentions that it has taken no precipitate action which would cast doubt on its capacity to exercise its discretionary authority in a reasoned manner and that it should be placed under no legal restraint that could result in its being forced into noncompliance with *N.J.S.A.* 2A:135-5 which states that any person who ex-

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pends public moneys in excess of authorized appropriations is guilty of a misdemeanor; and

The Commissioner, after carefully balancing the respective contentions of the parties to the controverted matter, having concluded that there is insufficient showing that the Regional Board has demonstrated impaired judgment in the face of its fiscal crisis to warrant ordering the restraint sought by petitioners; and

The Commissioner having also determined that immediate relief in the form of certification by the Commissioner to the County Board of Taxation, as requested by the Associations, would be inappropriate absent a plenary hearing to establish the facts relating to the Board's minimum essential requirements for the maintenance of a thorough and efficient educational program until the conclusion of the 1977-78 school year; now therefore

IT IS ORDERED that petitioners' application for immediate restraint be and is denied; and

IT IS ORDERED that the Associations' application for an immediate order certifying an additional tax levy for the Board's 1977-78 current expenses be and is denied; and

IT IS FURTHER ORDERED that should the Regional Board, in the future exercise of its discretion, contemplate action consisting of major reduction in force and/or shortening of the school year, it shall give public notice of its intention at least ten days in advance of that action, in order that application for a restraint, if desired, may be made to the Commissioner by any affected party; and

IT IS ORDERED that the hearing on the Regional Board's Amended Petition of Appeal proceed on an expedited basis as scheduled by the Commissioner's representative at the oral argument of January 27, 1978.

Entered this 8th day of February 1978.

COMMISSIONER OF EDUCATION

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**In the Matter of the Application of the Upper Freehold Regional Board of Education, Monmouth County.**

## COMMISSIONER OF EDUCATION

## DECISION

For Petitioner, Upper Freehold Regional Board of Education, Malsbury, Armenante & Gerepka (Barclay P. Malsbury, Esq., of Counsel)

For Petitioner, Washington Township Board of Education, John P. Scozzari, Esq.

For Petitioner, Plumsted Township Board of Education, Kessler, Tutek & Gottlieb (Henry G. Tutek, Esq., of Counsel)

For Petitioner, Millstone Township Board of Education, Cerrato, O'Connor, Mehr & Saker (James E. Collins, Esq., of Counsel)

For Petitioner, Upper Freehold Regional Education Association and New Jersey Education Association, Greenberg & Mellk (William S. Greenberg, Esq., of Counsel)

For Respondent, Upper Freehold Township Committee, Dawes & Gross (John T. Dawes, Esq., of Counsel)

For Respondent, Borough Council of Allentown, Turp, Coates, Essl & Driggers (Henry G. P. Coates, Esq., of Counsel)

For *Amicus Curiae,* New Jersey School Boards Association, Nathanya G. Simon, Esq.

The Upper Freehold Regional Board of Education, hereinafter "Regional Board," on January 27, 1978, filed an Amended Petition on Appeal with the consent of its three sending district Township Boards of Education of Washington, Mercer County, Plumsted, Ocean County, Millstone, Monmouth County, and the Freehold Regional Education Association and the New Jersey Education Association. A timely Answer to the Amended Petition of Appeal was filed by the municipal governing bodies of the Borough of Allentown and the Township of Upper Freehold. Permission was granted to the New Jersey School Boards Association to file a Brief, *amicus curiae*. Petitioners in their prayers for relief call upon the Commissioner of Education to exercise such powers as he may possess to provide the Regional Board, which faces an impending deficit in its current expense account, with funds necessary to conduct a viable educational program for the remainder of the 1977-78 school year.

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In the related matter of *Upper Freehold Regional Education Association, New Jersey Education Association and the Boards of Education of the Townships of Washington, Millstone and Plumsted v. Board of Education of the Upper Freehold Regional School District,* 1978 *S.L.D.* —— (decided February 8, 1978) the Commissioner, by an order incorporated herein by reference, denied applications either to place restraints on the Regional Board or to make immediate certification of additional local tax levies. That order, however, directed not only that the matter controverted herein proceed on an expedited basis, but also that the Regional Board give public notice at least ten days in advance of any contemplated action to effect a major reduction in force and/or shortening of the 1977-78 school year in order that application for restraint, if desired, might be made to the Commissioner by any affected party.

A hearing was conducted at the Washington Township Municipal Building, Robbinsville, on February 9 and 13, 1978 by a hearing examiner appointed by the Commissioner. Memoranda and Briefs were filed by respective counsel. While the mode of relief and opinion on the powers which the parties believe should be exercised by the Commissioner vary, there is little disagreement on the relevant factual context surrounding the Board's fiscal crisis. The facts are herewith set forth, grouped in categories as follows:

A. Underestimation of Expenditures

B. Overestimation of Revenues

C. Responsibility for the Board's Fiscal Crisis

A. *UNDERESTIMATION OF EXPENDITURES*

The Regional Board, which operates a K-12 district, when apprised on November 4, 1977 by its auditors of deficits in the revenue portion of its 1977-78 budget, requested that a State Department of Education audit team conduct an independent audit of accounts. (P-4) This was done utilizing as a base pertinent financial data as of October 31, 1977. The audit team, which took into consideration economies already ordered by the Superintendent, found anticipated overexpenditures in the current expense account of $23,729 by June 30, 1978. Those economies ordered by the Superintendent which have been effected include, *inter alia,* elimination of field trips and planned curriculum development, freezing of four professional and nonprofessional vacancies, cutback or elimination of purchases of books, equipment, audiovisuals, services, supplies, and management studies. Economies which he ordered in the amount of $207,600, together with line items which had been either overbudgeted or budgeted to wrong line items, totaled $290,500. (P-3)

The Superintendent testified, however, that his analysis of the budget also showed underbudgeting of other line items which required additional appropriations totaling $319,100 merely to maintain essential programs that had been in existence the prior year. (Tr. I-33; P-3) Thus, he estimated that after ordering

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those economies the 1977-78 expenditures for current expenses would exceed appropriations by $28,594, a figure $4,865 in excess of the audit team's estimate of $23,729. (Tr. I-33-41)

An analysis of the statement of line item balances for January 31, 1977, with all salaries encumbered through June 30, 1977, convinces the hearing examiner that, with careful budget controls, elimination of spring interscholastic and extracurricular programs, deferment of nonessential purchases and services until the ensuing fiscal year, non-expenditure of $8,000 budgeted for architectural fees, and reduction of all commitments to their lowest necessary levels for the remainder of the 1977-78 school year, expenditures may be limited to the total provided for by appropriations of $3,228,635 of which $546,546 remained, as an unencumbered balance at the end of the seventh month of the Board's fiscal year. This finding is based on a review of each line item in which expenditures and encumbrances to January 31, 1977 are less than the appropriation for that line item. It does not duplicate those economies which the Superintendent had already ordered to offset underbudgeted items, *ante*. (See C-2(A) and J-3.)

The hearing examiner also finds that the Board has adopted a policy of allowing its staff to diminish by attrition and by not filling existing vacancies. This has resulted in a reduction of staff consisting of one guidance counselor, one reading teacher, one clerk and one maintenance employee. (P-3) The Superintendent, when faced with the budgetary crisis in December 1977, had reluctantly recommended that forty-seven professional, clerical and custodial staff members be given notice of termination in order to conserve funds to be able to keep the system intact throughout the school year. (Amended Petition) This recommendation, he testified, was analogous to a physician treating a patient with cancer:

> "***[T]he choice is that you amputate an arm and you can save the patient's life.***
>
> "The physician has to make a decision, and he decides to go for what would be the life-saving measure, which is to cut the arm off.*** [T]hat was analogous to the type of situation I was in *** You wouldn't have a school district in a position to offer [a thorough and efficient education] but the school district would be living and it would be surviving.***" (Tr. I-109-110)

The Board, however, did not vote to reduce staff by forty-seven employees and has since taken no action to reduce staff other than to freeze the four vacancies. When asked whether, in his opinion, any additional staff reductions could be effected and still meet minimal standards, the Superintendent averred that, although he believes the district is currently providing a thorough and efficient educational program, the Board has not sought "***to strike the absolute rock bottom educational level that could be sustained and still have anybody consider it thorough and efficient***." (Tr. II-53-54) At one point the

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Superintendent testified that he was uncertain whether the further reduction of staff by five teachers would precipitate a less than thorough and efficient program. (Tr. I-95) Thereafter he testified that, in his opinion, not a single professional or nonprofessional employee could be eliminated at this time of the school year without causing the program to be less than thorough and efficient. (Tr. II-79) When questioned, however, whether the district intended to continue to maintain driver education behind-the-wheel training in the ensuing school year, he answered in the negative. (Tr. II-84-85)

The Assistant Superintendent testified that, in his opinion, the district had gone from full compliance with the Public School Education Act's requirements prior to November 1977 to virtual total noncompliance, with staff demoralization, as a result of reduction of funds ordered for those economies previously described. (Tr. II-104-130) In regard to the effect on pupils, he stated:

> "***I really believe in some ways it had a good effect, that people for the first time became very, very concerned about an educational process, both in terms of cost, efficiency and also in terms of making certain value judgments. *** I don't think it's a bad thing that kids became exposed to that problem.***" (Tr. II-153)

The Assistant Superintendent testified further that, both prior to the current school year and in the fall of 1977, he had advised his superior and the Board that the financial basis of operation was grossly inadequate and lacking in systematic management. (Tr. II-145, 161; P-18)

The hearing examiner, having considered the testimony of witnesses and having examined the documents in evidence which reveal class sizes, staff assignments and curricular offerings, finds that, although the Board has effected some economy by cutbacks in planned improvements and simple attrition of staff, it has not availed itself of certain economies which could be effected by reductions in force in areas that would not render its program less than minimally thorough and efficient. While the examiner can appreciate the Superintendent's reluctance to regroup classes during the progress of a school year, it is clear that a school district with such a fiscal crisis must itself do all that it can to effect economies in the face of that crisis. Among those areas of instruction where reductions could be made through elimination of offerings or regrouping of pupils in larger classes are behind-the-wheel driver education, elementary physical education, secondary physical education, English, social studies, business, seventh and eighth grades, fine arts, science and mathematics, and industrial arts. (P-20, P-22) The hearing examiner recommends that the Commissioner determine that, by reduction of certain staff members to less than full-time employment and by the elimination of other teaching staff positions, the Board should effect further economies by reduction in force of the full-time equivalent of eight staff positions from April 1, 1978, through the remainder of the 1977-78 school year a a saving conservatively estimated at $25,000.

In summary, the hearing examiner recommends that the Commissioner

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determine that it is unnecessary to provide for the following amounts which may yet reasonably be effected by prompt action of the Board:

| | |
|---|---|
| Reduction in Force (Staff) | $25,000 |
| Reductions of Other Line Item Expenditures | $23,729 |

B. *OVERESTIMATION OF REVENUES*

The Board appropriated to its 1977-78 budget $120,000 from free balance in its current expense account. That balance on June 30, 1976 was $301,007 of which $100,000 was used as a revenue appropriation in the 1976-77 budget. Of the remaining $201,007, the Board granted credits for overcharges in tuition, appropriated to compensate for deficits in tuition revenues or otherwise utilized all but $29,631 of its free balance prior to June 30, 1977. Thus, it was in a deficit position and unable to appropriate $120,000 from free balance of which $90,368 no longer existed.

Additionally, the Board anticipated transportation revenue for 1977-78 in the amount of $681,640. The actual audited amount for transportation revenue was $642,341, or a difference of $39,299 less than was anticipated.

Further compounding its crisis in revenues anticipated, the Board had estimated tuition revenues of $1,377,420 on the basis of a greater member of tuition pupils than were actually enrolled in September 1977. (P-1) The audit team estimated a shortage of tuition revenue of $160,315. The Superintendent testified, however, that since the audit team completed its work an additional thirty-five pupils had either graduated, moved away or were no longer attending by reason of having sufficient credits to graduate. He stated that the additional shortage of revenue incurred thereby amounts to $23,729. The hearing examiner finds this testimony to be uncontested and consistent with reliable documentation in evidence. (Tr. I-44; P-7, P-12, P-13)

The audit team also found that the Board had failed to budget miscellaneous revenues realizable in the amount of $8,100. (P-2)

The hearing examiner, having considered all documents entered into evidence and the testimony of witnesses, finds that the Board will sustain a shortage in the revenue portion of its budget, as summarized below:

| | | |
|---|---|---|
| Free Balance Appropriation | | ($ 90,368) |
| Transportation Aid | | ( 39,299) |
| Tuition Receivable | | |
| Audit Team Estimate October 30, 1977 | ($160,315) | |
| Losses Since October 30 | ( 23,729) | |
| | | ($184,044) |
| | | ($313,711) |
| Less Miscellaneous Revenue | | 8,100 |
| Total Revenue Shortage | | $305,611 |

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The hearing examiner, combining the revenue shortfall and such economies as may yet be effected beyond those compensating for overexpenditures estimated by the audit team, finds that the Board is in a deficit position for continued operation through June 30 of the 1977-78 school year, as follows:

| | |
|---|---|
| Revenue Shortage | $305,611 |
| Less Reduced Expenditures | 25,000 |
| Total Deficit | $280,612 |

The Board, faced with this fiscal crisis, has taken the following positions on proposed remedies:

1. Held a special election on January 3, 1978 to raise $106,750 of supplemental revenue from local taxation which, together with a voluntary reduction of staff salaries ($105,000) and voluntary contributions by the Borough of Allentown and the Township of Upper Freehold ($100,000) would have met its then known deficit. This referendum was defeated and the voluntary offers were irrevocably withdrawn.

2. Voted 5-4 on January 4, 1978 against a proposal to reduce its staff of employees of 164 by 47 administrators, teachers, clerks and custodians.

3. Filed the Amended Petition of Appeal in the instant matter on January 6, 1978.

4. Placed a proposal on the ballots at the 1978 annual school election on February 21, 1978 to raise by public taxation for current expenses for the 1977-78 school year the additional sum of $311,750, which proposal, together with the proposed amount to be raised for the current expense budget for the 1978-79 school year, was resoundingly defeated.

5. Gave public notice on February 15, 1978 of "***its intention to consider acting on a proposed reduction in force at a Special Board Meeting, February 27, 1978 *** preparatory to an anticipated April 1st closing, absent a resolution of [the Board's] financial deficit." (Board's Notice of February 15, 1978)

C. *RESPONSIBILITY FOR THE BOARD'S FISCAL CRISIS*

Adequate monthly machine print-outs of line items in the Board's budget are shown to have been available for review for budget control purposes by the Board or its administrative officers. (C-2, C-3 (A,B,C,D,E) ) A review of the testimony at the hearing, however, supports the conclusion that the Board Secretary did not perform this function because she believed that to be the responsibility of the Superintendent. It is clear from her testimony that she perceived a financial crisis only when the Board was faced with a shortage of cash as opposed to impending shortages which could have been foreseen from a line item review both in the revenue and expenditures sectors of the budget. (Tr. II-181-186, 199) In this regard she testified:

"***I was not aware that we had a fiscal problem until the cash balance

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was depleted in July, 1977. I could not have discussed this the year before, because it didn't exist.***'' (Tr. II-20)

The former superintendent who was in the Board's employ while this crisis was in the making was not called to testify. The present Superintendent, who was employed merely two months before he found it necessary to order the special audit, took such prompt action as he deemed appropriate but was powerless to compensate for the devastating revenue shortage with which he was faced.

The Board's job descriptions for the Superintendent and the Board Secretary do not forthrightly delegate the responsibility for budget control and analysis to either of these administrators. It is likewise clear that the Board itself did not perform that function. Accordingly, the responsibility must be jointly borne by the Board, its Secretary and the former superintendent, none of whom performed that vital function. Had some competent person done so, the following would have been learned during the preparation of the 1977-78 budget in January 1977 in time to make appropriate revisions:

1. There had been gross overestimation of the numbers of tuition pupils for at least five years prior to 1977-78.

2. The district had overcharged for tuition pupils for several years prior to 1977-78, requiring repayment through tuition credits.

3. Many line items were severely underbudgeted in terms of planned programs and personnel.

4. The free balance in the current expense account would be depleted during the 1976-77 year so that the planned appropriation of $120,000 therefrom would be impossible.

The hearing examiner recommends that the Commissioner direct the Board to adopt a policy statement which clearly recognizes the responsibility of the Superintendent of Schools for budgetary control and analysis and which directs that he report regularly to the Board not only on the status of all major accounts and line items in which it appears there may be either overbudgeting or underbudgeting in terms of planned programs, but also on the unappropriated free balances in any of its accounts.

The hearing examiner recommends that the Commissioner reject the application by the Washington Township Board that he declare the Regional District in receivership and take over the administration of the Regional District.

The hearing examiner, in conclusion, recommends that the Commissioner, pursuant to his responsibilities and authority under *N.J.S.A.* 18A:7A-1 *et seq.* and other applicable authority conferred by the New Jersey Constitution, should certify additional tax revenues in the amount of $280,612 for the Board's use

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as revenue in its budget in order that it may continue a viable program of education for the remainder of the 1977-78 school year.

It is noticed that, while the respondent municipal governing bodies do not object to the relief sought by the Regional Board, they request that if such relief is to come as the result of levying of additional local taxes, it be spread over a period of years in order that the burden in any one year not be oppressively severe. (Memorandum of Respondents, dated February 10, 1978) The Superintendent's written statement, uncontradicted in the record, is that an increase in local taxation of $311,750 would raise the present school tax rate of $1.94 in Allentown Borough by 27.3 percent and the school tax rate of $2.26 in Upper Freehold Township by 26.5 percent. (Amended Petition) By interpolation, it is calculated that a lesser increase of $280,612, as recommended herein, if sustained in one year, would raise the respective tax rates, for school purposes only, by approximately 24.7 percent in Allentown Borough and by approximately 24.3 percent in Upper Freehold Township. It should also be recognized that the impact of such an increase, if sustained in one year, would be in addition to increases which the Board has estimated may be necessary to its operations in the ensuing 1978-79 school year.

The hearing examiner commends to the Commissioner the legal arguments set forth in Briefs and memoranda of petitioners, respondents and intervenor. This concludes the report of the hearing examiner. Any exceptions to this report are, by common consent, to be filed within two days of receipt of this report.

* * * *

The Commissioner has carefully reviewed the entire record of the matter including the pleadings, exhibits in evidence, testimony adduced at the hearing, the hearing examiner report and all exceptions filed thereto pursuant to *N.J.A.C.* 6:24-1.17(b).

The Regional Board, the Associations and the Millstone Board, taking exception to the hearing examiner's finding that $25,000 may yet be realized as a saving by reduction of staff, contend, *inter alia*, that such reductions at this stage of the school year would create an administrative nightmare of rescheduling, accentuate already severe teacher and pupil morale problems, and reduce the educational program to less than a thorough and efficient level.

The Commissioner's review of the record leads to the conclusion that the hearing examiner's finding is valid and that economy may yet be effected within the constitutional and legislative contemplation of a thorough and efficient education. Accordingly, it is determined that the Regional Board must either reduce staff, as suggested, at a saving of $25,000 or by stringent economies elsewhere in its current expense budget effect both that saving and the additional reductions of line item expenditures of $23,729 as recommended by the hearing examiner, *ante*. The net result of those economies will result in expenditures during 1977-78 which will be at least $25,000 less than the adjusted grand total of appro-

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priations for current expenses of $3,242,349.51, of which $546,546 remained unencumbered on January 31, 1978. (C-2; C-2(A) ) The request that the Commissioner transfer unused funds from the Regional Board's capital account to its current expense account to fund teachers' salaries to the extent of $25,000 is denied on the basis that the option was available to but not utilized by the Board which could have placed such a transfer as a public question before the voters at the elections of January 3 and February 21, 1978. Furthermore, it is an option which still remains open and usable at the Board's discretion. While in no way demeaning the Regional Board's efforts which have resulted in cutbacks of planned expenditures totaling $207,600, the Commissioner determines that a fiscal crisis of such proportions, of the Regional Board's own making, requires yet greater efforts on its part to reduce the magnitude of that crisis.

The Regional Board also takes exception to the hearing examiner's finding that the additional loss of tuition revenue from reduced enrollment of tuition pupils since the audit team made its report totals $23,729. This exception has merit, since the record shows conclusively that the additional loss of revenue sustained was $41,586, an amount $17,857 greater than that reported by the hearing examiner. (Tr. II-45; P-8) In all other respects the findings of the hearing examiner are found to be accurate and are adopted by the Commissioner as his own. It is determined, therefore, that the Regional Board's deficit as computed at $280,612 by the hearing examiner, when recomputed by adding $17,857 totals $298,469. It is this amount which is required to enable the Regional Board, after it has effected the aforementioned economies, to continue and complete the 1977-78 school year. The Commissioner so holds.

No party to these proceedings suggests or recommends the termination of the 1977-78 school year with less than 180 school days. Nor can the Commissioner, pursuant to his statutory authority to inquire into and ascertain the thoroughness of educational programs, countenance as thorough the excision of over two months from the Regional District's academic year. *N.J.S.A.* 18A:4-24; *N.J.S.A.* 18A:7A-1 *et seq.*

The Board, having twice been unsuccessful in seeking approval of the electorate to raise funds necessary to complete the academic year, has properly appealed to the Commissioner to exercise such powers as are at his disposal to meet its fiscal crisis. There exist, however, no directives of the courts and no specific statutory delegation of power which directs the Commissioner to review and certify to a county board of taxation any or all of a supplemental budget appropriation proposed by a board at a special school election and defeated by the voters. Nevertheless, the courts have held in certain instances that, despite a lack of specific statutory provision, the Commissioner's authority as delegated by the Legislature was sufficiently broad to require that he act in compelling circumstances to effectuate the constitutional and statutory mandates as applied to the public schools. *Booker v. Board of Education of the City of Plainfield,* 45 *N.J.* 161 (1965); *Jenkins et al. v. Morris Township School District et al.,* 58 *N.J.* 483 (1971); *Board of Education of East Brunswick et al. v. Township Council of East Brunswick et al.,* 48 *N.J.* 94 (1966); *Board of Education of Elizabeth v. City Council of Elizabeth,* 55 *N.J.* 501 (1970)

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Familiar canons of statutory interpretation require that statutes *in pari materia,* including those not enacted at the same time, must be construed with reference to each other as a harmonious whole. *Arcell et al. v. Ashland Chemical Co., Inc.,* 152 *N.J. Super.* 471 (*Law Div.* 1977) Accordingly, although the statutes authorizing boards to submit proposals for supplemental budget appropriations to the voters do not specifically provide for the review and certification by the Commissioner of amounts required to be raised, (*Cf. N.J.S.A.* 18A:13-20) he may not be unmindful of the authority elsewhere conferred upon him to attain the objectives of the Public School Education Act of 1975. *N.J.S.A.* 18A:7A-1 *et seq.* The adjustment of budgets is specifically conferred therein, as follows:

> "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***." (*N.J.S.A.* 18A:7A-15)

The Supreme Court, in passing on the validity of the 1975 Act, in *Robinson v. Cahill,* 69 *N.J.* 449, 463 (1976), confirmed that the State, in order to meet its constitutional obligation, must have available the authority to compel a local school district to raise necessary funds to conduct a thorough and efficient program of education.

In the instant matter it has been concluded that sufficient necessary funds have not been provided. The purpose of the Legislature to anticipate and take action to forestall deficiencies in a given educational program would surely be frustrated if the program *in toto* were to be allowed to become nonexistent for nearly one third of the scheduled academic year. It is precisely such impermissible result that the 1975 Act and the decisions in *Robinson, supra,* were intended to prevent. The fact that the instant matter results from voter reluctance to approve necessary expenditures does not render the Commissioner powerless to take corrective action. To conclude otherwise would be to arrive at an absurd and anomalous result. *State v. Madewell,* 117 *N.J. Super.* 392 (*App. Div.* 1971), aff'd 63 *N.J.* 506 (1973) Accordingly, the Commissioner determines that he has authority and does hereby certify to the Monmouth County Board of Taxation the amount of $298,469 as the additional sum to be raised by local taxation for current expenses of the Board in order to insure a thorough and efficient educational program throughout the remainder of the 1977-78 school year.

The respondent municipal governing bodies and the Regional Board have asked that certification of additional taxes be spread over a period of several years. The Commissioner is sympathetic to this obvious desire to make the impact of additional taxation less burdensome in a given year, particularly 1978 when the above certification will be added to taxes which must be levied for the ensuing school year. The request to spread the certification over three or more years is, nevertheless, denied on the basis that the Regional Board and the respondent municipal governing bodies are not without recourse to ameliorate, under their own authority, the impact of the additional certification.

The Regional Board currently operates, as do many school districts, on a

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fiscal year basis from July 1 through the following June 30. Under this procedure the taxes certified for the 1978-79 school year are raised during calendar year 1978. One half of that amount is not needed, however, until the period from January 1 through June 30, 1979. The option exists for the Regional District to convert its operations to a calendar year basis pursuant to the provisions of *N.J.S.A.* 18A:22-34(b). The effect of such conversion by the Regional District would be that during 1978 the only taxes that would have to be raised (in addition to those which have already been collected in 1977 for use in the second half of the 1977-78 school year) would be those necessary to meet the supplemental certification by the Commissioner, *ante,* and the amount determined to be necessary to operate the schools for the period from July 1, 1978 through December 31, 1978. Thus, since the municipalities would be freed from raising during 1978 the taxes necessary to operate the schools from January 1, 1979 through June 30, 1979, it may be assumed that, even with the supplemental appropriation to meet the present crisis added to 50 percent of the amount to be raised for the 1978-79 school year, the tax rate for 1978 would be significantly less under a calendar year basis as compared to continuing on a fiscal year basis. That this is so is clearly demonstrated by the following calculations which utilize *for comparison purposes only* the assumption that the Regional Board's proposed current expense levy of $1,785,888 had been approved by the voters:

| | |
|---|---|
| Total Tax Levy Required for Current Expenses 1978-1979 School Year: | $1,785,888 |
| 50% of Tax Levy to be Raised for Current Expenses in 1978 Levy | 892,944 |
| Total Tax Levy Required for Debt Service | 71,721 |
| 50% of Tax Levy to be Raised for Debt Service | 35,860 |

*TOTAL 1978 LEVY: USING CALENDAR YEAR METHOD*

| | |
|---|---|
| 50% of 1978-1979 CE Budget | $ 892,944 |
| 50% of 1978-1979 Debt Service | 35,860 |
| Subtotal | $ 928,804 |
| Supplemental Appropriation for 1977-1978 to be Raised by 1978 Levy | 298,469 |
| Total 1978 Levy (Calendar Year Method) | $1,227,273 |

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*TOTAL 1978 LEVY: USING FISCAL YEAR METHOD*

| | |
|---|---|
| 1978-1979 Current Expense | $1,785,888 |
| 1978-1979 Debt Service | 71,721 |
| Subtotal | $1,857,609 |
| Supplemental Appropriation for 1977-1978 to be Raised by 1978 Levy | 298,469 |
| Total 1978 Levy (Fiscal Year Method) | $2,156,078 |

The impact on each municipality's 1978 local taxes for school purposes may be calculated as follows utilizing 35.3152402 percent as Allentown Borough's proportionate share and 64.6847598 as Upper Freehold Township's proportionate share:

| *Calendar Year Basis* | *1978 School Tax* |
|---|---|
| Upper Freehold Township | $ 793,859 |
| Allentown Borough | 433,414 |
| Total | $1,227,273 |
| *Fiscal Year Basis* | |
| Upper Freehold Township | $1,394,654 |
| Allentown Borough | 761,424 |
| Total | $2,156,078 |

It is readily seen that conversion to a calendar year basis would reduce the amount to be raised by local taxation for school purposes in the Regional District in 1978 by $928,806 as compared to the amount which would be required by continuing to operate on the present fiscal year basis. Correspondingly, Upper Freehold Township would be required to raise in 1978 for school purposes $600,797 less on a calendar year basis than on a fiscal year basis. Allentown Borough would be required in 1978 to raise on the calendar year basis $328,009 less than it would by continuing to operate on a fiscal year.

It must be recognized, however, that in 1979 taxes would inevitably rise when the municipalities would again have to raise taxes for both January through June of the Regional Board's 1978-79 school year and for July through December of the Board's 1979-80 school year. It is apparent that those taxes would have to realistically reflect the true costs of operating the schools for an entire year. To make the transition smoother the municipal governments could raise in 1978 more than the required 50 percent statutory minimum in 1978 and thus reduce proportionately the amount which would be required to be raised for school purposes in the ensuing 1979 calendar year.

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The available alternative of conversion to a calendar year basis of operation is an option which would offer relief from the temporarily burdensome increase in local property taxes which may otherwise ensue during 1978. The Commissioner will not direct that it be utilized but strongly urges that it be considered as a viable option to assuage the effects of the sharp increases in local property taxes which, it appears, will otherwise result in 1978 if that option is not adopted.

COMMISSIONER OF EDUCATION

March 22, 1978

**In the Matter of the Annual School Election Held in the Toms River Regional School District, Ocean County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

Pursuant to a mailgram request filed by Candidates Robert J. Davis and James Sullivan, alleging irregularities in the conduct of the annual school election held on February 21, 1978 in the Toms River Regional School District, an inquiry was conducted by a representative of the Commissioner of Education at the office of the Ocean County Superintendent of Schools, Toms River, on March 1, 1978. The specific allegation of improper conduct of the election is set forth as follows:

> "Literature distributed in favor of Candidates Patricia Schinski and Arthur 'Jack' Kingsley for the Toms River Regional Board of Education election *** carried no source of authorization (i.e.: name and address) as per *N.J.S.A.* 18A:14-97 (Printed matter used in elections.)***"

Candidates Sullivan and Davis testified that they learned on the Saturday prior to the election held on Tuesday, February 21, 1978, that a single page printed handbill was distributed in two polling districts. They testified that they acquired a copy of the handbill (C-1) and determined that it did not bear upon its face a statement of the name and address of the person or persons causing the same to be printed, in violation of *N.J.S.A.* 18A:14-97. They further alleged that the handbill was deceitful and smeared them as candidates. They requested of the Commissioner that the names of Candidates Schinski and Kingsley be removed from the ballot or, in the alternative, that they be declared ineligible to serve if elected.

*N.J.S.A.* 18A:14-97 reads as follows:

> "*No person shall print,* copy, publish, exhibit, distribute or pay for printing,

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copying, publishing, exhibiting or distribution *or cause to be distributed in any manner or by any means, any* circular, *handbill,* card, pamphlet, statement, advertisement or other printed matter *having reference to any election or to any candidate* or to the adoption or rejection of any public question *at any annual* or special *school election unless such* circular, *handbill,* card, pamphlet, statement, advertisement or other printed matter *shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed,* copied or published or of the name and address of the person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published." *(Emphasis supplied.)*

Candidate Schinski and Kingsley stipulated that they were the authors of the controverted handbill and did indeed distribute copies of same in Polling Districts 8 and 10 prior to the election. Candidate Schinski testified that between 600 and 700 copies of the handbill were printed and distributed in the two polling districts. She testified that she was aware of the provisions of *N.J.S.A.* 18A:14-97; however, inasmuch as there was no cost to her or Candidate Kingsley for the printing, she did not believe it was necessary to publish the name and address of the person by whom the cost of the printing was defrayed.

A summary of the "Combined Statement of Result of School Election," is as follows:

| | *At Polls* | *Absentee* | *Total* |
|---|---|---|---|
| Patricia Schinski | 819 | 25 | 844 |
| Arthur F. (Jack) Kingsley, Jr. | 713 | 13 | 726 |
| Warren D. Sierveld | 708 | 15 | 723 |
| James Sullivan | 652 | 16 | 668 |
| Robert J. Davis | 572 | 22 | 594 |
| Paul F. McCarthy | 472 | 23 | 495 |
| Raymond E. Bonwell, Jr. | -0- | 1 | 1 |

An analysis of the results of the voting at the two polling districts in which the controverted pamphlet was distributed shows the following:

*Polling District No. 8*

| *Names of Candidates* | *Votes Counted* |
|---|---|
| Patricia Schinski | 190 |
| Robert J. Davis | 107 |
| Paul F. McCarthy | 98 |
| Warren D. Sierveld | 114 |
| James Sullivan | 138 |
| Arthur F. (Jack) Kingsley, Jr. | 138 |

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*Polling District No. 10*

| *Names of Candidates* | *Votes Counted* |
|---|---|
| Patricia Schinski | 50 |
| Robert J. Davis | 24 |
| Paul F. McCarthy | 27 |
| Warren D. Sierveld | 13 |
| James Sullivan | 38 |
| Arthur F. (Jack) Kingsley, Jr. | 46 |

The Commissioner's representative finds that the allegation as set forth by Candidates Davis and Sullivan is true in that the handbill printed and distributed by Candidates Schinski and Kingsley did not bear upon its face a statement of the name and address of the person or persons causing the handbill to be printed.

The hearing examiner does not find, however, that the will of the voters has been thwarted in this election. An analysis of the votes cast shows that there was individual voter selection of the candidates, and that Candidates Sullivan and Davis finished in fourth and fifth place respectively.

Having considered this procedural violation, the Commissioner's representative recommends that the election stand as recorded and, further, that any violations of *N.J.S.A.* 18A:14-97, if deemed to be fraud or deliberate misconduct, be reported by complainants to the office of the Ocean County Prosecutor for consideration and possible prosecution in a court of law.

* * * *

The Commissioner has reviewed and considered the record in this matter and the recommendations of his representative. The irregularities in this election are clear and may not be condoned. There is no evidence that such irregularities clearly affected the result of the election or that the will of the people was thwarted or could not be determined. *In the Matter of the Annual School Election Held in the School District of the Borough of Jamesburg,* 1975 *S.L.D.* 413

In such circumstances there is reason to caution this Board and all other local boards of education to inform prospective candidates in order to prevent such irregularities in the future and to urge strict compliance with the statutes that govern the printing and distribution of campaign literature. *N.J.S.A.* 18A:14-97 There is no reason, however, to warrant a conclusion that this election should be set aside.

Accordingly, the Commissioner determines that Candidates Schinski, Sierveld, and Kingsley were each elected to three year terms on the Board of Education of the Toms River Regional School District. The complaint herein is dismissed.

COMMISSIONER OF EDUCATION

March 28, 1978

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**In the Matter of the Annual School Election Held in the School District of the Township of Galloway, Atlantic County.**

## COMMISSIONER OF EDUCATION

## DECISION

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual school election held February 14, 1978 in the School District of the Township of Galloway, Atlantic County, were as follows:

| | |
|---|---|
| Clyde Stockton | 273 |
| Dorothea Willey | 223 |
| Pauline Stuckel | 154 |
| Elaine Conforti | 110 |
| James Newell | 71 |
| William Smith | 27 |

Nine other persons received one or two votes each.

Pursuant to a letter request from Candidate Elaine Conforti received February 17, 1978, the Commissioner of Education directed an authorized representative to conduct an inquiry into the conduct of the election and a recount of the ballots cast. The recount was conducted on February 27, 1978 at the voting machine warehouse, Northfield.

Candidate Conforti set forth several complaints concerning the conduct of the election. They are summarized as follows:

1. the write-in votes were improperly considered in that names with initials and various spellings were counted in one polling place but not in the other;

2. it was possible to vote for the same candidate more than once;

3. the poll list was not compared with the signature copy register;

4. some write-in candidates' names were written on the face of the voting machine;

5. voters were told not to use stickers;

6. one paper roll was left in the Arthur Rann School polling place for a few hours while the Board Secretary delivered another roll to his office. He returned later to pick up this paper roll which he then delivered to his office.

Testimony was elicited from the Board Secretary, several election workers, a successful candidate, the complainant and other interested citizens. Only two

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candidates' names appeared on the ballot; nevertheless, it was demonstrated by the warehouse custodians that it was not possible to vote for more than three candidates if the write-in ballots were counted correctly. Any combination of candidates selected by depressing a lever, or by raising a shuttered window to write in a name, effectively locked the machine so that no other votes could be cast after three selections had been made. It was possible, however, to write the same candidate's name twice or to write two names of different candidates in the first large square in the upper left hand corner of the machine. During the recount, this phenomenon occurred three times and all such ballots were voided because in each case the voter could have voted for four persons instead of three as each voter was instructed.

The election workers admitted that they did not compare the signatures of all voters with the signature copy register. One election worker testified that they compared only the signatures of those persons they did not know. The evidence of names written on the machines was contained in two notarized letters which stated that a write-in candidate's name was written in pencil on the face of one machine. Regarding the complaint that voters were told not to use stickers, an election worker testified that she did warn voters that stickers might fall off the paper roll and that they should use pencil to insure that their ballot would be counted. No one testified that he/she could not vote because he/she was advised not to use stickers.

The Board Secretary testified that he did, in fact, leave one paper roll locked in an office at the polling place protected by a burglar alarm while he took the second paper roll to his office. He returned shortly thereafter to retrieve this second roll which he then took to his office. His testimony is corroborated by the Board President and by complainant. There is no showing that anyone touched or had access to the paper roll in the Board Secretary's absence. Neither did an inspection of the paper roll during the recount show any irregularity on the ballot caused by tampering.

Finally, the machines were checked to tally the votes for the two candidates, Willey and Stockton, whose names appeared on the machine ballot. Their tallies were as follows:

| | |
|---|---|
| D. Willey | 223 |
| C. Stockton | 273 |

A recount of the paper roll showed the following result:

| | |
|---|---|
| P. Stuckel | 150 |
| E. Conforti | 111 |

Nine other persons received write-in votes; however, the votes cast for each were so few in number that they are not reported here.

The record will show that the voting machines were properly prepared and that no irregular votes were counted. Regarding the comparison of signatures,

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the relevant statute demands that signatures be compared for all persons who wish to vote. *N.J.S.A.* 18A:14-51 The record reveals, also, that on repeated occasions someone did write a candidate's name on the face of the voting machine. The statutes demand that all election paraphernalia be sealed in an envelope for safekeeping. *N.J.S.A.* 18A:14-61 In the instant matter this was done except for the paper rolls which were rolled up and sealed with gummed tape.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has read the report of his representative and is convinced that there were only minor irregularities during the conduct of this election.

In future elections, the Board Secretary is directed to instruct the election workers regarding all procedures which must be utilized for the proper conduct of a school election. Specifically, attention must be given to the comparison of voters' signatures. *N.J.S.A.* 18A:14-51 In this regard *N.J.S.A.* 18A:14-63 reads as follows:

> "It shall be the *duty* of the secretary of the board of education to perform any such duties, not in conflict with those imposed upon any other officer by this law, as may be necessary for the proper conduct of a school election." *(Emphasis supplied.)*

It is proper, also, to use stickers on the voting machine where a personal choice is required or desired. *N.J.S.A.* 18A:14-55

The election workers should be instructed, also, to be certain that the face of the voting machine is not marked by voters or left pasted with stickers. In future elections, the inspector of elections should be instructed, where possible, to fold the paper roll from each voting machine and seal it in a large package with the other election materials. *N.J.S.A.* 18A:14-61

The Commissioner stated *In the Matter of the Annual School Election Held in the Borough of Totowa,* 1965 *S.L.D.* 62:

> "***It is well established that irregularities which are not shown to affect the results of an election will not vitiate the election. The following is quoted from 15 *Cyc.* 372, in a decision of the Commissioner in the case of *Mundy v. Board of Education of the Borough of Metuchen,* 1938 Edition of School Law Decisions, at page 194:
>
> > 'Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the courts are disposed to give effect to elections when possible. And it has been held that gross irregularities when not amounting to fraud do not vitiate

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an election.' *In the Matter of the Recount of the Annual School Election in Ocean Township,* 1949-50 *S.L.D.* 53, 55

"See also *Love v. Freeholders of Hudson County,* 35 *N.J.L.* 269 (*Sup. Ct.* 1871).***" (at 65)

In the instant matter there is no showing of any irregularity which affected the result of the election in any manner. Therefore, the results will stand as shown in the recount.

The Commissioner finds and determines that Dorothea Willey, Clyde Stockton, and Pauline Stuckel were elected to full terms of three years each on the Board of Education of the School District of the Township of Galloway, Ocean County.

COMMISSIONER OF EDUCATION

March 28, 1978

**Barbara Kuboski and Florence Sgromolo,**

*Petitioners,*

*v.*

**Board of Education of the Borough of South Plainfield, Middlesex County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioners, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Richard H. Greenstein, Esq., of Counsel)

For the Respondent, Jacob Green, Esq.

Petitioners, teaching staff members in the employ at various times of the Board of Education of the Borough of South Plainfield, hereinafter "Board," allege that they had an entitlement to continue their employment for the school year 1975-76 but were denied such entitlement by action of the Board. They assert that, although the Board's reason for their non-reemployment was a decrease in enrollment, a number of vacancies occurred for which they applied

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and were denied employment. They contend that the Board's action was arbitrary, unreasonable and capricious and demand judgment for restoration to their teaching positions forthwith. The Board denies the allegations and maintains that petitioners' services were legally terminated at the conclusion of the 1974-75 school year.

On May 21, 1976, a hearing examiner appointed by the Commissioner of Education opened the record in the instant matter whereupon fifty-three documents were individually introduced into evidence as joint exhibits of petitioners and the Board. In addition, the parties agreed to certain stipulations with regard to pupil enrollments in the school district as of September 30, for the years 1973, 1974 and 1975. (Tr. 17; PR-1 through PR-53)

Subsequent to the introduction of the documents into evidence, Petitioner Kuboski advanced a Motion to amend the Petition of Appeal to assert a claim for tenure rights as provided by *N.J.S.A.* 18A:28-5(c) and *N.J.A.C.* 6:24-1.6. The Board opposed the Motion to amend the Petition of Appeal on the grounds of prejudice to its position caused by the delay in making the tenure claim and the equitable doctrine of laches. No testimony was elicited at the hearing.

The matter comes before the Commissioner at this juncture on a Motion advanced by the Board for Summary Judgment to dismiss the Petition and Amended Petition of Appeal. Both parties filed Briefs and the submission for decision was completed by the introduction of supplementary documentary evidence on January 19, 1977. The factual allegations contained in the Petition and Count Three of the Amended Petition, but not the conclusions therein, are conceded by the Board to be true. (See Board's Brief, at p. la.)

Thus, two matters are before the Commissioner for determination: the Board's statement of reasons for the non-reemployment of nontenured teaching staff members, Petitioners Kuboski and Sgromolo, as set forth in the original Petition and the tenure claim advanced by Petitioner Kuboski in her Amended Petition. The issues will be considered *seriatim* as follows:

With regard to Petitioner Sgromolo, the pertinent facts of this matter are recited as follows:

Petitioner entered into a contract with the Board on January 1, 1973 for an appointment to serve until June 30, 1973 as a second grade teacher at Grant Elementary School. (PR-48-49) Subsequently, the Board appointed her as a supplemental instructor for the 1973-74 school year at the rate of $6.00 per hour, four hours per day, five days per week from September 1, 1973 until June 30, 1974. (PR-46 A, B) During the course of the academic year and at its regular monthly meeting of February 19, 1974, petitioner was appointed as a third grade teacher effective April 1, 1974 to replace a regular teaching staff member granted a maternity leave until June 30, 1974. (PR-45 A,B,C) on April 17, 1974, petitioner was informed that the Board voted not to renew her teaching contract for the 1974-75 school year. (PR-44) She was subsequently notified on May 1, 1974 that the Board's action was due to a decrease in pupil enrollment and the necessity to reduce the number of teaching staff members for the 1974-75 school year. (PR-43)

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On August 20, 1974, the Board appointed Petitioner Sgromolo to the position of sixth grade teacher as a replacement for a teaching staff member granted a maternity leave for the 1974-75 school year. (PR-40-42) The record reveals that she was observed in her teaching duties on the dates of September 25, October 24, December 12, 1974, and January 28, 1975 and was in receipt of two "good" evaluations by the school principal dated December 1, 1974 and March 1, 1975. (PR-38-39) Subsequently, on April 7, 1975 the principal informed petitioner that because of declining pupil enrollment and the return of teachers from maternity leave her contract would not be renewed for the 1975-76 school year. (PR-10) The Board took formal action not to renew her contract on April 15, 1975. (PR-35, 36, 37) Petitioner Sgromolo alleged that the teacher she replaced, who was granted maternity leave, did not return to duty for the 1975-76 school year. She further asserted that she applied for six vacant positions which were posted by the Board for the 1975-76 school year. (PR-31A, B, 32A, 33A, B) The evidence reveals that Petitioner Sgromolo was interviewed on three separate occasions by three different interviewers for the posted positions and was not recommended for employment. (PR-28A, F, 29-30)

On or about August 28, 1975, Petitioner Sgromolo's attorney sent the Board a letter asserting her right to be employed in any vacancy in grades kindergarten through eight which might have occurred since her non-reemployment and further requested the reasons for the Board's failure to renew petitioner's contract for the 1975-76 school year in the event the Board's reasons for said non-reemployment were other than the decreased pupil enrollment. (Petition of Appeal, Exhibit E)

The Board asserts that Petitioner Sgromolo was fully aware that her employment for the 1974-75 school year was as a replacement for a teacher on leave and, due to teachers returning from leave, her continued employment was not possible. (PR-10-11, 37) It further asserts that its pupil enrollment did indeed decrease for the 1975-76 school year and, therefore, the reasons given not to renew petitioner's contract were in fact true. Additionally, subsequent to the Board's action not to renew Petitioner Sgromolo's contract, she applied for and was interviewed for teaching vacancies which occurred for the 1975-76 school year and was not recommended for employment.

The Board avers that Petitioner Sgromolo's termination was not based upon any proscribed reason nor was it shown that her due process rights had been violated and, further, that petitioner had not exercised her right to a written statement of reasons nor had she requested in a timely fashion an informal appearance before the Board with regard to her non-reemployment. (Board's Brief, at pp. 3 and 5)

The Board submitted that under the facts alleged, the instant matter has been rendered *stare decisis* by previous decisions of the Commissioner, particularly in the matter of *Kenneth Dougherty v. Board of Education of the Township of Hamilton,* 1976 *S.L.D.* 412, wherein the Commissioner found that the board had met its statutory and contractual obligations to Dougherty and that such obligations terminated with the employment contract on June 30, 1974 and the

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board had no obligation to offer a subsequent vacant position to petitioner. *Patricia Bolger et al. v. Board of Education of the Township of Ridgefield Park,* 1975 *S.L.D.* 93, aff'd State Board of Education 98, aff'd Docket No. A-3214-74 New Jersey Superior Court, Appellate Division, April 21, 1976 (1976 *S.L.D.* 1122) (Board's Brief, at pp. 5-7)

The Commissioner observes that the education statutes require that non-tenure teachers be notified by April 30 if they will not be reemployed for the subsequent school year. *N.J.S.A.* 18A:27-10 *et seq.* The effect of these statutes on a teacher's employment status has been the subject of numerous determinations by the Commissioner. See *Barbara Hicks v. Board of Education of the Township of Pemberton,* 1975 *S.L.D.* 332; *Phebe Baker v. Board of Education of the Lenape Regional High School District et al.,* 1975 *S.L.D.* 471; *Inez Nettles v. Board of Education of the City of Bridgeton,* 1976 *S.L.D.* 555 *Joanne Johnson v. Board of Education of the Township of Monroe et al., Gloucester County,* 1977 *S.L.D.* 508.

In *Bolger, supra,* the Commissioner commented that the primary purpose of *N.J.S.A.* 18A:27-10, 11 and 12 is to provide teachers with timely notice when they are not to be reemployed in order that they may seek other employment. In the instant matter, the record reveals that Petitioner Sgromolo exercised such an option and applied for six different vacancies subsequent to her notification of non-reemployment.

Petitioner, as a nontenured teacher, was in a probationary period of employment. The Board made its determination not to reemploy her for reasons other than her classroom performance. Boards of education are invested with broad discretionary powers. *N.J.S.A.* 18A:11-1 One of the most essential of these is the power to determine who shall be employed and reemployed to teach in the public schools in each successive year. That a board may consider elements other than a teacher's classroom performance is made clear by the words of the Court in *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974), wherein it was stated that:

> "***The board's determination not to grant tenure need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board *** may conclude that tenure should not be granted.***" (65 *N.J.* at 241)

The Commissioner observes that the instant Petition of Appeal was filed prior to the enactment of *N.J.A.C.* 6:3-1.20 which provides the procedure for the appearance of nontenured teaching staff members before a local board of education upon receipt of notice of non-reemployment. There being no controversy with regard to that section of the Administrative Code, the Commissioner determines that Petitioner Sgromolo has failed to set forth credible evidence that the Board has acted in any way that was unreasonable, arbitrary, capricious or otherwise improper. *Schinck v. Board of Education of Westwood Consolidated School District,* 60 *N.J. Super.* 448, 476 (*App. Div.* 1960) In such matters the Commissioner will not substitute his discretion for that of a local board of

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education. Nor does he find reason to do so in this instance. Accordingly, that portion of the Petition of Appeal with regard to Petitioner Sgromolo is dismissed.

With regard to Petitioner Kuboski and the original Petition of Appeal, the undisputed facts of her employment history are stipulated and recited as follows:

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) 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) On April 16, 1974, the Board voted not to renew her teaching contract for the 1974-75 school year. (PR-18)

Petitioner Kuboski relies upon the same arguments as those advanced by Petitioner Sgromolo with regard to the Board's failure to renew her teaching contract for the 1974-75 school year.

Subsequent to the introduction of the joint exhibits and stipulations on the day of the hearing in the instant matter, counsel for petitioners requested leave to advance a Motion to amend the Petition of Appeal with regard to Petitioner Kuboski, wherein a claim of tenure accrual was set forth. Petitioner's counsel stated that it was not until the stipulated facts unfolded during the hearing that he became aware that she may have acquired tenure under *N.J.S.A.* 18A:28-5(c). (Tr. 19-23)

Notwithstanding the Board's objection to amend the original Petition the hearing examiner requested that Petitioner Kuboski's amendment be filed for consideration by the Commissioner pursuant to *N.J.A.C.* 6:24-1.6. (Tr. 31-32, 35)

The Board contended that Petitioner Kuboski had a ''fair and reasonable'' opportunity to present her tenure claim and, further, her delay in asserting such a claim until the day of the hearing constituted a waiver and that the Motion to amend the Petition should be barred by laches. (Board's Brief, Point II, at pp. 9-13 and Point III, at pp. 14-19)

Petitioner argued:

''***Given the manifold legal complexities and niceties of our tenure stat-

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utes, it cannot seriously be expected that a teaching staff member, not versed in the law, could readily recognize a pattern of employment giving rise to tenure. Likewise, since it is uncontroverted that petitioner's status was not analyzed with respect to tenure until the date of the hearing, it would be manifestly unfair to preclude petitioner Kuboski from asserting this claim (especially in light of the virtual nonexistence of teaching positions in the current education job market) based upon an alleged waiver, which is clearly not applicable herein. Clearly this claim is not specious; and, in fact, the Hearing Examiner (at T-32) believed that the petitioner had basis for amending the petition.***''

(Petitioner's Brief, at pp. 17-18)

With regard to the Board's claim of laches, petitioner argues that she made a timely claim for reinstatement and had not abandoned any claim to her position. Only through the analysis of her employment record on the day of the hearing was it realized that she had a tenure claim based upon the periods of employment with the Board. (Petitioner's Brief, at p. 21)

The Commissioner has considered the arguments of the parties and finds that petitioner did not waive her rights to entertain a claim for tenure subsequent to the filing of the original Petition of Appeal. *John Papa v. Board of Education of the Borough of Palisades Park,* 1974 *S.L.D.* 1081 Similarly, the Commissioner determines that the Amended Petition is not barred by laches. *Scott Rosenthal v. Board of Education of the Greater Egg Harbor Regional High School District and Oak Crest High School,* 1975 *S.L.D.* 619 The matter to be determined, therefore, is whether or not Petitioner Kuboski has acquired tenure pursuant to *N.J.S.A.* 18A:28-5 (c), which provides as follows:

''The services of all teaching staff members including all teachers *** 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 *** shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of Chapter 6 of this title,[1] after employment in such district or by such board for:

***

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

Petitioner Kuboski asserts that she complied with the requirement of the statute by teaching the equivalent of more than three academic years during four consecutive academic years of employment by the Board. During the academic

[1]Section 18A:6-9 *et seq.*

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years of 1971-72, 1972-73, 1973-74 and 1974-75 she avers that she was employed for a total of 32 months as follows:

1. 1971-72 School Year:

   December 3, 1971 to June 30, 1972 (Title I)

2. 1972-73 School Year:

   January 1 to June 30, 1973 (1st Grade)

3. 1973-74 School Year:

   October 15, 1973 to March 17, 1974 (Supplemental)
   March 18 to June 30, 1974 (1st Grade)

4. 1974-75 School Year:

   September 1, 1974 to June 30, 1975 (1st Grade)

Petitioner asserts that during all periods of her employment she was granted such employment by action of the Board for a specific teaching position and was not employed as a substitute teacher. Further, that she did not receive a substitute's pay but, rather, was compensated pursuant to the Board's current salary guide or its salary policy in effect for the supplemental or Title I programs and was observed and evaluated at all times as a teaching staff member. (PR-7, 12, 13, 21, 23, 24) She avers that her employment in both supplemental and Title I teaching positions is cognizable for purposes of tenure accrual, as well as entitlement to all other emoluments required to be paid to a teaching staff member in the Board's employ. *Hazlet Township Teachers Association et al. v. Board of Education of the Township of Hazlet,* 1976 *S.L.D.* 578; *Ruth Nearier et al. v. Board of Education of the City of Passaic,* 1975 *S.L.D.* 604; *Henry Butler et al. v. Board of Education of the City of Jersey City,* 1974 *S.L.D.* 890, aff'd State Board of Education 1975 *S.L.D.* 1074, aff'd in part/rev'd in part Docket No. A-2803-74 New Jersey Superior Court, Appellate Division, July 9, 1976 (1976 *S.L.D.* 1124), *cert.* den. 72 *N.J.* 468 (1977); *Jack Noorigian v. Board of Education of Jersey City,* 1972 *S.L.D.* 266, aff'd in part/rev'd in part State Board of Education 1973 *S.L.D.* 777; *Wall v. Board of Education of Jersey City,* 1938 *S.L.D.* 614 (1936), rev'd and rem. State Board of Education 618, aff'd 119 *N.J.L.* 308 (*Sup. Ct.* 1938) Petitioner submits that, since she was employed by the Board as a teaching staff member for a period in excess of three academic years within a period of four consecutive school years, she was under tenure when the Board in April 1975 gave her notice of termination of her employment.

The Board argues that Petitioner Kuboski was not entitled to tenure while she was employed on two occasions to replace tenured teachers on maternity leaves of absence from March 18, 1973 to June 30, 1973 and for the school year 1974-75. It cites *Schulz v. State Board of Education,* 132 *N.J.L.* 345

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(*E.&A.* 1945) and *Nicoletta Biancardi v. Waldwick Board of Education,* 1974 *S.L.D.* 356, aff'd State Board of Education 364, rev'd 139 *N.J. Super.* 175 (*App. Div.* 1976), aff'd 73 *N.J.* 37 (1977) wherein the Court held that employment as a substitute teacher for a regular teacher who was unable to complete a school year could not be appended to an employee's employment record to achieve tenure status.

The Board concedes that merely treating petitioner as a substitute for purposes of avoiding tenure would be impermissible. *Downs v. Board of Education of Hoboken,* 13 *N.J. Misc.* 853 (*Sup. Ct.* 1935); *Wall, supra; Juanita Zielenski v. Board of Education of Guttenberg,* 1970 *S.L.D.* 202, rev'd State Board of Education 1971 *S.L.D.* 664, aff'd Docket No. A-1357-70 New Jersey Superior Court, Appellate Division, February 16, 1972 (1972 *S.L.D.* 692) It asserts, however, that petitioner was fully aware that her employment during March to June 1974 and September 1974 to June 1975 was as a substitute for a regular tenured teacher on leave. The Board avers that where no vacancy exists and the replacement accepts employment knowing the regular tenured teacher is on leave of absence, such service must be characterized as that of a substitute teacher. *Joan Driscoll v. Board of Education of Clifton,* 1976 *S.L.D.* 7, aff'd State Board of Education 14, rev'd Docket No. A-3588-75 New Jersey Superior Court, Appellate Division, October 18, 1977 (1977 *S.L.D.*)

The Board asserts further that Petitioner Kuboski has not alleged any attempt by it to thwart the intent of the tenure statute. It states that the exhibits herein describe letters of appointment, employment contracts and her own acts when she applied for other teaching positions in the district and that she knew and accepted her conditions of appointment as a replacement for a teacher on leave of absence. It cites *Kathy A. Wolf v. Board of Education of Norwood,* 1975 *S.L.D.* 494, aff'd State Board of Education January 7, 1976.

The Board further contends that petitioner's employment as a supplemental instructor did not count toward tenure accrual. *Joseph Capella et al. v. Board of Education of Camden County Vocational and Technical Schools,* 1975 *S.L.D.* 178, aff'd State Board of Education 186 It argues that supplemental instructors are employed to augment and reinforce various designated needs of pupils beyond that which the regular teacher provides in a regular instructional program and that such assignment is often on a per case basis rather than a classroom basis typically given to regularly employed teaching staff members. It asserts that petitioner was not employed or paid on the same basis as regular teaching staff members, nor did she have a similar schedule, benefits or duties. The Board contends that petitioner's differences in employment have been held sufficient enough to distinguish such employment from that of a regular teaching staff member and that such employment should not be added for purposes of tenure service. *Lawrence M. Davidson v. Newark State College and Eugene G. Wilkins,* 1968 *S.L.D.* 12

The Board observes that the Commissioner had held that employment as a Title I teacher was cognizable for the purpose of tenure accrual. *Nearier,*

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*supra; Butler, supra;* and Noorigian, *supra* Notwithstanding such decisions, the Board states:

> "***The arguments made by the respondent Boards in the above cited cases are now well-known to the Commissioner and this Respondent shall not reiterate them except to state its intent to maintain its position, for purposes of future appeal, that employment as a Title I Teacher, at least in the circumstances of this case, was not intended by the Legislature to constitute employment as a teacher for tenure purposes.***"
>
> (Board's Brief, at p. 30)

The Commissioner observes that Petitioner Kuboski was employed by the Board for a total of thirty-one and one-half months from December 3, 1971 until June 30, 1974. The decision required herein must be grounded on an appraisal of her service during such periods of employment and whether or not it comports with the statutory provision pursuant to *N.J.S.A.* 18A:28-5(c).

The Board does not dispute petitioner's seven months' service as a Title I teacher toward tenure accrual from December 3, 1971 to June 30, 1972. *Nearier, supra; Butler, supra; Noorigian, supra* Nor does it set forth an argument with regard to her employment as a first grade teacher for a period of six months from January 1, 1973 until June 30, 1973.

It asserts, however, that her employment for a period of thirteen and one-half months was that of a substitute replacing a tenured teacher on maternity leave of absence and that such service as she rendered does not qualify toward the accrual of tenure in this instance. The Commissioner takes notice of the State Board of Education opinion in *Zielenski, supra,* wherein it stated:

> "***Schulz v. State Board of Education,* 132 *N.J.L.* 345 (*E.&A.*, 1945) held that substitute teachers were not included in the phrase 'all teaching staff members including all teachers' as used in the tenure statute. Nevertheless, other cases make it clear that whether an employment is as a regular teacher or substitute teacher is not to be determined by the designation given the employment by an employing board, but by an examination of the factual picture presented. *Downs v. Board of Education of Hoboken,* 13 *N.J. Misc.* 853 (1935); *Board of Education of Jersey City v. Wall et al.,* 119 *N.J.L.* 308 (*Sup. Ct.* 1938) The testimony was polaristic as to whether the five-month employment of petitioner was as a regular teacher or as a substitute. We must, therefore, turn our attention to the evidence concerning the nature of that employment and a review of pertinent statutes and judicial decisions to determine the character of that employment.***"
>
> (1971 *S.L.D.* at 665)

The evidence shows that the Board executed contracts with petitioner for the period of March 18 through June 30, 1974 at an annual salary of $11,558 and from September 1, 1974 through June 30, 1975 at a salary of $12,000. (PR-14B, 20A) It may be stated that the salary established by the Board for such service was not that which petitioner would have earned as a substitute teacher, nor was she employed on a casual basis for this period of time.

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The facts in the instant matter show that Petitioner Kuboski's employment, *ante,* was for specific limited periods of time and that such employment was to replace tenured teachers employed by the Board who were granted maternity leaves of absence. (PR-14A, B, 19, 20A, 22A, B) The Commissioner observes the Court's recent decision in *Biancardi, supra,* wherein the court reversed both the Commissioner and the State Board of Education, holding that a two month period of employment in which petitioner served as a substitute for the regular teacher who was unable to complete the school year could not be added to petitioner's employment record in order to achieve tenure status. Citing *Schultz, supra,* the Court held that petitioner was a substitute and not a "teaching staff member" during the two month period. The Court adopted the dissenting opinion of the State Board of Education which stated that petitioner was not a teaching staff member as envisioned by the statutes and to hold otherwise would bar a local board of education from engaging a teacher with permanent certification as a substitute on any continuing basis to fill a position in the absence of a regularly employed teaching staff member.

The Commissioner observes certain dissimilarities in the instant matter and *Biancardi, supra.* The diverse elements involve the uncontroverted facts that Petitioner Kuboski was compensated in accordance with the Board's adopted salary policy for regular teaching staff members and, additionally, she was afforded all of the benefits and emoluments afforded regular teaching staff members, including enrollment in the Teachers' Pension and Annuity Fund. Biancardi, on the other hand, was paid at a per diem rate and excluded from consideration of the benefits and emoluments afforded the regular teaching staff members in the board's employ. The similarity between *Biancardi* and the instant matter is that both petitioners wrote letters expressing their desire for "full time teaching" positions in the upcoming year, and the Court held in *Biancardi* that "***respondent thus implicitly admitted that *** she had been hired as a substitute to fill the two-month period of vacancy caused by the departure of a regular teacher***." (139 *N.J. Super.* at 177)

The Commissioner observes that *N.J.S.A.* 18A:29-16 clearly recognizes the right of a local board of education to engage substitute teachers. The statutes are silent, however, with regard to the compensation, benefits and/or other emoluments afforded substitute teachers. Such determination rests with each board of education as provided by *N.J.S.A.* 18A:11-1. It is uncontroverted in the instant matter 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 for regularly employed tenured teachers on leave of absence and that she accepted such condition in executing the employment contracts. The Commissioner held in the matter of *Wolf, supra:*

> "***When parties enter into agreements of employment, they are free agents seeking a meeting of the minds regarding such matters as responsibilities, duties, compensation and other involvements, pertaining to such employment. While neither party may properly resort to subterfuge, they are bound by such agreements as they have entered into for the duration of such employment.***" (1975 *S.L.D.* at 500)

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Additionally, it is the responsibility of the Board to provide a continuity of a thorough and efficient program of education to its pupils as was stated in the minority opinion of the State Board of Education in *Biancardi, supra,* as follows:

> "***Certainly continuity was desirable in the educational process through the services of petitioner on a continuing substitute basis. It appears clear that the local board took every step that it could to provide that kind of education to the classroom pupils involved, and at the same time made it ever so clear in all respects that it was engaging a teacher for substitute service.***" (1974 *S.L.D.* at 371)

Thus, the Commissioner finds and determines that petitioner's employment for the period of March 18 through June 30, 1974 and September 1, 1974 through June 30, 1975 was temporary and that of a substitute for regularly employed tenured teachers on approved leaves of absence granted by the Board. He determines further that such controverted period of employment is not cognizable for purposes of tenure accrual.

The Commissioner will next consider petitioner's service as a supplemental teacher for the period from October 15, 1973 until March 17, 1974, and whether or not such service is applicable for the purposes of tenure accrual. He observes that her duties were limited to an assignment of seven fourth grade pupils and three sixth grade pupils classified by the Board's Child Study Team as in need of supplemental instruction in reading and mathematics. Additionally, petitioner 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. (PR-25, 26A, C) There is no assertion, finding nor stipulation that petitioner performed the duties or assumed the same responsibilities of regular teaching staff members.

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 certificated, 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.

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In the instant matter petitioners have failed to establish their proofs that the Board's action was arbitrary, capricious, unreasonable or in any way illegal. Respondent's Motion for Summary Judgment in this matter is granted and, accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

March 28, 1978

## COMMISSIONER OF EDUCATION

## ORDER

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

For the Respondent, Wilentz, Goldman & Spitzer (Robert J. Cirafesi, Esq., of Counsel)

This matter having been opened before the Commissioner of Education by Jack Wysoker, Esq., attorney for petitioner, on a Notice of Motion and supporting affidavit for a new trial or, in the alternative, to relieve petitioner of the Commissioner's decision in *Barbara Kuboski et al. v. Board of Education of the Borough of South Plainfield, Middlesex County,* 1978 *S.L.D.* —— (decided March 28, 1978) and direct that further hearing be conducted with regard to count three of petitioner's Amended Verified Petition filed June 3, 1976, Robert J. Cirafesi, Esq., for the Board of Education; and

Oral argument on the Motion having been heard by the Commissioner's representative at the State Department of Education, Trenton, on July 6, 1978; and

The Commissioner having considered argument of counsel; and

The Commissioner having concluded that there is sufficient reason to reopen the matter to provide petitioner opportunity to present further proofs with regard to count three of the Amended Verified Petition; now therefore

IT IS ORDERED that petitioner's Motion for further hearing in the instant matter is hereby granted; and

IT IS FURTHER ORDERED that this matter proceed to final determination as expeditiously as possible.

Entered this 20th day of September 1978.

COMMISSIONER OF EDUCATION

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**In the Matter of the Annual School Election Held in the School District of the Township of Hope, Warren County.**

## COMMISSIONER OF EDUCATION

## DECISION

The announced results of the balloting for two seats on the Board of Education of the Township of Hope for full terms of three years each at the annual school election held on February 14, 1978 were as follows:

| | *At Polls* | *Absentee* | *Total* |
|---|---|---|---|
| Donald W. Beers | 60 | 1 | 61 |
| Howard Malon | 17 | -0- | 17 |
| Robert Mikkelson | 17 | -0- | 17 |
| Thomas Planer | 4 | -0- | 4 |
| Lynn Carrick | 2 | -0- | 2 |
| Rose Wentz | 2 | -0- | 2 |
| Mimi Rice | 2 | -0- | 2 |
| King Schaedel | 1 | -0- | 1 |
| Thomas Tighe | 1 | -0- | 1 |
| Janet Wargo | 1 | -0- | 1 |
| Alexander Merriman | 1 | -0- | 1 |
| Gerald Vorse | 1 | -0- | 1 |

Pursuant to *N.J.S.A.* 18A:12-15 the Commissioner of Education directed that the ballots cast at the Hope Township polling place be recounted. The recount was conducted on March 2, 1978 by an authorized representative of the Commissioner at the State Department Office in Warren County.

At the conclusion of the recount it was determined that the announced results of the ballots accepted by the election board were true, in fact, and that the ballots had resulted in a tie vote for Candidates Malon and Mikkelson.

Candidate Malon filed a letter with the Commissioner on March 6, 1978, stating that he fully understood the provisions of *N.J.S.A.* 18A:12-15, as amended by *c.* 324, *L.* 1977, effective January 10, 1978, and with that knowledge waived all rights to membership on the Board of Education of the Township of Hope and relinquished any claim presently or in the future, to this position in favor of Candidate Mikkelson.

The Commissioner determines, therefore, that a second election as provided

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by *N.J.S.A.* 18A:12-15 as amended is not necessary. Accordingly, he determines that Donald W. Beers and Robert Mikkelson were elected to full terms of three years each on the Board of Education of the Township of Hope.

COMMISSIONER OF EDUCATION

March 29, 1978

**Board of Education of the City of East Orange,**

*Petitioner,*

*v.*

**City Council of the City of East Orange, Essex County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Love and Randall (Melvin Randall, Esq., of Counsel)

For the Respondent, Michael H. Smoller, Esq.

At a regular meeting of the Board of Education of the City of East Orange, hereinafter "Board," on March 3, 1977, the Board adopted a resolution certifying to the Board of School Estimate and City Council of the City of East Orange, hereinafter "Council," that the sum of $8,464,657, exclusive of State, county and other funds, was necessary to be raised by taxes for current expenses for the operation of the public schools of the City of East Orange for the school year beginning July 1, 1977 as follows:

| | |
|---|---|
| Current Expenses | $8,444,657 |
| Vocational Evening School | 12,000 |
| Evening School, Foreign-Born | 8,000 |
| | $8,464,657 |

As required by law, *N.J.S.A.* 18A:22-14 and 15, the Board submitted its budget to the Board of School Estimate which met on March 17, 1977, voted and adopted per resolution the amount of $8,464,657 to be necessary for the operation of the school district.

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On March 22, 1977, Council voted to reduce the Board's proposed current expenses by $250,000, thereby setting $8,214,657 as the amount to be raised by local taxation. This amount was then certified by Council with the Essex County Board of Taxation.

The facts of the matter were adduced at a hearing conducted September 1, 1977 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

The Board states that Council acted arbitrarily, capriciously, and unreasonably in reducing the funds to be raised for school purposes and avers that the sum appropriated will not provide sufficient funds for the operation of a thorough and efficient system of schools in the City of East Orange. The pertinent amount in dispute is shown as follows:

| | CURRENT EXPENSE |
|---|---|
| Board's Proposal | $8,464,657 |
| Council's Certification | 8,214,657 |
| Amount Reduced | $ 250,000 |

The Board advanced a Motion for Summary Judgment grounded on the assertion that Council's detailed list of economies were procedurally defective and did not meet the mandate as set forth in *Board of Education of East Brunswick et al. v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966). (Tr. 5-6)

The Board's Motion was held in abeyance. The hearing examiner found that Council's reductions did indeed exceed $250,000 in the Board's proposed budget. It was thereafter stipulated that an aggregate amount of $250,000 in dispute was considered in the instant matter as follows:

| | | | |
|---|---|---|---|
| J200 | Salaries (six categories) | | $153,000 |
| J240 | Teaching Supplies | | 75,000 |
| J820B | Insurance-Employee | | 22,000 |
| | | Total | $250,000 |
| | | | (Tr. 10-13) |

Thus, Council maintains that it acted properly and that the items reduced by its actions are only those which are not necessary for a thorough and efficient educational system. As part of its determination, Council suggested specific categories and line items of the budget in which it believed economies could be effected as follows:

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CHART I

| *ACCOUNT NUMBER* | *ITEM* | *BOARD'S PROPOSAL* | *COUNCIL'S PROPOSAL* | *AMOUNT REDUCED* |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J213A | Sal., Tchrs. | $10,132,586 | | |
| J213B | Sal., Spec. Ed. Tchrs. | 552,000 | | |
| J215A | Sal., Secys. | 475,000 | | |
| J215B | Sal., Coord. Secys. | 23,500 | | |
| J215C | Sal., Pupil Pers. Secys. | 44,300 | | |
| J216 | Sal., Para-Prof. | 381,700 | | |
| SUBTOTALS-Salaries | | $11,610,086 | $11,457,086 | $153,000 |
| J240 | Teach. Supls. | 400,000 | 325,000 | 75,000 |
| J820B | Ins., Empl. | 146,000 | 124,000 | 22,000 |
| | TOTALS | $12,156,086 | $11,906,086 | $250,000 (P-1) |

The Board submitted written documentation and work sheets supporting its stated need for funds reduced by Council. Additional testimony was adduced at the hearing.

The findings and recommendations of the hearing examiner in regard to the controverted line items are set forth as follows:

*J213A Salaries, Teachers; J213B Salaries, Special Education Teachers; J215A Salaries, School Office Secretaries; J215B Salaries, Coordinators' Secretaries; J215C Salaries, Pupil Personnel Secretaries; J216 Salaries, Para-Professional*

Council waived testimony with regard to line items J213B Salaries, Special Education Teachers and J215B Salaries, Coordinators' Secretaries. It stated that as a result of its analysis of the two line items, Council did not seek economies in those two areas. (Tr. 21-22)

Council contends that the Board employed 628 teachers for the 1976-77 school year, of which the equivalent of twelve teaching positions were assigned to Compensatory Education. It asserts that the Board's projected increase to 643 teachers in line item J213A represents an addition of twenty-seven positions rather than fifteen positions as reported by the Board. (Tr. 31-36)

The Board argued that it could not sustain a reduction of $153,000 in the controverted salary line items. It argued that salary contract negotiations had not been completed at the time of the hearing and that the Board had included

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a six percent margin for both salary increment and salary adjustment in its various line items. An increase of 3.3 percent was budgeted for salary increases with the negotiation units representing the employees included in the controverted line items. (Tr. 22-23, 25-26, 29-30)

The Board asserts that its pupil enrollment has increased annually for the past four or five years and that the projection for the 1977-78 school year was higher than the 1976-77 school year. It projects a pupil enrollment increase of 366 pupils with an expectation of an additional 100 or 150 pupils above the 366 projection for the 1977-78 school year. It argues that the pupil enrollment determines the number of teachers, school secretaries, coordinators' secretaries and paraprofessional personnel required to provide the necessary educational program and that a reduction of $153,000 would not afford sufficient funds to carry out its commitment for a thorough and efficient education of its pupils. (Tr. 26-28)

With regard to line item J213A Salaries, Teachers, the Board avers that it arrived at its proposed budgeted amount as follows:

| | | |
|---|---|---|
| J213A | $9,323,500 | — 643 classroom teachers |
| | 372,000* | — 3.3% salary increase for all employees bargaining units |
| | 372,375 | — salaries for per diem substitutes |
| | 50,000* | — compensation for extracurricular activities |
| | 10,132 | — compensation for classroom coverage in lieu of a substitute |
| | $10,128,007 | |
| | 4,579* | Adjusted |
| | $10,132,586 | Total budgeted |

(Tr. 36-48, 62-70, 73-75; P-1)

The Board asserts that it had employed 637 teachers of the 643 budgeted positions as of the date of the hearing for a total commitment of $9,236,500. There remained five teaching positions to be filled at an approximate amount of $87,000 to complete the proposed budget. (Tr. 36-38)

Extensive testimony was proffered with regard to line item J216 Salaries, Para-Professional, wherein Council noted that the actual expenditure for 1976-77 was in the amount of $271,732 as compared with an amount of $381,700 for the 1977-78 budget for an additional sum of $109,968, or a 40.4 per cent increase. (Tr. 82-83)

The Board argues that it originally budgeted $321,122 for seventy paraprofessional positions in 1976-77; however, only $271,732 was spent because of budget constraints. It asserts that the 1977-78 budget accounts for seventy-three positions as follows: fifty-seven full-time paraprofessional positions at an average salary of $5,050; and the equivalent of sixteen full-time lunch aide positions at an average salary of $2,970 per full-time equivalency. This represents a total cost of $335,700 or a difference of approximately $45,000 between

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the actual amount needed and the budgeted figure. It contends that a contingency of $45,000 is needed by Board policy to assign paraprofessional teacher aides to classrooms when the pupil enrollment exceeds twenty-six pupils. In addition, a part of the $45,000 contingency would be used for additional lunchroom aides in the elementary school lunch program. (Tr. 79-86; P-1)

The Board's argument as to the need for its budgeted funds for J215B Salaries, Coordinators' Secretaries was affirmative and compelling. Council did not elicit testimony with regard to line item J215A Salaries, School Office Secretaries. (Tr. 93-96)

The hearing examiner notices that the Board's records and testimony adequately support its need for contracted salaries as reflected in J213A Salaries, Teachers and therefore recommends no reduction in this line item. (Tr. 98-105) The Board did not, however, support its recommendation for full funding of line item J216 Salaries, Paraprofessional as set forth in its proposed budget. The hearing examiner recommends that the reduction of $45,000 be sustained as set forth by Council.

*J240 Teaching Supplies*

Council asserted that the Board's actual expenditure of $380,955.39 for the 1976-77 school year included a sum of $79,000 for Compensatory Education for which the Board was reimbursed; therefore, it argues, the expenditure for line item J240 was actually $301,955 rather than the reported $380,955.39. It argues further that the proposed 1977-78 budget of $400,000 is excessive and recommends that it be reduced by $75,000.

The Board contends that its proposed budget is necessary because of increased pupil enrollment, inflation and to meet the requirements of *N.J.S.A.* 18A:7A-1 *et seq*. It asserts that, notwithstanding a $20,000 increase above its 1976-77 budget, its per pupil expenditure will fall below the average of Essex County and the State of New Jersey as follows:

| *School Year* | | *Enrollment* | *Teaching Supplies Expenditures* | *Expenditure Per Pupil* |
|---|---|---|---|---|
| 1975-76 | (actual) | 12,535 | $340,941.62 | $27.20 |
| 1976-77 | (actual) | 13,049 | $380,955.39 | $29.19 |
| 1977-78 | (budgeted) | 13,438 | $400,000.00 | $29.77 |

The Board supports its need for these funds by stating that some are mandated by statute and the remainder are required to support its ongoing instruction program. (Tr. 108-125) The hearing examiner recommends, therefore, that $75,000 be restored to the J240 line item.

*J820B Insurance, Employee*

Council erroneously listed line item J820C in its list of economies, which was corrected to J820B on the official transcript and record. (Tr. 131-132) Council subsequently waived testimony and withdrew its reduction of $22,000

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in the J820B line item. (Tr. 132-133) Thus, the hearing examiner recommends that the $22,000 reduction by Council be restored to the Board's 1977-78 budget.

The hearing examiner entertained a motion by Council to go beyond the scope of its detailed list of economies and examine the Board's competent witnesses with regard to line items J610A Salaries, Custodians and J710 Salaries, Maintenance of Plant. Motion was granted for limited testimony and Council subsequently waived examination with regard to line item J710. (Tr. 48-62, 130-131, 144) Limited testimony was also adduced with regard to line item J810B Social Security. The Board was not prepared with an affirmative defense because this line item was not included in Council's list of economies. The hearing examiner, therefore, will not consider any reduction therein. (Tr. 145-152)

The hearing examiner finds that the record supports the Board's need for these funds for the cost of contractual salaries in line item J610A. (Tr. 136-144) He recommends, therefore, that no reduction of funds in J610A be considered.

In summary, the recommendations of the hearing examiner with respect to the total budget reductions are listed as follows:

CHART II

| *ACCOUNT NUMBER* | *ITEM* | *AMOUNT OF REDUCTION* | *AMOUNT RESTORED* | *AMOUNT NOT RESTORED* |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J213A | Sal., Tchrs. | $ | | |
| J213B | Sal., Spec. Ed. Tchrs. | (waived) | | |
| J215A | Sal., Secys. | (waived) | | |
| J215B | Sal., Coord. Secys. | (waived) | | |
| J215C | Sal., Pupil Pers. Secys. | (waived) | | |
| J216 | Sal., Para-Prof. | | | 45,000 |
| | SUBTOTALS-Salaries | $153,000 | $108,000 | $45,000 |
| J240 | Teach. Supls. | 75,000 | 75,000 | -0- |
| J820B | Ins., Empl. | 22,000 | (waived) 22,000 | -0- |
| | | $250,000 | $205,000 | $45,000 |

The hearing examiner recommends that the total sum of $205,000 be restored to the Board's budget for the 1977-78 school year and that a reduction of $45,000 be sustained.

This concludes the report of the hearing examiner.

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*  *  *  *

The Commissioner has reviewed the record of the instant matter and observes that neither party has filed exceptions to the hearing examiner's report pursuant to *N.J.A.C.* 6:24-1.17(b). The Commissioner concurs in all points with the findings and recommendations of the hearing examiner. Accordingly, it is found and determined that in addition to the amounts previously certified to the Essex County Board of Taxation, the amount of $205,000 for current expenses is required for a thorough and efficient operation of the school district during the 1977-78 school year. The Commissioner directs the Essex County Board of Taxation to raise by public taxation the amount of $205,000 in addition to the amount previously certified for the current expenses of the East Orange School District for the 1977-78 school year.

The additional amount of $205,000 for current expenses for the 1977-78 school year means the 1977-78 current expense budget shall be $8,419,854. Using a $8,419,854 1977-78 current expense budget, the 1978-79 equalization aid shall be $3,587,839. The maximum permitted net current expense budget for the 1978-79 school year shall be $21,408,150.

COMMISSIONER OF EDUCATION

April 3, 1978

**In the Matter of the Annual School Election Held in the School District of the Borough of Cliffside Park, Bergen County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

The announced results of the balloting for current expenses to be raised by local taxation for the 1978-79 school year at the annual school election held on February 14, 1978 in the School District of the Borough of Cliffside Park were as follows:

| | *At Polls* | *Absentee* | *Total* |
|---|---|---|---|
| For | 323 | 8 | 331 |
| Against | 326 | 6 | 332 |

Written charges dated February 17, 1978 were received from Donnaellen Colao, a resident of the school district, in which she alleged that although she was properly registered as a new voter in the community, she was denied an

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opportunity to cast her ballot in the school election by the election workers at the polls. In addition, a letter request dated February 21, 1978, was received from the Secretary of the Board of Education, asking that there be a recount of the ballots cast on the current expense appropriation for the 1978-79 school year.

Pursuant to such requests, an authorized representative of the Commissioner of Education was appointed to conduct a recount of the ballots cast and an inquiry into the charges filed by Ms. Colao. The recount and inquiry was conducted on March 2, 1978 by the Commissioner's representative at the voting machine warehouse in Bergen County. The recount of the ballots was confined to the total ballots cast on the 1978-79 current expense appropriation. At the conclusion of the recount the Commissioner's representative found that the results remained unchanged.

Subsequent thereto an inquiry was conducted into the allegations of Ms. Colao who testified that she registered as a new voter with the Bergen County Office of Elections on January 11, 1978 and produced her voter registration card at the time of the inquiry for the Commissioner's representative to examine. The card was found to be valid.

Ms. Colao complained that when she arrived at the school polling place she presented her registration card to the school election officials and requested a ballot. She alleges that she was told by them that she was not eligible to receive a ballot by virtue of the fact that she had not been a registered voter in the school district for 40 days and, further, that her name did not appear on the signature copy register at the polling place. It was not until the day after the school election, according to Ms. Colao, that she discovered that she was in fact eligible to vote by virtue of an amendment to the election laws which require that voters be duly registered only 30 days preceding the time they claim their right to vote in any election.

The testimony of the Judge of Elections and that of another election worker confirms the circumstances described above as their reasons for denying Ms. Colao an opportunity to cast her ballot at the school polling place on February 14, 1978.

Their testimony further reveals that they did not learn until after the school election that the registration time for voting prior to an election had been amended by law and such period of time reduced from 40 to 30 days prior to an election.

The Judge of Elections stated that her reasons for not allowing Ms. Colao to attest, by way of written affidavit, that she was a duly registered voter was grounded on her understanding of the 40 day registration requirement and the fact that her name did not appear on the signature copy register at the polls. The Judge of Elections testified that she subsequently discovered that information containing the fact that Ms. Colao was a duly registered voter was inadvertently sent to another school district in the county.

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Ms. Colao contended in her letter of February 14, 1978 to the Commissioner and by way of testimony that had she been permitted to cast her ballot at the time of the school election, she would have voted in favor of the Board's current expense budget proposal for the 1978-79 school year. Had this opportunity occurred, it is her contention that the current expense budget would not have been defeated by one vote.

The Commissioner's representative has reviewed the testimony of the parties and finds that Ms. Colao was in fact a duly registered voter at the time she appeared at the polls on February 14, 1978 claiming her right to cast her ballot. This determination is grounded on the applicable amendments to *N.J.S.A* 19:31-3.

Ms. Colao's voter registration card shows that she had been registered in Bergen County on January 11, 1978 and therefore she was eligible to vote in the school election on February 14, 1978 by virtue of having been a registered voter 35 days before the school election. It is further found that had the school election officials been aware of the aforementioned amended statutory ruling, they would not have denied her an opportunity to cast her ballot.

It is further found that if, in fact, one additional vote had been cast in favor of the Board's current expense budget at the school election, it would have resulted in a tie vote on this question (For—332; Against—332) and would have not altered the outcome by virtue of the fact that such tie could not be construed as voter approval for current expenses, but rather that there was a failure to approve this portion of the budget.

In view of these circumstances, the Commissioner's representative finds that while Ms. Colao was improperly and illegally denied an opportunity to cast her ballot at the polls during the annual school election, such determination by the school election officials was not intentional and, further, that the final outcome of the results of the election would not be altered.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner finds that the results of the recount of the ballots pertaining to the 1978-79 current expense appropriation remain unchanged and that the voters failed to approve this question by a margin of one vote.

The Commissioner cannot condone the fact that one voter was improperly denied her legal right to cast her ballot at the time of the school election by school election officials; however, it is determined that the circumstances giving rise to the complaint herein were caused by a lack of awareness by the officials regarding the recently amended statutory provisions pertaining to the required number of days a voter is to be registered prior to an election. The Commissioner, in this regard, cautions the Cliffside Park Board of Education to take the nec-

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essary measures in the future to inform its school election officials of such changes in school election laws prior to the annual school election so as to insure that every eligible voter will not henceforth be denied his/her rightful opportunity to cast a ballot.

COMMISSIONER OF EDUCATION

April 5, 1978

**In the Matter of the Annual School Election Held in the School District of the Borough of Tinton Falls, Monmouth County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

The announced results of the balloting for two members of the Board of Education for full terms of three years each at the annual school election held February 14, 1978 in the School District of Tinton Falls, Monmouth County, were as follows:

| | *Totals* |
|---|---|
| Harry Estelle | 253 |
| James E. Holley | 222 |
| Raymond Waters | 162 |

Pursuant to a letter request from Candidate Raymond E. Waters and a letter from Jane K. Falk on behalf of more than ten qualified voters in the school district, an inquiry was conducted on March 6, 1978 in the office of the Monmouth County Superintendent of Schools, Freehold.

At the inquiry, it was disclosed through the testimony of several witnesses that certain irregularities occurred as will be discussed, *post*.

It is stipulated that when the polls opened at 3:00 p.m. all five voting machines, set up in each of the five polling places in the school district, had no printed ballots thereon displaying the names of the nominated candidates for Board Members' seats, or the machines displayed an incorrect ballot.

Candidate Waters testified that the several machines were ready to be used at 5:42 p.m., 6:10 p.m., 6:30 p.m., 7:00 p.m., and 7:21 p.m. An employee from the office of the County Superintendent of Elections testified that the machines were ready for use possibly ten or fifteen minutes earlier than the above reported times.

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The record reveals that the Board Secretary did not have official ballots printed for use in voting machines as required by *N.J.S.A.* 18A:14-41. Rather, past practice was followed and the ballot "content" for the annual school election was sent to the Superintendent of Elections. (Exhibit A) Misinterpretation of this document is the reason why the machines were not properly prepared, according to the testimony of authorized employees in the office of the Superintendent of Elections.

Because the machines were not ready, the early voters were turned away. The record shows that names and telephone numbers were taken from those persons who could not vote and they were called later so they could return and cast their ballots. One election worker testified that of all the persons turned away at her polling place, only three did not return to cast their ballots. There is no evidence regarding the return of voters at other polling places, but Candidate Waters stated that he had personal knowledge that not all voters were notified that they could return to the polls. He testified that he learned some persons heard that the polls were not open and therefore they did not bother to go out to vote.

A further complication arose when a local radio station announced that the polls would remain open until 11:00 p.m. It is not known who notified the radio station about an extension of voting hours; however, the Board Secretary testified that when he heard the announcement he called and informed the local station that the polls would not be open beyond 9:00 p.m.

Candidate Waters and the petitioners represented by Joan K. Falk assert that a full and fair election was denied the voters of the district because of the irregularities heretofore mentioned and the resulting confusion.

The Commissioner's representative finds that the allegations regarding the comparison of voters' signatures is without merit. No testimony or evidence was adduced to support that allegation.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has examined the report and the record of the instant matter.

It must be noticed that the pertinent statute states that is the duty of the secretary of the board to insure that an election is properly conducted. *N.J.S.A.* 18A:14-63 In this regard *N.J.S.A.* 18A:14-41 specifically requires that the board secretary "***shall furnish to said officer or officers of the county *** official ballots *** for use in voting machines***."

The information that was forwarded to the county officers and described as the ballot "content" does not meet the requirement of this statute.

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Because this statutory requirement was not strictly followed, other situations developed which complicated the election procedures.

While the Commissioner does not condone the lack of adherence to the specific statutes concerning the conduct of school elections, there is no evidence that the Board Secretary acted in bad faith.

It has been held by the Commissioner and the courts of this State that gross irregularities, when not amounting to fraud, do not vitiate an election. *Love v. Freeholders of Hudson County,* 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Stone et al. v. Wyckoff et al.,* 102 *N.J. Super.* 26 (*App. Div.* 1968); *In the Matter of the Election Inquiry of the School District of the Township of Monroe, Gloucester County,* 1976 *S.L.D.* 233

The Board Secretary is instructed to henceforth comply with the school election statutes as set forth in *N.J.S.A.* 18A:14-1 *et seq.*

The results of the annual school election will stand as announced.

COMMISSIONER OF EDUCATION

April 10, 1978
Pending State Board of Education

**Board of Education of the Town of Bloomfield,**

*Petitioner,*

*v.*

**Mayor and Town Council of the Town of Bloomfield, Essex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, John A. Errico, Esq.

For the Respondent, John A. Bukowski, Jr., Esq.

Petitioner, the Board of Education of the Town of Bloomfield, hereinafter "Board," appeals from an action of the Mayor and Town Council of the Town of Bloomfield, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37

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certifying to the Essex County Board of Taxation a lesser amount of appropriations for current expense costs for the 1977-78 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted October 6 and 13, 1977 at the offices of the Union and Bergen County Superintendents of Schools, respectively, before a hearing examiner appointed by the Commissioner of Education. Subsequent thereto, the Board filed a letter memorandum in support of its position. The report of the hearing examiner is as follows:

At the annual school election held March 29, 1977, the Board submitted to the electorate a proposal to raise $10,034,655 by local taxation for current expense costs of the school district. The voters rejected this proposal and, subsequently, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in Bloomfield for the 1977-78 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Essex County Board of Taxation an amount of $9,771,737.90 for current expense costs. The pertinent amount in dispute is shown as follows:

| | *CURRENT EXPENSE* |
|---|---|
| Board's Proposal | $10,034,655.00 |
| Council's Proposal | 9,771,737.90 |
| Amount Reduced | $ 262,917.10 |

The hearing examiner observes that while Council imposed reductions in that amount on the Board's proposal, the actual amount the Board seeks to have restored to its 1977-78 current expense budget is $185,223.90. (C-2)

The Board alleges that Council's action was arbitrary, capricious and unreasonable and further asserts that the action controverted herein is contrary to the principles articulated by the New Jersey Supreme Court in *Board of Education of East Brunswick v. Township Council of East Brunswick,* 48 *N.J.* 94 (1966) with respect to Council's responsibility on defeated school budgets. The Board alleges that subsequent to the voter defeat of its current expense proposal and its submission of that defeated proposal to Council for review and determination, Council imposed a two percent reduction on its total current expense budget in deference to the proposal's defeat by the voters. The Board alleges that Council did not consider the educational needs of the pupils with respect to its reduction. (Board's Letter Memorandum)

A review of Council's written testimony (R-1) with respect to the reductions it imposed on the Board's proposal does establish that the total original reduction of $262,917.10 does approximate two percent of the Board's current expense proposal. Council, however, also argues that the specific reductions are to be effected through the elimination of new and existing positions.

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The hearing examiner finds no basis to conclude that Council's action herein is arbitrary, capricious or unreasonable or contrary to its responsibility set forth in *East Brunswick, supra.*

The parties of interest have documented their respective positions with written documents and oral testimony at the time of hearing. As part of its determination, Council suggested specific line items of the budget in which it believed economies could be secured. The specific line items and the specific reductions which remain in dispute are as follows:

CHART I

| *ACCOUNT NUMBER* | *ITEM* | *BOARD'S PROPOSAL* | *COUNCIL'S PROPOSAL* | *REDUCTION* |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J110F | Sal., Supt. Off. | $ 14,350 | -0- | $ 14,350 |
| J212 | Sal., Supvr. Instr. | 42,200 | -0- | 42,200 |
| J213.1 | Sal., Tchrs. | 87,133** | -0- | 87,133 |
| J215A | Sal., Secy. Cler. | 7,910 | -0- | 7,910 |
| J710B | Sal., Repr. Bldgs. | 10,510 | -0- | 10,510 |
| J820B | Empl. Ins. | 6,701 | -0- | 6,701 |
| Unappropriated Current Expense Balance* | | 16,420** | -0- | 16,420 |
| TOTALS | | $185,224 | -0- | $185,224 |

* Council, as part of its total specific reductions, directed the Board to appropriate an additional amount of $16,420 from its unexpended current balance.

** Rounded to nearest dollar

The hearing examiner shall address each of the Council's recommended economies and the Board's documentation of its need to have the reductions restored.

*J110F Salaries, Superintendent's Office Reduction $14,350*

The written (P-13) and oral testimony of the Board establishes that the amount reduced in this line item is intended to support a position of administrative assistant to the Superintendent, which position has been in existence for four years. (Tr. II-88) The Superintendent testified that the person assigned to this position has the responsibility of assisting him with community services, school budget presentations, coordinating the development of a Board policy manual and the preparation and dissemination of information to school staff. The Superintendent explained that the increasing demands made upon his office through the advent of new legislation leaves him little time to address the areas in which the administrative assistant is involved.

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The hearing examiner observes that the Bloomfield School District is comprised of one senior high school, two junior high schools and ten elementary schools. The Board has in its employ over 600 persons, professional and non-professional, with a total pupil enrollment of 7152 on September 30, 1977. The duties and responsibilities of chief school administrators have, in fact, been increased through the implementation of the Public School Education Act. *N.J.S.A.* 18A:7A *et seq.*

The hearing examiner finds that the Board has proven its need for the restoration of this reduction to continue the position of administrative assistant to the Superintendent.

*J212 Salaries, Supervisors of Instruction* *Reduction $42,200*

The Board asserts that the funds in this line item are essential to be restored in order for it to employ supervisors of mathematics and reading instruction. The hearing examiner observes that the supervisors would coordinate and supervise the reading and mathematics instruction on a district-wide kindergarten through twelfth grade basis. It is also observed that these two positions are new.

The hearing examiner has reviewed the written testimony of the Superintendent with respect to the Board's need for these moneys (P-1; P-2), and the oral testimony of the assistant superintendent in charge of pupil services and research. The hearing examiner finds that the alleged need for supervisors of mathematics and reading is based on the results achieved by pupils in the respective disciplines on the State Educational Assessment program, which tests were administered in the fall of 1976. The hearing examiner has reviewed those results (Tr. I-6, 30) and finds that the Board has failed to establish that the creation of the two controverted positions herein is essential for the operation of a thorough and efficient program of education.

Accordingly, the hearing examiner recommends that this reduction be sustained.

*J213.1 Salaries, Teachers* *Reduction $87,133*

The total reduction of $87,133 in this line item was planned by the Board for the following positions:

| | |
|---|---|
| 1 Social Science Teacher | $10,680 |
| 4 Elementary Classroom Teachers | 44,413 |
| 1 Fine Arts Teacher | 10,680 |
| 1 Teacher of English as a Second Language | 10,680 |
| 1 Special Education Resource Room Teacher | 10,680 |
| | $87,133 |

The assistant superintendent in charge of curriculum and instruction testified that the acquisition of an additional social science position, which had existed

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prior to 1976-77 when thirty-nine teaching staff member positions were eliminated because of budget restrictions, would allow for greater staff utilization in the following fashion.

One of the Board's existing social science teachers is also certified as a guidance counselor. If the social science position were restored, that person would be assigned to teach social science. The existing social science teacher with guidance certification would be assigned guidance duties to free an existing guidance counselor who would then become coordinator of career education. In this manner the Board would utilize a position of social science and also meet the requirements of *N.J.A.C.* 6:8-3.5(5) which provides that an educational program shall

> "Provide all pupils guidance and counseling to assist in career and academic planning***."

The hearing examiner finds that the Board established its need for a social science teacher in the amount of $10,680.

Testimony adduced from the assistant superintendent in charge of curriculum and instruction, as well as the written testimony of the Superintendent (P-9), establishes that the Board attempts to hold enrollment in classes at the elementary level to a maximum of twenty-five pupils. The four classroom teacher positions, if not restored, would require four classes of thirty each at the third grade level in two of its schools, two classes of thirty each at the fourth grade level in one of its schools, and two classes of twenty-nine at the sixth grade level at one of its schools.

The hearing examiner finds that the Board has proved its need for the restoration of $44,413 to support four classroom teacher positions which had existed prior to 1976-77.

The Board presently has four fine arts teachers. Prior to 1976-77 it had five persons employed as fine arts teachers and assigned to the senior high school. The Superintendent, in his written testimony, explains that the loss of that one position during 1976-77 caused the fine arts program to be curtailed and that twenty-five pupils were unable to select an art course of their choice. (P-8)

The hearing examiner finds no evidence that the position of fine arts teacher is essential to the conduct of the Board's total program of thorough and efficient education. It is clear that the position is desirable, but the Board failed to prove that the position is essential.

Accordingly, the hearing examiner recommends that the amount of $10,680 to support a position of fine arts teacher be sustained.

The hearing examiner has reviewed the testimony of the Superintendent in regard to the need for restoration of funds to support one position of teacher of

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English as a second language for twelve pupils already identified at the senior high school (P-3; Tr. I-56) and to support a position of special education resource room teacher to be assigned to the senior high school.

The hearing examiner finds that the Board has established its need for the restoration of $21,360 to support these two positions.

In summary, the hearing examiner recommends that of the total reduction of $87,133 in this line item a reduction of $10,680 be sustained and that an amount of $76,453 be restored to the Board.

*J215A Salaries, Secretarial and Clerical Services* *Reduction $7,910*

The funds recommended for reduction in this line item are intended to support the position of a second secretary in the high school principal's office. The Superintendent, in his written testimony, explains that this position had been in existence but was eliminated for the 1976-77 school year because of budget restrictions. (P-14) The result of the reduction from two to one secretary in the high school principal's office during 1976-77 was that the principal and vice-principal were required to perform many clerical tasks because one secretary could not perform all the required duties.

The hearing examiner finds that the Board has established its need for the restoration of these moneys in order to insure an efficient principal's office at its senior high school and to allow the principal to devote his time to professional duties.

*J710B Salaries, Repair of Buildings* *Reduction $10,510*

The funds reduced in this line item were to support a position of electrical apprentice. The hearing examiner has reviewed the oral and written testimony of the Superintendent with respect to the need for this position. (P-15; Tr. II-121-122) The Board presently has two persons employed and assigned to electrical maintenance, compared to three persons during 1976-77. It is noticed that the third person has since retired. (P-15, at p. 2)

The hearing examiner finds that the Board has established its need for the restoration of these funds to support the position of electrical apprentice.

*J820B Employee Insurance* *Reduction $6,701*

The Superintendent in his written testimony explains that these funds are essential to be restored in order for the Board to fully meet the costs of a health benefits program it negotiated with its employees.

It appears that Council arrived at this reduction based on 3.42 percent of $195,946 in total salaries for sixteen positions it recommended for reduction. (P-17) Applying that same formula, the total salaries for the restoration of the ten positions recommended herein is $109,223 and 3.42 percent of that amount is $3,735.

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Accordingly, the hearing examiner finds that the Board has established a need for $3,735. It is recommended that of the total reduction of $6,701, $3,735 be restored and a reduction of $2,966 be sustained.

Finally, Council recommends that the Board appropriate an additional amount of $16,420 from its unexpended current expense balance. The Board's audit report for 1976-77 shows that the total amount of unappropriated current expense balance is $213,282.71. The hearing examiner has determined from the Commissioner's official records that the Board has also applied $63,283 of this amount to its proposed 1978-79 current expense budget. The total amount of unappropriated current expense balance available to the Board is $150,000. This amount is approximately one and one-half percent of the Board's total current expense appropriation for 1977-78 which, while not specifically authorized by law has been recognized as necessary for boards of education to carry for unexpected contingencies during the course of the year.

The hearing examiner recommends that the Board not be expected to appropriate this sum from its minimal amount of unappropriated current expense balance.

The hearing examiner has reviewed the arguments of Council with respect to a decline in pupil enrollment throughout the Bloomfield Schools. The hearing examiner finds that while a decline of 200 pupils did occur between June 1977 and October 1977 it is impossible to state that that decline will increase or decrease. Should the decline remain constant, the Board *may* accrue additional unexpended current expense funds by June 30, 1978. Such an argument, in the context of this dispute, is pure conjecture and has no relevance.

The hearing examiner's recommendation with respect to the items in dispute are set forth in chart form below:

CHART II

| *ACCOUNT NUMBER* | *ITEM* | *AMOUNT REDUCED* | *AMOUNT RESTORED* | *AMOUNT NOT RESTORED* |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J110F | Sal., Supt. Off. | $ 14,350 | $ 14,350 | $ - 0 - |
| J212 | Sal., Supvr. Instr. | 42,200 | - 0 - | 42,200 |
| J213.1 | Sal., Tchrs. | 87,133 | 76,453 | 10,680 |
| J215A | Sal., Secy. Cler. | 7,910 | 7,910 | - 0 - |
| J710B | Sal., Repr. Bldgs. | 10,510 | 10,510 | - 0 - |
| J820B | Empl. Ins. | 6,701 | 3,735 | 2,966 |
| Unapprop. Curr. Exp. Bal. | | 16,420 | 16,420 | - 0 - |
| | TOTALS | $185,224 | $129,378 | $55,846 |

This concludes the report of the hearing examiner.

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* * * *

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

The parties assert that the proofs of the matter support each of their respective positions. Council demands that the Commissioner reject the recommendation of the hearing examiner to restore $129,378 to the Board's current expense budget and further demands that its total reduction of $262,917.10 be sustained. The Board asserts that the proofs establish its need for an additional amount of $42,200 beyond the amount recommended for restoration by the hearing examiner.

The Commissioner finds no merit in the objections raised by the parties. The hearing examiner's recommendations are fully supported in the record.

It is observed, however, that of the $129,378 recommended for restoration, $98,713 of that amount is intended to support various personnel positions for the 1977-78 year. The hearing examiner's recommendations with respect to the restorations were issued on January 30, 1978. Consequently, the Board may expend the amount necessary for the personnel positions from February 1 to June 30, 1978, or fifty percent of the $98,713.

Accordingly, the Commissioner hereby modifies the hearing examiner's recommendation for restoration of moneys to the following accounts by fifty percent:

| *ACCOUNT NUMBER* | *ITEM* | *RECOMMENDED RESTORATION* | *MODIFIED BY* | *ACTUAL RESTORATION* |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J110F | Sal., Supt. Off. | $ 14,350 | 50% | $ 7,175.00 |
| J213.1 | Sal., Tchers. | 76,453 | 50% | 38,226.50 |
| J215A | Sal., Secy. Cler. | 7,910 | 50% | 3,955.00 |
| J710B | Sal., Repr. Bldgs. | 10,510 | -0- | 10,510.00 |
| J820B | Empl. Ins. | 3,735 | -0- | 3,735.00 |
| Unapprop. Curr. Exp. Bal. | | 16,420 | -0- | 16,420.00 |
| | | $129,378 | | $80,021.50 |

The Commissioner of Education hereby directs the Essex County Board of Taxation to add the amount of $80,021.50 to the amount of $9,771,737.90 previously certified to it for 1977-78 current expense school purposes for the Bloomfield School District. The total amount to be raised by local taxation for current expense purposes is $9,851,759.40 for 1977-78.

The Commissioner is constrained to observe that the Board failed to submit a revised 1977-78 budget subsequent to Council's original reduction. Consequently, the amount it has since been advised it could anticipate as State equal-

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ization aid for 1978-79 school purposes is based on its total current expense proposal originally submitted to the voters. Thus, the calculation in this regard is overstated. The restoration herein shall also have an effect on the amount of State equalization aid it may anticipate for 1978-79.

The Commissioner hereby directs the Board Secretary of the Board of Education of the Town of Bloomfield to forthwith consult with the County Superintendent of schools to arrange a meeting with the Assistant Commissioner in charge of the Division of Administration and Finance, Department of Education, to immediately reconcile any disparity which may exist in regard to the Board's anticipated 1978-79 equalization aid.

COMMISSIONER OF EDUCATION

April 10, 1978

**Nicholas Mastorelli,**

*Petitioner,*

*v.*

**Bureau of Child Nutrition Programs, Division of Field Services, Department of Education,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Arthur J. Lobbe, Esq.

For the Respondent, William F. Hyland, Attorney General (Mark Schorr, Deputy Attorney General, of Counsel)

Petitioner, the executive director of the North Hudson Community Action Corporation, Union City, an agency funded by a grant of the United States Department of Agriculture to provide a summer food services program, alleges that the Bureau of Child Nutrition Programs in the Division of Field Services, State Department of Education, did arbitrarily and improperly reduce the number of lunch stations for needy children in the summer of 1977. He requests judgment of the Commissioner of Education to this effect. The Division of Field Services, respondent, denies the allegation and requests dismissal of the Petition.

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A hearing set down for June 2, 1977 was cancelled by agreement of the parties and the matter is submitted for Summary Judgment by the Commissioner on the pleadings and a Stipulation of Facts. Respondent has filed a Memorandum of Law.

The Stipulation of Facts is set forth in its entirety as follows:

"1. Petitioner operated a Summer Food Service Program for the summer of 1976. It was funded by the United States Department of Agriculture pursuant to the terms of the National School Lunch Act. Respondent was responsible for supervision and administration of the program on a statewide basis. The program was governed by regulations, promulgated by the United States Department of Agriculture. 41 *F.R.* 9533 (March 5, 1966).

"2. Petitioner sponsored 31 feeding sites in 1976.

"3. On June 16, 1976, four pre-program inspections were made by respondent on petitioner's four largest sites.

"4. Seventeen inspections were made on the sites sponsored by petitioner while the program was in operation—13 were conducted by respondent; four by the United States Department of Agriculture. Fifty-nine percent of the site inspections disclosed violations of one or more of the applicable federal regulations. In all a total of 12 violations were detected.

"5. In December 1976, respondent notified petitioner that it would be permitted to sponsor 22 sites for the summer of 1977. That decision was based on the application of a predetermined formula. (Exhibit A)"

The formula of reference, which resulted in a reduction of the number of feeding sites in 1977, is one wherein a percentage of on-site violations, as determined by those responsible for program supervision, is employed to measure program effectiveness. The percentage of violations is then paralleled by a percentage reduction in the number of sites which may be operated in the future. The formula is recited as follows:

| *Percentage of Site Reviews Indicating One or More Violations* | *Corresponding Percentage Reduction in Sites* |
|---|---|
| 0-20 | 10 |
| 21-40 | 20 |
| 41-60* | 30* |
| 61-80 | 40 |
| 81-100 | 50 |

*The applicable category

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An application of this formula to the facts of the stipulation resulted in a reduction of the number of approved lunch stations operated by petitioner from 31 to 22 since observed violations comprised 59 percent of all site inspections. Respondent avers that the use of such formula was within its discretionary authority pursuant to terms of the National School Lunch Act and regulations governing such lunch programs published in the Federal Register on March 5, 1976 and superseded by regulations published in March 1977. 41 *F.R.* 9533 Of particular importance, respondent avers, is 225.4(a)(3) which provides that:

> "***The State agency, or FNSRO [Food and Nutrition Services Regional Office] where applicable, shall assess the maximun number of meals to be served at each site, and the maximum number of sites that the service institution can reasonably expect to administer effectively."

Thus it may be seen that the percentage formula as devised by the Bureau of Child Nutrition Programs, *ante,* is one which attempts in mathematical percentage terms to establish the number of lunch sites that service agencies "***can reasonably expect to administer properly." The question for determination is whether such formula use to determine effectiveness was a valid and proper exercise of discretion by respondent. Respondent avers, and it is not denied, that all sponsoring agencies were made aware at the inception of the lunch program of their continuing monitoring responsibilities and were offered continuous access to respondent's personnel for advice. Respondent further avers that, in the absence of a precise statutory or administrative directive pertinent to lunch program administration, it may not be faulted for choosing the formula method as a solution to the problems with which it was faced.

The Commissioner has reviewed the Stipulation of Facts, and the total record of this matter and determines that the controverted action of the Bureau of Child Nutrition Programs in reducing the number of lunch sites to be operated by petitioner's corporation was not an action which may, as alleged, be termed arbitrary and capricious. The action was grounded in a formula which, while imprecise, provided a logical means to arrive at a judgment that the corporation's responsibilities for supervision were overextended. Past performance became, in effect, a gauge of future efficiency. Petitioner's responsibility was thus required to be curtailed. The Commissioner so holds and there is no relief which may be granted.

Accordingly, the Petition is dismissed.

COMMISSIONER OF EDUCATION

April 13, 1978

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**In the Matter of the Annual School Election Held in the School District of the Borough of Woodlynne, Camden County.**

## COMMISSIONER OF EDUCATION

## DECISION

The announced results of the balloting for candidates for three full terms of three years each and one unexpired two-year term to membership on the Board of Education of the Borough of Woodlynne, at the annual school election held on March 29, 1977 were as follows:

| | *AT POLLS* | *ABSENTEE* | *TOTAL* |
|---|---|---|---|
| *FOR THREE-YEAR TERM* | | | |
| Robert R. Walters | 236 | 1 | 237 |
| Carol L. Day | 226 | 1 | 227 |
| Edward Barrett | 165 | 1 | 166 |
| Michael D. Sangarlo | 160 | 1 | 161 |
| Patricia A. Fagan | 111 | -0- | 111 |
| *FOR TWO-YEAR TERM* | | | |
| Carole R. Waters | 214 | 1 | 215 |
| Eugene J. Melvin | 100 | 1 | 101 |

Pursuant to letter requests dated March 31, 1977 from Candidates Sangarlo, Fagan and Melvin, hereinafter "petitioners," the Commissioner of Education directed his representative to conduct a recount of the ballots cast and an inquiry into the conduct of the election. The recount and the inquiry were conducted on April 18, 1977 at the Camden County voting machine warehouse. The inquiry was continued on April 27, 1977. The report of the Commissioner's representative is as follows:

The recount of the ballots cast confirmed the announced results set forth above.

Petitioners allege that the election officials failed to check signatures against the signature copy register as required by *N.J.S.A.* 18A:14-15. Petitioners testified that when they presented themselves at the polling place to claim their right to vote, each was asked to sign the poll list. No comparison was made of their signatures on the poll list to their signatures in the signature copy register. The testimony of two other citizens who cast ballots corroborated the failure of the election officials to compare signatures; the testimony of one election official who admits that signatures were not compared establishes as fact that the election officials failed to compare signatures. The hearing examiner so finds.

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Petitioner Sangarlo was granted leave to compare all signatures on the poll list with those persons who properly registered to vote and whose signatures appear in the signature copy register. The Deputy Registrar for the Camden County Board of Elections advised the hearing examiner by letter dated May 5, 1977 (C-1) and on June 15, 1977 (C-2) that the following four persons who cast ballots in the election were registered as follows:

Anthony Polumbo, 159 Elm Avenue, Woodlynne, New Jersey
Mr. Polumbo's registration was removed because he had not voted in four years.

Josephine M. Tamru, C-16, Ferry Station Apartments, Camden, New Jersey
Ms. Tamru is not registered as a voter of the Borough of Woodlynne.

Joseph A. Bangs, 337 Cypress Avenue, Woodlynne, New Jersey
It is reported by the Deputy Registrar that Mr. Bangs had moved to Marlton, New Jersey, on August 22, 1974. Consequently, he was not a resident of Woodlynne when he cast a ballot in this election.

It is clear that by the failure of the election officials to compare signatures at this election, four persons were allowed to cast ballots who were not properly entitled to do so. The hearing examiner finds no merit in the election official's explanation that they know everyone by sight. *N.J.S.A.* 18A:14-51 states clearly and unequivocally that "***the election officers *shall* compare the signature[s]***." *(Emphasis supplied.)*

Petitioners allege that a partisan political committeeman was electioneering on behalf of certain candidates twenty feet from the polling place, contrary to the provisions of *N.J.S.A.* 18A:14-81. The statute provides in full as follows:

> "If a person shall distribute or display any circular or printed matter or offer any suggestion or solicit any support for any candidate, party or public question, to be voted upon at any election, within the polling place or room or within a distance of 100 feet of the outside entrance to such polling place or room, he shall be a disorderly person."

Petitioner Fagan testified that Edward Hallahan had given her a form of a sample ballot (P-1), which endorsed the candidacy of Robert R. Walters, Carol L. Day, Edward Barrett, and Carole R. Waters, twenty feet from the outside door to the polling place. Petitioner Melvin testified that, while he was not given one of the controverted ballots, he did see Edward Hallahan with the ballots approximately fifty to seventy-five feet from the outside entrance.

The hearing examiner finds, on the basis of Petitioner Fagan's testimony, that a *prima facie* case has been made with respect to Edward Hallahan violating the provisions of *N.J.S.A.* 18A:14-81. The hearing examiner also observes that Edward Hallahan was not called for testimony in the matter.

The hearing examiner finds no merit in petitioners' complaint that the Board Secretary endorsed certain candidates in the election and, in fact, paid for the printing of the sample ballot. (P-1) There is no showing that the Board Secretary

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illegally or improperly used his official functions to further the candidacy of those he supported.

The hearing examiner has reviewed the testimony of petitioners in regard to their allegations that the Board, contrary to the provisions of *N.J.S.A.* 18A:14-6, appointed one of its employees to be an election officer. The Board Secretary testified that this allegation is true. The Board did appoint Irene Penty, who is a full-time employee of the Board, to be an election official.

*N.J.S.A.* 18A:14-6 specifically prohibits employees of the Board from being appointed election officials. Consequently, the hearing examiner finds that the Board did violate the provisions of the statute in its appointment of Irene Penty as an election official.

The hearing examiner finds that notwithstanding the fact that four persons cast ballots who were not entitled, there is no proof that the will of the electorate has been thwarted. Even if the four persons cast ballots for the candidate who received the next highest number of votes than Candidate Sangarlo, he, Candidate Sangarlo, still would have lost by one ballot.

The hearing examiner recommends that the Commissioner affirm the announced results of the election and refer to the Camden County Prosecutor the matter of the four persons who voted improperly and the matter of Edward Hallahan distributing the election material (P-1) contrary to the provisions of *N.J.S.A.* 18A:14-81.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and observes that no exceptions or objections were filed thereto. Accordingly, the Commissioner adopts as his own the findings of fact and conclusions of law set forth, *ante*.

The Commissioner directs the Board of Education to henceforth fully comply with the provisions of *N.J.S.A.* 18A:14-6 and refrain from appointing its employees as election officials. The Board Secretary is also instructed to direct election officials to fully comply with the requirements that signatures on the poll list be compared with signatures in the signature copy register.

The Commissioner hereby refers to the Camden County Prosecutor for further action, if necessary, the matter of the four persons who voted improperly and the matter of Edward Hallahan and the distribution of election material.

The Commissioner finds and determines that Robert R. Walters, Carol L. Day and Edward Barrett were elected to full terms of membership of three years and Carole R. Waters was elected to a two-year term of membership on the Board of Education of the Borough of Woodlynne.

COMMISSIONER OF EDUCATION

April 13, 1978

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**In the Matter of the Annual School Election Held in the School District of the Town of West Orange, Essex County.**

## COMMISSIONER OF EDUCATION

## DECISION

The announced results of the balloting for one member of the Board of Education for a full term of five years at the annual school election held February 14, 1978 in the School District of the Town of West Orange, Essex County, were as follows:

| | *At Polls* | *Absentee* | *Total* |
|---|---|---|---|
| Joan Pine | 1134 | 51 | 1185 |
| Naomi Dower-LaBastille | 1106 | 22 | 1128 |
| James Rhatican | 262 | 2 | 264 |
| Leontine Mascia | 162 | 8 | 170 |

Pursuant to a letter request from Candidate LaBastille, a recount of the ballots and an inquiry were conducted by an authorized representative of the Commissioner of Education on February 28, 1978 at the voting machine warehouse, Newark.

At the conclusion of the recount considering, also, the statement of results of the absentee ballots, the totals as set forth above remained unchanged.

Candidate LaBastille complained of several irregularities which she believed may have affected the final tally. Regarding her complaint about the machines malfunctioning, it was demonstrated at the recount that all the machines used were operable and that the original count was correct. It was conceded by the Board Secretary that candidates were not notified when the machines were ready so that they could be examined as required by *N.J.S.A.* 18A:14-42(b).

A second complaint is that the Board Secretary improperly removed challengers' names from a list she submitted. The statutes require that subsequent to the appointment of challengers and alternates by a candidate, a board secretary shall make a certificate of appointment of the challengers which challengers must submit to the election officers in each respective polling place. *N.J.S.A.* 18A:14-16 This submission authorizes a challenger to remain in the polling place. Further, *N.J.S.A* 18A:14-17 requires that each challenger shall wear a mark of identification furnished to him/her by the secretary of the board.

In the instant matter there is no showing that any person was denied an opportunity to be a challenger if he/she wished to serve as one. Rather, the record reveals that one appointee was in Arizona and another called the Board Secretary to have his/her name removed from the list of challenger appointees.

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Candidate LaBastille admitted that some of her appointees did not know their names would appear on a challengers' list.

In any event, if no certification was submitted to the election officers by the individual challengers, and if they had no identification marks as required by the statutes, *ante*, the challengers would not possess the required authorization to remain in the polling place. *N.J.S.A.* 18A:14-16, 17 Having reached this conclusion, and considering the circumstances of this particular case regarding the appointment of challengers, the Commissioner's representative finds that it is unnecessary to discuss whether or not a board secretary has the right to remove a challenger's name from a list submitted by a candidate.

Candidate LaBastille contests the procedure involving the handling of the absentee ballots. The record reveals that the Board Secretary did issue some applications for absentee ballots upon which were printed the incorrect directions that they should be filled out and returned to the school district clerk. (Exhibit C) This procedure was corrected at a later time when corrected forms, directing that the applications be returned to the county clerk, were made available through the office of the Essex County Superintendent of Schools. (This was necessitated by an amendment to the school elections statutes.) The corrected forms were prepared at the office of the Commissioner of Education. Nevertheless, the Board Secretary testified that when he gave approximately fifty applications for absentee ballots to Candidate LaBastille's husband, a note was attached to the package directing that they be returned to the county clerk. Mr. LaBastille testified that no such note was attached. He testified, also, that he picked up fifty or more applications for absentee ballots from the town clerk. In any event, the Board Secretary testified that on February 1, 1978, he hand delivered to the county clerk any applications mailed to him.

The Commissioner's representative takes official notice of the fact that a severe winter snow storm covered the northeastern states on Monday and Tuesday, February 6 and 7, 1978. The storm was so severe that the regional school district elections scheduled for February 7, 1978 were postponed by Order of Chief Justice Richard J. Hughes, in part because voting machines could not be delivered in many districts throughout the State. It is also common knowledge that there was practically no mail delivery in most communities for two or more days.

Complainant LaBastille asserts that these factors, as recited earlier, were responsible for a number of absentee ballots not being returned on time to the county clerk to be counted in her favor.

Assuming for the purposes of this decision that all of Candidate LaBastille's assertions are true regarding the processing of applications for absentee ballots, while not conceding that they are, there is no showing that these applications acquired by her were treated any differently than those of all other candidates who received them. Candidate Pine testified that she, also, received applications with the return address of the Board Secretary printed thereon. (Exhibit D) If

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the misinformation printed on some of the applications and the snow storm had any effect on the timely receipt of absentee ballots, it is merely speculative that a sufficient number would have been returned in Candidate LaBastille's favor to alter the results of the election.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has read the report of his representative and reviewed the record in this matter. The Commissioner concurs with the findings and conclusions therein.

Regarding the several allegations of irregularities, the Commissioner directs the Board Secretary to adhere strictly to all of the provisions in the statutes regarding school elections. *N.J.S.A.* 18A:14-63 Specifically, regarding this election, notices were not sent to candidates, as they should have been, that the voting machines could be examined. *N.J.S.A.* 18A:14-42(b) It is speculative to propose that any or all of the allegations of irregularities, even if true, would have changed the results of this election. *In the Matter of the Annual School Election in the School District of Voorhees Township*, 1968 *S.L.D.* 70 See also *Sharrock v. Keansburg*, 15 *N.J. Super.* 11 (*App. Div.* 1951); *In the Matter of the Annual School Election in the Township of Jefferson*, 1960-61 *S.L.D.* 181.

It is well established that an election will be given effect and will not be set aside unless it is shown that the will of the people was thwarted, was not fairly expressed, or could not properly be determined. *Love v. Board of Chosen Freeholders*, 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Petition of Clee*, 119 *N.J.L.* 310 (*Sup. Ct.* 1938); *Application of Wene*, 26 *N.J. Super.* 363 (*Law Div.* 1953), aff'd 13 *N.J.* 185 (1953) There has been no such showing herein.

Accordingly, the Commissioner finds and determines that Joan Pine was elected for a full term of five years on the Board of Education of the Town of West Orange.

COMMISSIONER OF EDUCATION

April 13, 1978

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**Board of Education of the School District of the City of Hoboken,**

*Petitioner.*

*v.*

**Mayor and Council of the City of Hoboken, Hudson County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

## ORDER

This matter having been opened on August 5, 1977 by the filing of a Petition of Appeal by the Hoboken Board of Education, hereinafter "Board," wherein the Board appealed a reduction of its current expense budget by respondents; and

The Board having submitted on March 29, 1977 to the voters a proposal to raise by local taxation $4,196,023 for current expenses of the Board in the 1977-78 school year; and

The voters having rejected that proposal whereupon the matter of the defeated budget was considered by respondent pursuant to applicable law; and

Respondent having adopted a resolution on April 14, 1977 reducing the Board's current expense budget by $59,500; and

The Board having on April 29, 1977 appealed that reduction alleging that it was both procedurally defective and contrary to the constitutional mandate that a thorough and efficient system of education be provided; and

A timely answer having been filed by respondent; and

The Assistant Commissioner of Education for Administration and Finance, after numerous reviews of the Board's financial records and the aforementioned proposed budget, having determined that the amount of $4,196,023 placed before the voters on March 29, 1977 to be raised by local taxation for current expenses exceeded the maximum current expense budget permitted by law by an amount greater than the $59,500 by which respondent reduced the Board's budget for current expenses when certifying the amount to be raised to the Hudson County Board of Taxation (Exhibit A); and

The Commissioner having determined that the fact that the Board placed before the voters an amount to be raised by local taxation which exceeded by more than $59,500 the maximum permitted by law is sufficient reason to dismiss

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the Board's appeal for restoration of funds to its current expense budget; now therefore

IT IS ORDERED that the Petition of Appeal be and is dismissed.

Entered this 14th day of April 1978.

COMMISSIONER OF EDUCATION

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Robert W. Taylor, Esq.

For the Respondent, Lawrence E. Florio, Esq.

The Hoboken Board of Education, hereinafter "Board," appeals to the Commissioner of Education for an order directing the Mayor and Council of the City of Hoboken, hereinafter "Council," to pay to the Board for capital outlay expenditures the sum of $222,000 which Council, upon review of the Board's defeated budget in February 1974, by resolution had approved for the Board's capital outlay needs. (Exhibit D) Council, while admitting that such a resolution was passed by a 5-4 vote on February 27, 1974, avers that two members of Council who were employees of the Board were in conflict of interest, thus rendering that vote illegal and void *ab initio*.

The matter is before the Commissioner in the form of a Motion for Summary Judgment by respondent, the pleadings and Briefs. The relevant factual context, over which there is no dispute, is set forth as follows:

The Board, which had available State school building aid of $1,607,000 for the construction of its Calabro School, learned in 1974 from its architects that an additional $222,000 was required to complete that construction project. Accordingly, the Board submitted to the voters at the February 13, 1974 annual election a proposal to raise that amount for capital outlay purposes. Upon defeat of that proposal, the matter, at the Board's request, was reviewed by Council which determined that it was in the interest of the people of the City of Hoboken to have the school built, and by a 5-4 vote on February 27, 1974, resolved that:

> "***[The] Council of the City of Hoboken hereby approves the Capital Outlay of $222,000.00." (Exhibit D)

Two members of Council who voted in favor of the resolution were employed

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by the Board in their respective positions as business manager and custodial supervisor.

In July 1974 the Board entered into contracts with contractors and suppliers to build the Calabro School at a cost of $1,829,000. The $222,000 has not been paid to the Board which, having completed the Calabro School, still owes that amount to its contractors.

Council's contention that its February 27, 1974 action is rendered void and of no effect, for the reason that two of its members who voted for the resolution were employees of the Board, is in error. While the Commissioner agrees that the public is entitled to have municipal governing officials perform their duties free from personal or pecuniary interests that might affect their judgment, there is no showing of personal or pecuniary gain which would or could accrue to the Board's business manager or custodial supervisor by favoring a resolution to raise funds to assist the Board to build the Calabro School. Nor does Council so much as allege in what way those members' private interests could be enhanced thereby. Absent a showing that such personal interest existed, it must be held that those members were neither in conflict of interest nor prevented from casting their votes on a resolution to raise by public taxation funds necessary to supplement those available from State school building aid for the construction of the Calabro School. It was not the business manager nor the custodial supervisor, but rather the public, which stood to benefit from the resolution and the resultant school facility. Nor is it shown that any private employer with whom they were associated stood to gain from their votes as was found in *Griggs v. Princeton Borough,* 33 *N.J.* 207 (1960) and *Newton v. Demas,* 107 *N.J. Super.* 346 (*App. Div.* 1969). *Aldom v. Borough of Roseland,* 42 *N.J. Super.* 495 (*App. Div.* 1956), *Netluch v. Mayor and Council of West Paterson,* 130 *N.J. Super.* 104 (*Law Div.* 1974) and *Driscoll v. Burlington-Bristol Bridge Co.,* 8 *N.J.* 433 (1952), cited by Council, are all inapposite, absent a showing herein that the business manager or the custodial supervisor because of private pecuniary gain, enhancement of personal interest, or secretive agreements cast their votes in violation of their public trust.

*Kaufman v. Pannuccio,* 121 *N.J. Super.* 32 (*App. Div.* 1972), a case directly on point, is controlling. Therein, it was determined that a city school system guidance counselor's employment was not incompatible with his holding office as a council member in that same city where his employer was an elected board of education. The Court determined that he did not stand in conflict of interest since the only involvement of the city council with the budget of the school system was, in the event of a defeated budget, to certify the gross amount necessary to be appropriated, whereas the allocation of those funds, remained solely under the discretionary control of the board of education. The direct parallel to the instant matter is inescapable. Accordingly, it must be held that the business manager and the custodial supervisor were legally entitled to cast votes on the resolution authorizing capital outlay funds to be appropriated.

Council's further argument in support of its Motion to Dismiss, that the instant matter is *res judicata* for having already been acted upon by the Com-

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missioner, is inapplicable. The Commissioner who, without contradiction, is charged with determining disputes which arise under the school laws of this State, through his Assistant Commissioner of Education in charge of Controversies and Disputes, directed the Board on April 28, 1977 to "***submit appropriate pleadings in order *** to qualify the status of the City Council's resolution.***" (Exhibit B) This directive was deemed necessary in full consideration of the Commissioner's determination in *Board of Education of the City of Hoboken v. Mayor and Council of the City of Hoboken, Hudson County*, 1977 *S.L.D.* 493. Therein, the matter of the controverted $222,000 was dealt with only as to a question of how it should be properly accounted for as an accounts receivable.

Finally, the Commissioner determines that as a matter of equity and fairness Council should be precluded at this late date from challenging its own act and refusing to comply with its February 27, 1974 resolution upon which the Board relied when, in the public interest, it entered into contracts, constructed and placed in service the Calabro School.

Council is legally obligated to transfer $222,000 to the Board for its capital outlay needs. The Commissioner so holds. Accordingly, Council is directed to provide that amount from available funds forthwith or to certify to the Hudson County Board of Taxation that additional amount to be raised by tax levy for the Board's capital outlay needs if it has not already done so.

In consideration of the above determination, Council's Motion to Dismiss is denied.

COMMISSIONER OF EDUCATION

April 21, 1978

## SUPERIOR COURT OF NEW JERSEY

## APPELLATE DIVISION

Decided October 11, 1978
Before Judges Fritz, Bischoff and Morgan.

This matter having been duly presented to the Court, it is hereby ordered that the Motion to Dismiss the Appeal and for counsel fees and costs on behalf of respondent is denied and

We observe that there has been no response from appellant to this motion. See *R.* 2:8-1 permitting us in such circumstances to consider the motion unopposed. We also note the probable merit to respondent's complaint that ap-

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pellant filed its appeal without first exhausting available administrative remedies. Nevertheless, in view of the nature of the matter concerning a dispute between two public bodies and a substantial sum of taxpayers' money, the interests of justice require restraint and we will not dismiss the motion. Rather we will treat the motion as one for summary disposition. *R.* 2:8-3(b). In view of appellant's failure to respond to this motion, we relax the time period requirement of that *Rule* and grant the motion. The matter is remanded to the State Board of Education for further proceedings in accordance with its rules and regulations as though appellant had in fact appealed to that body from the decision of the Commissioner of Education.

Movant's complaint that appellant's brief was not timely filed in the Appellate Division is without merit. *R.* 2:6-11(a) allows the filing of a brief "within 45 days after the service of the statement of the items comprising the record." Appellant's brief was filed within that time. Accordingly, the motion for counsel fees is denied. Taxed costs on the appeal in the amount of $16 are allowed.

We do not retain jurisdiction.

## STATE BOARD OF EDUCATION

## DECISION

Decided by the Commissioner of Education, April 21, 1978

For the Petitioner-Appellee, Robert W. Taylor, Esq.

For the Respondents-Appellants, Lawrence E. Florio, Esq.

The State Board dismisses this case as being out of time as it was not filed within the 30 day period prescribed by law. The State Board further believes that on the basis of their review of the case on the merits, the Commissioner's decision should be affirmed. For both of the above reasons the appeal is dismissed.

December 6, 1978

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**In the Matter of the Tenure Hearing of William Simpson, School District of the Borough of Audubon Park, Camden County.**

## COMMISSIONER OF EDUCATION

## DECISION

For the Complainant, Farrell, Eynon, Madden & Lundgren (David G. Eynon, Esq., of Counsel)

For the Respondent, Michael P. Mullen, Esq.

The Board of Education of the Borough of Audubon Park, hereinafter "Board," certified charges of unbecoming conduct on June 17, 1977 to the Commissioner of Education against respondent, a teacher with tenure status. Said charges were filed pursuant to *N.J.S.A.* 18A:6-11 upon a complaint filed with the Board against respondent by "E.B.," a minor by his parent and guardian *ad litem,* alleging that respondent had caused to commit assault and battery, contributing to the delinquency of a minor, debauching and impairing the morals of a minor under age sixteen, lewdness and indecency and conduct unbecoming a teacher. Respondent denies the allegations and seeks reinstatement to his position from which he has been suspended with pay.

Two days of hearing were conducted at the office of the Camden County Superintendent of Schools, Pennsauken, on October 3 and 7, 1977, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

The following principal facts of the instant controversy are not in contention and may be stated succinctly.

1. On May 2, 1977 respondent administered a physical examination upon E.B.

2. E.B. was a seventh grade pupil assigned to respondent's homeroom, English and social studies classes.

3. On May 2, 1977, the school nurse was absent from duty.

4. On May 2, 1977, the school principal was absent from the school building.

Complainant E.B. testified that on the morning of May 2, 1977, respondent removed him from a music class which was in session and directed him to the school nurse's office. He stated that respondent closed and locked the door after they had entered the nurse's office and directed him to sit on a couch. Respondent then weighed him and recorded the weight on a white paper form. The following testimony by E.B. was conflicting in that he testified at the hearing that re-

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spondent checked the arch of his left foot with a pen, while in his deposition taken on September 13, 1977, he testified that respondent had checked the arch of his right foot. (Tr. I-20, 32-33; J-1, at p. 83) In any event, E.B. testified that respondent had him remove his shirt and that respondent checked his back with his hands. He stated that, thereafter, respondent directed that he remove his pants and underpants. E.B. testified that he did not remove his underpants immediately; however, he subsequently removed them and stated further that respondent "felt around my private area." (Tr. I-22) He stated that respondent told him that he had a lump in that area and that he made it go away by rubbing it. E.B. testified that respondent then told him he could return to his classroom. He stated that he got dressed and left the nurse's office while respondent remained behind. (Tr. I-15-23), 25-44) E.B. testified that he immediately went to the school principal's office and asked the school secretary for permission to see him. The secretary informed E.B. that the principal was not available, whereupon E.B. inquired of the school secretary if teachers were allowed to give pupils physical examinations and he testified that she stated that they were not permitted to do so. The school secretary corroborated E.B.'s testimony. (Tr. I-88-93) E.B. stated that he then returned to his classroom. (Tr. I 24-25)

The alleged incident occurred on a Monday. E.B. testified that he returned to school and respondent's classes on Tuesday and Wednesday, May 3 and 4, 1977. He stated that he did not inform his parents of the incident because he was afraid. (Tr. I-47, 55; J-1, at p. 106) He testified further that pupils in the school had learned of the incident and in a teasing manner asked him if it was true that respondent had given him a physical examination. He testified that in response to the inquiries he said nothing (Tr. I-48), he answered "no" (Tr. I-69), he said that it was none of their business (Tr. I-72), and he told pupils that respondent checked his weight and eyesight. (Tr. I-79) E.B. stated that by Wednesday, May 4, 1977, the pupils' inquiries with regard to the alleged incident had "***died down a little bit.***" (Tr. I-73)

The alleged incident occurred during the school's parent-teacher conference week and the record reveals that E.B.'s mother was scheduled to meet with respondent and a co-teacher to discuss their evaluation of E.B.'s progress and to review his report card. (Tr. II-15-16) It had been determined by respondent and his co-teacher that E.B. was to be retained in the seventh grade for the subsequent school year, therefore it was necessary that the parent attend the scheduled parent-teacher conference. (Tr. II-16-18)

In his deposition, E.B. testified that he attended school after the alleged incident and did not have any problems attending respondent's classes nor did he say anything to respondent about the incident. (Tr. I-55, 76; J-1, at pp. 106-107) On Wednesday, May 4, 1977, E.B. testified, he had a conversation with respondent and informed him that his mother would not be able to attend the parent-teacher conference because she was going to leave the home and separate from his father. (Tr. I-49-55; J-1, at pp. 97, 104-105) E.B. testified that he was very upset about the impending separation and he was more concerned with his parents than with the alleged incident with respondent. (Tr. I-51, 55; J-1, at pp. 98, 107) He testified that when the alleged incident came to light his parents

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forgot about fighting and that it had brought them together again. (Tr. I-54-55; J-1, at p. 101)

E.B.'s mother testified that she learned of the alleged incident of the physical examination on Wednesday, May 4, 1977 at approximately 2:30 p.m. as a result of a telephone call she received from a parent who asked her if she had knowledge of a rumor that children had reported that respondent had given E.B. a physical examination. (Tr. I-133, 138, 142, 152) She stated that she had no such knowledge and subsequent to the telephone call she questioned E.B. about the allegation. She testified that E.B. informed her that respondent had him remove his clothing and felt around his groin area. She testified that E.B. told her that respondent said that E.B. had a lump on the left side and respondent would attempt to remove it. She testified that E.B. stated that he was afraid to tell her about the alleged incident. (Tr. I-66-68, 133-134)

E.B.'s mother testified that she then called her husband at his place of work. When he arrived home they and E.B. went to the school to confer with the principal. She testified that when they arrived at the school, the parent who had first telephoned her and another parent who had telephoned her were present and they met with the principal to discuss the alleged incident. She testified that she did not know why the two other parents attended the meeting with the principal. In addition, she stated that during the course of the meeting the president of the Board arrived to attend the meeting. She testified that the principal stated that he would file formal charges against respondent with the Board with regard to the alleged incident. (Tr. I-152-160) She further testified that she removed E.B. from school and that the Board supplied home instruction for the remainder of the school year. (Tr. I-140, 161)

During the course of her testimony, E.B.'s mother stated that she was upset because of his failing grades. (Tr. I-136, 140-141) She also testified that she had planned to go to Alabama because of marital problems. She stated that she had had physical problems and that she and her husband had discussions over money problems and that she was going to "***[j]ust get away for a few days. I said I was going to leave for a few days." She stated that E.B. knew that she was thinking about leaving the home. (Tr. I-135)

A Title I teacher testified that E.B. was assigned to her on Monday, May 2, 1977 from approximately 10:00 until 10:30 a.m. She stated that E.B. had informed her that his parents had had some difficulty over the week-end and that his mother would not attend the scheduled parent-teacher conference with respondent. (Tr. I-112, 113-116) She further testified that her assigned teaching station was within view of the nurse's office and that she observed respondent and E.B. enter the nurse's office between 10:45 and 11:15 a.m. on the day in question and that the door to the nurse's office was closed. She testified that she later was aware that both respondent and E.B. had left the area; however, she could not recall whether they left together or separately. She also testified that she did not discuss her observations until she was called to the principal's office on the afternoon of May 4, 1977. (Tr. I-95, 100-103, 106, 108, 112-116)

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Respondent admitted that he gave E.G. a physical examination; however, he denied that he directed E.B. to remove his pants or that he touched him in any way. (Tr. II-9) Respondent testified that events occurred as follows: At approximately 10:40 a.m. on May 2, 1977, the music teacher arrived at his classroom to conduct a music class. Respondent went to the teachers' room to mark pupils' papers and then checked his mailbox to see if any parents had called to cancel their appointments for the parent-teacher conferences scheduled for that day. He testified that he discovered two pieces of paper, the topmost of which read, "Bill, please fill out this form," and was signed with the initials "E.G." He testified that the bottom page had the name of E.B. and asked for "***age, weight, any illness in the past year, any hospitalization in the past year, and any asthma attacks during the past year.***" (Tr. II-5) Respondent testified:

> "***After looking at the note I thought that I would fill it out because at the time I thought it came from Mrs. [G], the nurse, and I thought well, it's my chance to help her out. She had just given a gift to my daughter and I kind of felt that I wanted to do something in return to help her.***" (Tr. II-5)

Respondent testified that he returned to the music class and asked the music teacher to excuse E.B. He stated that E.B. accompanied him to the nurse's room and he closed the door and asked E.B. his age. He testified that he asked E.B. to step on the scales in order to complete the form with respect to his weight. After he had completed weighing E.B., respondent testified, he directed E.B. to sit on the green couch while he sat at the nurse's desk and asked E.B. to answer the questions which appeared on the form. (Tr. II-6-7) He testified that when he came to the last question, E.B. responded and as he was writing on the form he told E.B. he could return to the music class. Shortly thereafter, respondent left the nurse's office. (Tr. II-9) Respondent denied that he had any physical contact with E.B. other than taking his weight. (Tr. I-9-10) He also stated that although this was the first such request he had received, he did not see anything on the form that would prevent him from carrying out the request. (Tr. II-13)

Respondent testified that he left the nurse's office with the form and returned to the teachers' room to continue to mark pupils' papers and that he did not immediately return the form to the nurse's mailbox. He stated that he returned to his classroom and taught a social studies lesson. Upon the completion of the social studies class, he testified, he took the form with him to the teachers' room at lunchtime with the intention of placing it in the nurse's mailbox. After he had arrived at the teachers' room, he asserted that he remembered that he had to tell a fellow teaching staff member something about the local teachers' association and he placed the form on the table in the teachers' room and left. He testified that he returned to the teachers' room in a few minutes, picked up the form and the note, put the note in the trash basket and placed the completed form in the nurse's mailbox. (Tr. II-13-14)

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Respondent testified that he and his co-teacher had determined that E.B. was to be retained in the seventh grade for the 1977-78 school year due to his very poor performance. E.B.'s mother was scheduled for a parent-teacher conference with respondent and his co-teacher; however, she had not arrived as of Wednesday, May 4, 1977, the last day for conferences. It was on that day that E.B. informed respondent that his mother would not be able to attend the conference because she was going to leave his father. Respondent stated that he had not realized that there were any marital problems between the parents and he subsequently informed his co-teacher that E.B.'s mother would not attend the parent-teacher conference. (Tr. II-16-18)

Respondent testified that he first learned there was a problem with regard to the physical examination when his co-teacher telephoned him on Wednesday evening, May 4, 1977, after which he telephoned the school nurse to inquire about the physical examination form for E.B. He testified that the nurse was unaware of what had taken place, that she did not place any physical examination form in his mailbox and, further, that she had not received a form with regard to E.B. (Tr. II-27, 43-45)

Respondent testified that on the following morning, he arrived at the school earlier than usual and discussed the incident with two fellow staff members who indicated to him that they were not aware of the allegations. When the nurse arrived he asked her again what she knew about the incident and he testified that she stated she had been unaware of the whole situation. (Tr. II-51-53)

Subsequently, on the morning of May 5, 1977, respondent and his co-teacher met with the County Superintendent and the principal in the principal's office at which time respondent was informed of the allegations that E.B. had asserted. Respondent stated that the principal had been informed that respondent had "fondled" E.B. Respondent testified that the principal and the County Superintendent informed him of his rights of due process. (Tr. II-29-39, 69-72)

Respondent testified that his co-teacher attended the meeting with the County Superintendent and the principal at his request and upon the advice of the principal to have someone accompany him as a witness. (Tr. II-33) Subsequent to the meeting, respondent's co-teacher stated to respondent that he recalled seeing the physical examination form in the teachers' room on Monday, May 2, 1977. On cross-examination, respondent testified that although his co-teacher was present at the meeting with him, the County Superintendent and the principal, he did not volunteer to those present that he had seen the note and the physical examination form. (Tr. II-29-30, 57-59)

Respondent's co-teacher testified that he saw the note and the form in the teachers' room on May 2, 1977. He testified that he was alone when he observed and read the note and form which included a list of questions to be answered with regard to health items. He testified that after he had read the note and form, he left the teachers' room for a few minutes, and when he returned he had lunch with respondent. No mention was made with regard to the form upon his return. (Tr. I-182-186)

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The school nurse testified that she was absent from school on Monday, May 2, and Tuesday, May 3, 1977. She stated that E.B.'s physical examination had been completed on December 1, 1976 (P-1) and that neither she nor the school medical inspector had requested any further physical examination or medical information of E.B. She testified specifically that she did not request respondent to administer a physical examination upon E.B. on May 2, 1977 and, further, she did not receive a report of such an examination subsequent to that date. She testified that it was her responsibility to carry out the physical screening of pupils which included weight, measurement, vision test and blood pressure, and that she had never asked teachers to help her with such screening. She further stated that it was the school's medical inspector who had the responsibility to conduct the pupil physical examinations. (Tr. I-121-131)

With regard to the alleged typed note and physical examination form, the nurse testified that the school had executed standard forms for parents to complete. (P-2) She further testified that she very rarely types and, in addition, if she were to use her initials she would use E.F.G., rather than E.G. which was alleged to have been on the note to respondent. (Tr. I-125-126; Tr. II-80)

In summary, the hearing examiner finds all the following facts to be true in fact:

1. That respondent administered a physical examination upon pupil E.B. behind closed doors without proper and approved authority on May 2, 1977.

2. That the school nurse was absent on May 2, 1977 and denies requesting respondent to administer a physical examination upon the pupil, E.B.

3. That respondent could not produce the original or a copy thereof of the alleged note from the school nurse, nor the alleged physical examination form.

4. That the school nurse denies the receipt of the completed physical examination form.

Additionally, the hearing examiner has carefully reviewed the testimony of respondent's co-teacher and finds that it lacks credibility. This finding is grounded on the fact that respondent's co-teacher was in attendance at the meeting with respondent, the County Superintendent and the principal on May 5, 1977 and that he knew the seriousness of the charges against respondent at that time. He did not, however, volunteer any information in respondent's defense at the time of the meeting or, subsequently, to the school's administration but, rather, informed respondent at a later time that he had seen the alleged note from the nurse and the physical examination form.

Accordingly, the hearing examiner finds the charge of conduct unbecoming a teaching staff member to be true and fully supported by testimony and documentary evidence.

This concludes the report of the hearing examiner.

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*  *  *  *

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter. The Commissioner has also reviewed the exceptions to the hearing examiner's report filed by respondent.

With regard to respondent's exceptions the Commissioner is asked to consider respondent's eleven years of unblemished record in the Board's employ and the testimony of character witnesses presented on his behalf. The Commissioner observes that three witnesses did indeed testify as to respondent's character, decorum and professional behavior, however, none of these witnesses had any direct knowledge with regard to the allegations and the tenure charges filed against respondent. (Tr. I-5-15)

Respondent takes exception to the hearing examiner's failure to report an alleged incident which occurred in 1973 when E.B. was a third grade pupil. E.B.'s third grade teacher testified that he had accused her of inflicting corporal punishment upon him; however, she asserted that she had not done so and that E.B.'s mother had believed her report of the alleged incident. (Tr. I-150, 163-179) The Commissioner observes again that the testimony of E.G.'s former third grade teacher reflected no direct knowledge of the allegations and charges under consideration in the instant matter. With regard to this specific exception and the credibility of the testimony of children, the Commissioner has always been mindful that such testimony must be examined with great care. The Commissioner said *In the Matter of the Tenure Hearing of David Fulcomer*, 1961-62 *S.L.D.* 160, rem. State Board of Education 1963 *S.L.D.* 251, decision on remand 1964 *S.L.D.* 142, aff'd State Board of Education 1966 *S.L.D.* 225, rev. and rem. 93 *N.J. Super.* 404 (*App. Div.* 1967), decision on remand 1967 *S.L.D.* 215:

> "***It is the opinion of the Commissioner that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of children.' *Palmer v. Board of Education of Audubon*, 1939-49 *S.L.D.* 183, 188.***"(1961-62 *S.L.D.* at 160-61)

The Commissioner is constrained to observe that much of the evidence herein adduced through the testimony of complainant E.B. was indeed corroborated by respondent. The Commissioner concludes, therefore, that E.B.'s testimony herein was credible and that respondent's exception with regard to an alleged incident in 1973 has no merit.

Respondent's exception to the hearing examiner's report with respect to the specific time that complainant E.B. appeared at the school secretary's office is

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likewise without merit. The facts of the matter show that subsequent to the alleged incident of the physical examination administered upon E.B. by respondent, E.B. did, indeed, seek the opinion of the school secretary with regard to the propriety of a teaching staff member conducting such an examination. Whether or not the school secretary could recall the specific time of day that E.B. made his inquiry of her is of no moment in the instant matter. The testimony was clear that E.B. did in fact make such an inquiry of the school secretary and, further, the school secretary informed E.B. that such conduct was not permissible. (Tr. 1-89)

With regard to respondent's exception to the hearing examiner's finding that the testimony of respondent's co-teacher lacked credibility, the Commissioner is constrained to observe that the facts in the instant matter speak for themselves. The co-worker asserted that he had observed the controverted missing documents, that he was a witness to the meeting held with respondent, the Superintendent and the County Superintendent of Schools where respondent was informed of his rights of due process with respect to pending tenure charges to be filed against him, and that he knew the seriousness of the allegations and pending charges against respondent. His assertion that he was aware of all this but nonetheless failed to volunteer any information or knowledge of the alleged controverted documents to those present at the meeting or subsequent thereto except to respondent is, in the Commissioner's considered judgment, incredible.

Finally, respondent objects to the hearing examiner's finding that he administered the alleged physical examination without proper and approved authority. He states in his exceptions that the testimony did reveal that there was no proper authority for him to take the pupil E.B. to the nurse's office; his argument, however, fails when he states that he thought and/or believed that he had such authority. The Commissioner so holds.

The Commissioner finds that the formal charge against respondent of conduct unbecoming a teaching staff member is in fact true. This finding is based upon the testimony of witnesses and confirmed by the admission of respondent. In these matters arising under the Tenure Employees Hearing Act, the Commissioner is required to decide the controversy in its entirety, including the determination of the penalty. *Fulcomer, supra* In the instant matter respondent's only defense for his action was that he was doing the school nurse a favor. It is clear from the record that the pupil was under considerable emotional strain and that respondent's actions of May 2, 1977 had a pervasive negative effect. The Commissioner commented in *Palmer, supra,* as follows:

> "***Regardless of how efficient *a teacher* is in teaching subject matter and skills, she *is not justified in doing so at the cost of unnecessary emotional upsets*. Good mental hygiene is important in child growth and promotes intellectual achievement.***" (*Emphasis supplied.*)(1939-49 *S.L.D.* at 187)

*In the Matter of the Tenure Hearing of Thomas Appleby,* 1969 *S.L.D.* 159,

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aff'd State Board of Education 1970 *S.L.D.* 448, aff'd New Jersey Superior Court, Appellate Division (1972 *S.L.D.* 662) the Commissioner said:

> "***The Commissioner finds *** an underlying philosophy that *an individual has a right* not only to freedom from bodily harm but also *to freedom from offensive bodily touching* even though there be no actual physical harm. *In the Matter of the Tenure Hearing of Frederick L. Ostergren,* 1966 *S.L.D.* 185, 186***." (*Emphasis supplied.*) (at 172-173)

The Commissioner has seriously considered respondent's unblemished record of eleven years in the Board's employ. He finds, however, respondent's conduct to be so reprehensible that this single incident is grounds for dismissal. As the Commissioner observed *In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick,* 1971 *S.L.D.* 566, aff'd State Board of Education 1973 *S.L.D.* 733, aff'd Docket No. A-1680-72 New Jersey Superior Court, Appellate Division, November 28, 1973 (1973 *S.L.D.* 733):

> "***The Commissioner considers this incident to be grounds for dismissal. The fact that this is a single incident does not bar the imposition of the penalty of dismissal.
>
> "As the Court stated in *In Re Fulcomer, supra,* at p. 421:
>
> > '***Nor have we any doubt that unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. See *Redcay v. State Board of Education,* 130 *N.J.L.* 369 (*Sup. Ct.* 1943), affirmed *o.b.* 131 *N.J.L.* 326 (*E.&A.* 1944).***'***" (1971 *S.L.D.* at 574)

The Commissioner holds that the conduct of the teacher in the matter heretofore detailed was a demonstration of unprofessional conduct so gross as to warrant forfeiture of tenure rights.

Accordingly, having found the charge to be true, in fact, and of a nature sufficiently serious to warrant respondent's dismissal from his position as a teacher in the School District of the Borough of Audubon Park, the Commissioner hereby orders the dismissal of respondent as of the date of his suspension.

COMMISSIONER OF EDUCATION

April 14, 1978

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## STATE BOARD OF EDUCATION

### DECISION

Decided by the Commissioner of Education, April 14, 1978

For the Petitioner-Appellee, George Feriozzi, Esq.

For the Respondent-Appellant, Michael P. Mullen, Esq.

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

September 6, 1978

**In the Matter of the Annual School Election Held in the School District of the Township of Cherry Hill, Camden County.**

## COMMISSIONER OF EDUCATION

### DECISION

Complainant, an unsuccessful candidate for election to the Board of Education of the Township of Cherry Hill, hereinafter "Board," filed a letter complaint in which he alleges irregularities occurred during the annual election conducted on February 14, 1978. A second letter complaint in regard to the conduct of the election was filed by ten qualified voters of Cherry Hill pursuant to the provisions of *N.J.S.A.* 18A:14-63.12.

An inquiry was conducted on March 8, 1978 at the office of the Camden County Superintendent of Schools, Pennsauken, by a representative of the Commissioner of Education. The proofs offered to support the allegations raised by complainants are as follows:

The ten qualified voters aver that the street where they reside in Cherry Hill, Cobblestone Road, was not cleared of the snow which had fallen on February 13 and 14, 1978. They allege that they were deprived of their right to vote because they could not traverse Cobblestone Road to register their votes at their assigned polling place. The Mayor of Cherry Hill advised one of the ten signatories herein, by letter dated February 27, 1978, that Cobblestone Road was, in fact, plowed by the municipality on February 14, 1978 at 3:45 p.m. (C-1)

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It is common knowledge that New Jersey received significant amounts of snow on February 13, 1978 which made travel difficult. The ten qualified voters, however, brought forward no proof that they did not cast ballots at this election for some failure of the Board to properly prepare for the election or for some failure of the election officials to properly conduct the election. Furthermore, the mere allegation of the ten qualified voters that they could not traverse Cobblestone Road to cast their ballots, and particularly in view of the Mayor's letter that the road was plowed, is insufficient proof to establish that the Board or the election officers committed any act, by commission or omission, which would establish any irregularity on their part with respect to snow removal.

The unsuccessful candidate alleges that irregularities occurred in the conduct of the election with respect to challengers, poll lists, comparison of signatures, notices of election and the Board's failure to mail sample ballots. The specific allegations shall be considered in the order presented.

Complainant testified that he observed one challenger who displayed no identification as a challenger, that that challenger exceeded her authority by assuming control of the poll list and by instructing the persons claiming their right to vote to sign the poll lists. Complainant visually identified that person at the time of hearing. The person so identified was not, in fact, a challenger at the election. Rather, she testified she was a duly appointed election clerk who challenged the presence of complainant in the polling place with sheaves of paper in his hand.

Complainant failed to establish the truth of his allegation that irregularities occurred in regard to challengers.

Complainant testified that he was not required to write his address in the poll list next to his signature and that the election officials failed to compare his signature in the poll list to his signature in the signature copy register.

The election clerk testified that when persons appeared before the election officials to claim their right to vote, the official asked each person his name and address. The signature copy register was then checked to insure proper registration. The person was then directed to sign the poll list. The signature in the poll list was compared to the signature in the signature copy register. The election clerk testified that the person was not directed to state his address in the poll list

Complainant failed to establish that the election officials did not compare signatures in the poll list with the signature copy register. It is found to be true that the election officials did not direct persons claiming their right to vote to state their addresses in the poll list as required by *N.J.S.A.* 18A:14-50. Complainant has offered no proof that such a deviation from statutory prescription had any effect on the outcome of the election.

Complainant testified that the Board Secretary failed to post notices of the election on schoolhouse doors pursuant to the provisions of *N.J.S.A.* 18A:14-

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19. Complainant's proofs in regard to this allegation are his testimony that he did not see any notices of election posted and a copy of an affidavit executed by another Cherry Hill citizen which states that he did not observe any such notices posted. (C-5)

The assistant Board Secretary testified that he caused proper notices of election to be posted on each schoolhouse door in the district on February 2, 1978 pursuant to *N.J.S.A.* 18A:14-19. The two employees of the Board who did the actual posting testified that the notices were, in fact, posted in each schoolhouse on February 2, 1978.

Complainant failed to establish the truth of his allegation that the Board Secretary failed to post notices of election pursuant to *N.J.S.A.* 18A:14-19.

Complainant's final allegation that the Board failed to mail sample ballots to the citizenry prior to the election is without merit. There is no statutory requirement that boards of education must distribute sample ballots prior to its annual school election. Rather, *N.J.S.A.* 18A:14-29 provides boards of education the authority to mail sample ballots if they so elect.

A final matter remains. *N.J.S.A.* 18A:42-4 prohibits the distribution of any literature which favors the candidacy of any candidate to any public school pupil on school premises for the pupil to take home or distribute outside school premises. A notice favoring the candidacy of four candidates, none of whom was successful, was distributed to some pupils at the Board's Wesley Stafford Elementary School. (R-5) The principal of the school attests that the notice was prepared on a mimeograph machine owned and housed in the school by the PTA. The principal explains that he had no knowledge that the notice was prepared or distributed to the pupils in his school. Finally, the principal attests that he informs officials of the PTA that any notice which is to be sent out through pupils must be approved by him. However, in this instance, no approval was sought or given.

* * * *

The Commissioner has reviewed the proofs offered by complainants herein and finds, with two exceptions, no merit in the allegations.

Firstly, the Board Secretary is directed to instruct election officials in future elections that persons who appear at a polling place to claim their right to vote must state their address beside their signature on the poll list consistent with *N.J.S.A.* 18A:14-50.

Secondly, the Commissioner abhors the distribution of campaign literature to public school pupils in violation of *N.J.S.A.* 18A:42-4. The fact that the four candidates endorsed for election on the notice were not successful is of no moment. It is recognized that the distribution of the notices was without the principal's knowledge or approval. The Board is directed to take necessary measures to insure the fact that campaign literature is not distributed to any of

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its pupils contrary to law. School elections, like all elections, must be conducted in strict compliance with the law.

In the instant matter, the Commissioner must be guided by the principle that school elections must be given effect whenever possible, despite irregularities, if the will of the people, freely expressed, may be clearly seen. It is well established that gross irregularities, when not amounting to fraud, do not vitiate an election. *Stone et al. v. Wyckoff et al.*, 102 *N.J. Super.* 26 (*App. Div.* 1968) The rule, as set forth *In re Wene*, 26 *N.J. Super.* 363 (*Law Div.* 1953), aff'd 13 *N.J.* 185 (1953) is as follows:

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

The irregularities which occurred herein are not sufficient to set aside the election. The Commissioner so holds.

The Commissioner finds no basis to intervene in the school election conducted on February 14, 1978. Accordingly, the complaints are dismissed.

COMMISSIONER OF EDUCATION

April 14, 1978

**In the Matter of the Annual School Election Held in the School District of the Borough of South River, Middlesex County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

Pursuant to a letter complaint received from Joseph M. Bodnar dated February 16, 1978, the Commissioner of Education directed his representative to conduct an inquiry into an alleged violation of statutorily prescribed procedures at the annual school election held in the Borough of South River on February

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14, 1978. An inquiry was conducted on March 7, 1978, at the office of the Middlesex County Superintendent of Schools, New Brunswick, in conformance with *N.J.S.A.* 18A:14-63.12.

The letter complaint initiating inquiry into this matter sets forth one area of concern; namely, that "***stickers were found over names of candidates in the election booth.***" (Letter Petition) It is initially observed that the elections law provides for the use of a sticker, or paster, to cast a vote for ' "write-in" candidate by pasting the sticker in the voting machine receptacle provided on the machine for that purpose. The authority for this proper use of stickers or pasters is found in *N.J.S.A.* 19:49-5 which reads as follows:

*N.J.S.A.* 19:49-5.

> "Ballots voted for any person whose name does not appear on the machine as a nominated candidate for office are herein referred to as irregular ballots. Such irregular ballot shall be written or affixed in or upon the receptacle or device provided on the machine for that purpose. No irregular ballot shall be voted for any person for any office whose name appears on the machine as a nominated candidate for that office; any irregular ballot so voted shall not be counted. An irregular ballot must be cast in its appropriate place on the machine, or it shall be void and not counted. As amended L. 1941, c. 166, p. 530, §5."

At the inquiry, one election worker assigned to the Campbell School polling place testified that at approximately 5:50 p.m. on February 14, 1978, she found a sticker on the face of the voting machine obliterating the name of Claire Miller, one of the candidates for a term of three years. The election worker did not know who had placed the sticker on the machine, nor at what time of the day the sticker was placed on the machine. Immediately upon noticing the sticker, the election worker removed it from the face of the machine. Thereafter, the machine was checked after each voter left the booth.

The law is clear that the face of a voting machine must be inspected directly after each voter exits the booth. *N.J.S.A.* 19:52-2 reads in part:

> "***The district election officer attending the machine shall inspect the face of the machine after each voter has cast his vote, to see that the ballots on the face of the machine are in their proper places and have not been mutilated or defaced and that the machine has not been damaged.***"

The Commissioner finds that a violation of the elections law did occur in that there was a failure to observe the provisions of *N.J.S.A.* 19:52-2.

School elections must be given effect whenever possible, despite irregularities, if the will of the people may be clearly seen. The Commissioner has previously stated those principles enunciated by the courts by which matters of this kind must be guided. *Application of Wene*, 13 *N.J.* 185 (1953); *In the Matter of the School Election of the Hopatcong School District,* 1973 *S.L.D.*

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115 Fortunately, in the circumstances here presented, the outcome of the election was not affected, since Claire Miller was elected to a term of three years on the Board of Education of the Borough of South River. *In the Matter of the Annual School Election Held in the Borough of South River, Middlesex County*, 1978 *S.L.D.* (decided March 15, 1978) Nevertheless, the Commissioner deplores and cannot condone any such violations and is constrained to caution the election officials of their responsibility to observe the requirements of *N.J.S.A.* 19:52-2 in all future school elections.

The Petition is dismissed.

COMMISSIONER OF EDUCATION

April 17, 1978

**Eddie Lee Harrell,**

*Petitioner,*

*v.*

**Board of Education of the City of Paterson, Passaic County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Robert P. Swartz, Esq.

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the City of Paterson, hereinafter "Board," alleges that the Board improperly and illegally withheld his salary increment for the 1977-78 academic year. He requests the Commissioner of Education to declare the Board's action a nullity and to direct that the increment be paid. The Board avers that petitioner's increment was legally withheld pursuant to law and requests dismissal of the Petition. The matter is submitted to the Commissioner for Summary Judgment on petitioner's Motion, Memoranda of Law and stipulated exhibits.

The sole issue in the instant matter is whether the Board's action to withhold petitioner's increment for the 1977-78 year was accompanied by adequate notice to petitioner of the reasons therefor in conformity with the statutory prescription. *N.J.S.A.* 18A:29-14 The statute is recited in its entirety as follows:

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

> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

The Board's controverted action pursuant to the statutory prescription occurred on June 22 and June 23, 1977. An assistant superintendent notified petitioner by letter

> "***that at the adjourned meeting of the Board of Education held on June 22, 1977, the Board did vote to withhold, for *conduct unbecoming a teacher,* your employment increment for the school year 1977-78.***" (*Emphasis supplied.*) (PR-1, attached to Petition of Appeal)

The specific nature of the alleged "conduct unbecoming a teacher" was nowhere set forth in the letter, although at a time immediately prior to the Board's action to withhold the increment the Board had filed specific charges against petitioner with the Commissioner of Education, wherein it was alleged he had inflicted corporal punishment upon school pupils. Petitioner contends that these specific charges may not be correlated by implied reference with the phrase "***conduct unbecoming a teacher***" (PR-1, *ante*) and thus that the phrase fails to comply with the statutory mandate which petitioner avers "***necessitates that reasons must be spelled out in detail." (Petitioner's Letter Reply to the Board's Memorandum of Law) The Board avers that when it repeated in its letter of notification of salary increment withholding "***the very reason why Petitioner was under tenure charges and in fact, on suspension, it would appear that the sense of the statute was met.***" (PR-1; Board's Memorandum of Law, at p. 4)

The Commissioner finds no merit in petitioner's claim that the Board's stated reason for withholding his increment was so general as to be no reason at all. The circumstances clearly attest to the efficacy of another view; namely that the Board, apprised of serious charges of unbecoming conduct against petitioner acted properly within its own discretionary authority to certify the charges to the Commissioner for hearing pursuant to law *N.J.S.A.* 18A:6-10 *et seq.*) and to withhold the increment on the basis of the same specific charges and the general allegation of conduct unbecoming a teacher. The specific charges and the general allegation form an integral whole in the circumstances of the

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matter and a determination with respect to the adequacy of the general allegation standing alone is not required. The Commissioner so holds.

There remains a final determination on the merits of the tenure charges against petitioner. Such determination will ultimately serve as a contextual reference for the instant matter and a decision with respect to the salary increment withholding must be made at that juncture. The question will then be whether the charges and the proofs and findings in support thereof are adequate to justify the Board's action with respect to the increment. As the Commissioner said in *Kopera v. Board of Education of West Orange,* 1958-59 *S.L.D.* 96, aff'd State Board of Education 98, rem. to the Commissioner 60 *N.J. Super.* 288 (*App. Div.* 1960), decided on remand 1960-61 *S.L.D.* 57, aff'd Docket No. A-63-58 New Jersey Superior Court, Appellate Division, January 10, 1963 (1961-62 *S.L.D.* 223), the test of adequacy with respect to a penalty of increment withholding is different from, and not dependent on, the test of adequacy of the proofs required for a decision to dismiss a tenured teaching staff member.

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

Accordingly, the Commissioner determines there is no reason at this juncture to set aside the Board's action to withhold petitioner's salary increment for the 1977-78 academic year, although such determination is not the final one. The totality of the charges against petitioner and proofs in support thereof must now be examined and the instant Petition must, in effect, be held in abeyance pending their examination. Jurisdiction is maintained. The instant matter is hereby incorporated for final decision with the litigation against petitioner brought by the Board.

COMMISSIONER OF EDUCATION

April 17, 1978

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# In the Matter of the Annual School Election Held in the School District of the Borough of Audubon Park, Camden County.

## COMMISSIONER OF EDUCATION

## DECISION

For the Complainants, George S. Feriozzi, Esq.

For the Board of Education, Farrell, Eynon and Lundgren (David G. Eynon, Esq., of Counsel)

Pursuant to a letter complaint filed by George S. Feriozzi, Esq., alleging irregularities in the conduct of the annual school election held March 29, 1977 in the School District of the Borough of Audubon Park, an inquiry was conducted by a representative designated by the Commissioner of Education, at the office of the Camden County Superintendent of Schools, Pennsauken, on June 17, July 1 and October 12, 1977.

The announced results of the balloting for the election of school board members were challenged pursuant to a letter complaint filed before the Commissioner on April 4, 1977 and, subsequently, on April 12, 1977 a representative of the Commissioner conducted a recount of the ballots cast at the annual school election held March 29, 1977. The Commissioner issued a decision *In the Matter of the Annual School Election Held in the School District of the Borough of Audubon Park, Camden County* on May 20, 1977. At the conclusion of the recount, the results stood as announced. The allegations of improper conduct which are the subject matter of the present controversy were made with the assertion that such conduct could possibly have influenced the election of certain candidates. These charged irregularities are hereinafter considered *seriatim*.

*CHARGE NO. 1*

Two voters were challenged as being unregistered voters and were allowed to vote on an affidavit.

Counsel for the Board represented that the two named individuals cited in the written complaint were not members of the Audubon Board of Education nor were they agents of the Board, consequently it did not call or subpoena the two individuals to present themselves for testimony at the inquiry. In addition, subsequent to the filing of the written complaint and prior to the inquiry, the Board referred the matter as set forth in Charge No. 1 to the office of the Camden County prosecutor for investigation. (Tr. I-4) It was stipulated by the parties that the two individuals were challenged at the polls, signed affidavits, received voting slips and voted at the annual school election. (TR. I-37-38; Tr. III-6-7) The judge of election testified that the stipulation was true in fact. She testified that the two individuals assured her that they were registered to vote, whereupon

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she offered the affidavits and subsequently permitted them to vote. (Tr. III-9-10; P-2) The hearing examiner notices that one of the two individuals permitted to vote by affidavit was a candidate for an unexpired one-year term on the Board of Education. *In re Audubon Park, supra*

Complainants produced an unsigned document on the letterhead of the Camden County Board of Elections dated March 30, 1977 which stated as follows:

> "TO WHOM IT MAY CONCERN:
>
> "This letter is to certify that [names of the two individuals], 14 Sandpiper Place, Audubon Park, N.J. are not registered in the Camden County Board of Elections, as of this date.***
>
> "Camden County Board of Elections" (P-11)

Subsequently, counsel for the Board received a letter from the office of the Camden County Prosecutor dated July 21, 1977 which stated as follows:

> "We have reviewed the facts surrounding the execution of the voter affidavit by Mr. and Mrs. [name omitted]. We find no evidence that [they] knowingly violated the law. We are therefore closing the case at this time.
>
> "Thank you for bringing this matter to our attention." (C-1)

The hearing examiner finds that the evidence supports the charge and that it is true, in fact, that the two individuals who voted by affidavit were not duly registered to vote at the annual school election held in the district.

*CHARGE NO. 2*

> "Mr. Raroha questioned the fact that the Administrator and the Custodian measured 100 feet from the polls. The distance was not the same as last year."

Complainant Raroha questioned why a member of the Board's administrative staff and a custodian in the Board's employ were allowed to measure the distance of one hundred feet from the polling place rather than a member of the Camden County Board of Elections. He stated that the one hundred foot distance was not the same as the previous year. (Tr. I-6-7, 19-20) There was no allegation that any electioneering occurred within the prescribed distance of the polling place.

The Commissioner's representative observes the provision of *N.J.S.A.* 18A:14-81 which states as follows:

> "If a person shall distribute or display any circular or printed matter or offer any suggestion or solicit any support for any candidate, party or public

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question, to be voted upon at any election, within the polling place or room or *within a distance of 100 feet of the outside entrance to such polling place* or room, he shall be a disorderly person." *(Emphasis supplied.)*

The Board Secretary testified that she directed the school administrator and custodian to measure the one hundred feet from the polling place in accordance with the provisions of Title 18A, Education. (Tr. I-84-86) In the absence of an allegation that electioneering took place within one hundred feet of the polling place as provided by *N.J.S.A.* 18A:14-72, 81 and 86, the hearing examiner recommends that Charge No. 2 be dismissed.

*CHARGE NO. 3*

"Election worker, Mr. Ed Davis, gave out slips before checking the books. Example: [a voter] had already received her slip while a challenge was taking place. Her name was not found in the book."

Complainant Filinuk testified that she was an incumbent candidate for a seat on the Board and was defeated in the election held March 29, 1977. (Tr. I-34-35) She stated that she observed voters going to the voting machine with voting slips that had not yet been recorded in the voter registration book. (Tr. I-49-50) Similar testimony was proffered by Complainant Moses, a challenger at the polls, as follows:

"***I would look over and I would see him [Mr. Davis] issuing slips before he would check the registration book.***" (Tr. I-104)

Mr. Davis testified that he was a registrar for the annual school election and acknowledged that the allegation as set forth in Charge No. 3 was true. (Tr. I-148-149) He denied the allegation of Complainant Moses that he had forgotten on four or five instances to check the voter registration book before giving out the voter slips. (Tr. I-154)

The pertinent statute is *N.J.S.A* 18A:14-50, which provides as follows:

"The voter shall, *previous to the receipt of an official ballot*, sign his name without assistance and state his address, in an appropriate column of the poll list *and the election officer in charge* of the poll list *shall record therein opposite the voter's name, the number of the official ballot* furnished to the voter for voting." *(Emphasis supplied.)*

The hearing examiner finds that Charge No. 3 is true, in fact, grounded upon the testimony of the registrar.

*CHARGE NO. 4*

"Candidate, Eleanor Filinuk, made a complaint to the Judge of the Election that Mr. Davis stated that he could not see the names because he had new

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glasses and he was not used to the big book. There was [no] response made to the complaint.''

Complainant Filinuk testified that she heard Mr. Davis state that he could not see the names in the registration book because he had new glasses. (Tr. I-50) Mr. Davis denied the allegation that he could not use the registration book. He testified that his new glasses were replacements for those that were lost while he was hospitalized in December 1976 and that the new glasses were the same prescription as those that were lost. (Tr. I-149-150, 152) The judge of election testified that Complainant Filinuk stated to her that Mr. Davis was having trouble with his eyes and that she then spoke to him. She stated that Mr. Davis ''***was being a little slow looking names up, but he was looking the names up.'' (Tr. I-195)

The hearing examiner finds no credible proofs to support the allegation and therefore recommends that Charge No. 4 be dismissed.

*CHARGE NO. 5*

''Mrs. Marion Romanowski did not give out voter slips. She worked with the machine only.''

The charge is grounded on a publication issued by the Camden County Board of Election entitled ''Instructions to Members of the District Boards of Registry and Elections for the 1976 General Election November 2 in the County of Camden'' which states, *inter alia*, as follows:

28. ''***No one member shall handle any one assignment all day, regardless whether such member is Judge or Inspector.'' (P-1)

Complainant Raroha testified that he spent approximately four and one-half hours in the polling place, was absent approximately three hours, and observed Mrs. Romanowski for approximately one and one-half hours collecting voter slips. (Tr. I-9, 15-16, 21-22)

Mrs. Romanowski testified that she had been employed for seven annual school elections and for the 1977 school election she was instructed to open and check the voting machine, to handle the voting slips and relieve election workers. She stated that during the course of the election she relieved three election workers when they had to be excused or when they took breaks. (Tr. I-166-167)

The hearing examiner finds the testimony of Mrs. Romanowski credible and that she indeed performed other duties during the school election. He recommends, therefore, that Charge No. 5 be dismissed.

*CHARGE NO. 6*

''The Judge of the Election counted the ballots by herself after the election. She had [no] witnesses behind the machine with her.''

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Six witnesses testified that subsequent to the closing of the polls they observed the judge of election move to the rear of the voting machine and read the number of the protective counter to an election worker who, in turn, announced the number to those assembled. They asserted that the judge of election was alone and there were no witnesses with her behind the machine when she read the number on the protective counter. It was their collective testimony that the judge of election then proceeded to the front of the voting machine, opened the counters of the individual candidates and the propositions which appeared on the ballot and read the tallies for each to an election worker who orally reported the tally for each. Complainants testified that they did not challenge nor object to this procedure at the time it occurred. (Tr. I-17, 23, 29, 32, 51, 105-107, 119; Tr. II-6-7, 13)

The judge of election testified that she was selected for that position by the Board because she had formerly been employed as the Board Secretary to the school district and that she was familiar with the procedure for the annual school election. (Tr. I-190-191) She did not dispute the testimony of complainants with regard to the charge. (Tr. I-182-184) The election worker who announced to those present the tallies as read to her by the judge of election, subsequent to the closing of the polls, also corroborated the testimony of complainants with respect to the charge.

The applicable statute is *N.J.S.A.* 18A:14-57, which provides:

> "Immediately after the close of the polls, the election officers shall proceed to count the votes for each candidate and the votes for and against the adoption of each proposal, resolution or question submitted to the voters of the election. The counting shall be open and public but the number of persons permitted to be present shall not be such as to hinder, delay or inconvenience the election officers in counting and ascertaining the result. The election officers shall keep tally sheets of the votes as counted which shall be signed by the judge of the election and the secretaries of the election."

The hearing examiner finds the allegation as set forth by complainants to be true. He observes, however, that the absence of any allegation that the judge of election prevented, obstructed or otherwise hindered complainants from observing or witnessing her count of the tallies on the voting machine or that she in any manner violated the provision of *N.J.S.A.* 18A:14-57, renders the charge a nullity. The hearing examiner recommends, therefore, that Charge No. 6 be dismissed.

*CHARGE NO. 7*

> "Several addresses were omitted from the poll sheet. Some addresses were wrong, and others were filled in by someone other than the voter."

Complainants asserted that subsequent to the annual school election they acquired copies of the poll lists to compare the names and addresses thereon with a copy of the registered voters for the 1976 general election as supplied

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by the Camden County Board of Elections. (Tr. I-52-56, 60-71; Tr. II-36-41; P-2-6) Complainant Filinuk testified that addresses of voters had been omitted from the poll lists and further that the address of voter Hazel K. Holmes was in error and appeared to have been written by someone other than voter Holmes. (Tr. I-53-56; P-2)

Voter Holmes testified that the signature which appeared on the poll list was her signature; however, the address was incorrect and not in her handwriting. She testified further that the address which appeared opposite her name on the poll list was her former residence but she had moved from that address to another within the school district six years before the annual school election held in March 1977. (Tr. II-31-35; P-2)

The pertinent statute is *N.J.S.A.* 18A:14-48, which provides as follows:

> "*The board of education shall provide,* and one of the election officers, designated by the judge of election, and acting, as clerk of the election shall keep at each polling place, for each school election, *a poll list* arranged in a column or columns appropriately headed so as to indicate the election, the date thereof, and the school district and election district in which the same is used, *in such manner that each voter* voting in the polling place at the election *may sign his name and state his address* therein and the number of his official ballot may be indicated opposite the signature."
> (*Emphasis supplied.*)

The hearing examiner finds that the addresses of four voters were not recorded on the poll lists pursuant to *N.J.S.A.* 18A:14-48. (P-2, 4-6) Additionally, the testimony of voter Holmes and the evidence pertaining thereto that the address opposite her signature was in error and not in her handwriting, in the judgment of the hearing examiner, appears to be in violation of the statutes.

The hearing examiner finds, therefore, that the charge is true in fact.

*CHARGE NO. 8*

> "There is a question on the validity of the absentee ballots because of the manner in which they were obtained, the day they were obtained, and the person who handled all five ballots.
>
> "When the vote was counted, President of the Board and incumbent candidate, Nick Marcucci, said there were absentee ballots in Camden that would change the outcome of the election. He said, 'I know about them because I handled them.' He also told one of the challengers to tell the candidate with 141 votes that she had won the election. The Judge of the Election could not declare the election final. How could Mr. Marcucci?"

Complainants testified that they had no knowledge as to whether or not the President of the Board obtained absentee ballots; however, they testified that they heard his remarks with regard to absentee ballots as alleged in the charge. (Tr. I-11-12, 18, 107-108, 122-123, 125, 130-135)

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The former Board Secretary testified that on March 22, 1977, the last day to file application for civilian absentee ballots at the Board's office, the President of the Board obtained five or six applications for civilian absentee ballots. He did not return the completed application forms to the Board's office. (Tr. I-88-90, 95-100)

The President of the Board testified that he obtained five applications for civilian absentee ballots and that he was authorized by two voters to obtain absentee ballots while his wife was authorized to obtain one absentee ballot for persons who would be unable to go to the polls to vote at the annual school election. (Tr. II-80-86, 95, 100-102, 114, 116-119) The President of the Board testified that, subsequent to the absentee voters casting their ballots, he witnessed the voters place the ballots in the envelopes provided by the Board of Elections and that he then placed the envelopes in the mail. (Tr. II-104, 116-119) His wife testified that she delivered one absentee ballot to a voter, but did not witness his vote and did not mail the ballot to the Board of Elections. (Tr. II-128)

The President of the Board denied the allegations as set forth in the charge. He stated that after the vote was counted, he said, "***There are absentee ballots, five absentee ballots, in City Hall that may change the election." (Tr. II-82) He further testified that he did not recall with whom he spoke at the close of the polls but recalled that "***I walked up to somebody, and I said if those ballots, if those five votes [are] in our favor, she wins the election." (Tr. II-83, 121)

The hearing examiner has carefully reviewed the record and finds the testimony of the President of the Board and his wife credible. He further finds that no evidence was brought forth to indicate there were violations of the election laws as found in Titles 19 and 18A. The hearing examiner recommends, therefore, that Charge No. 8 be dismissed.

In summary, the hearing examiner finds and recommends that:

1. Charges Nos. 2, 4, 5, 6 and 8 be dismissed.

2. The two individuals who voted by affidavit were not duly registered voters in the district and therefore Charge No. 1 is true.

3. Charge No. 3 is found to be true, grounded upon the testimony and admission of the election worker that he gave out voter slips before checking the voter registration book.

4. Charge No. 7 is true and that voter addresses were omitted from the voter poll list.

* * * *

The Commissioner has read the report, findings and recommendations of the hearing examiner and concurs in his recommendations that Charges Nos. 2, 4, 5, 6 and 8 be dismissed.

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With respect to Charges Nos. 1, 3 and 7, the Commissioner concludes as follows:

*CHARGE NO. 1*

The Commissioner finds that the two votes as set forth in Charge No. 1 are illegal votes which should not have been cast. The two voters were not registered (P-11) which is clearly contrary to the statute *N.J.S.A.* 18A:14-49 which provides:

> "Every person qualified to vote in any school election shall be at liberty, at any time while the polls are open, to enter the polling place and claim, in person, his right to vote at such election in his proper polling district, before the election officers, giving, at the same time, his full name and address to the election officer in charge of the signature copy register."

The record is clear that the two unregistered voters were challenged by duly appointed challengers pursuant to *N.J.S.A.* 18A:51.2 and that the unregistered voters subsequently executed affidavits which stated, *inter alia,* that they were "***such persons[s] *** permanently registered *** at least 40 days prior to such election***" as provided by *N.J.S.A.* 18A:14-52. On the basis of the evidence before him, the Commissioner concludes that the election officials complied with the provisions of the statutes in the instant matter.

Notwithstanding that no impropriety by election officials is here involved, the Commissioner is constrained, however, to conclude on the basis of evidence presented in this matter and his findings in the related matter of *In re Audubon Park, supra,* that the two affidavit ballots, cast as they were by a previously unsuccessful candidate for a one year unexpired term and her husband, were illegal and must be declared void and of no effect. Hence, it becomes necessary to assess the impact of this holding upon the election results.

At the conclusion of the recount of votes cast in the March 29, 1977 election it was determined that there were two votes which separated the third position (successful candidate) and the fourth position (unsuccessful candidate). Distribution of the total votes cast for a full term of three years on the Board as to each of these candidates is as follows:

| *"FOR THREE-YEAR TERM* | *AT POLLS* | *ABSENTEE* | *TOTAL* |
|---|---|---|---|
| *** | | | |
| Carol Ann Fabianovicz | 140 | 5 | 145 |
| E. Eleanor Filinuk | 143 | -0- | 143 |
| | | *(Audubon Park, supra)* | |
| ***" | | | |

The maximum effect the voiding of the affidavit ballots could have upon the previously recorded votes of the candidates is determined by deducting a total of two votes from Candidate Fabianovicz (on the assumption that the

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candidate could have received the two voided votes) and comparing the remainder to the previously announced votes for Candidate Filinuk (on the assumption that other candidates might have received none of the voided votes). When this is done, it is apparent that neither one of the contenders in the third and fourth positions would possess the clear plurality required for election. Such an analysis shows that it is impossible to determine that either candidate for a three-year term was elected. Accordingly, the Commissioner declares that the seat on the Board presently occupied by Carol Ann Fabianovicz is vacant by virtue of a failure to elect. Therefore, he directs the County Superintendent of Schools of Camden County to appoint a member to fill the vacancy pursuant to *N.J.S.A.* 18A:12-15 until the next regular school election when it shall be filled by the electorate for the unexpired term.

The Commissioner observes that *N.J.S.A.* 18A:12-15 was amended under Chapter 324 of the Laws of 1977, approved on January 10, 1978 and effective immediately, which provides for a special election if there is a failure to elect a member at the annual school election due to improper election procedures. This amendment is not retroactive and, therefore, does not apply to the circumstances as enunciated herein.

*CHARGE NO. 3*

The Commissioner accepts the findings of the hearing examiner with regard to Charge No. 3. Failure of the election worker to follow the proper procedures was a clear violation of *N.J.S.A.* 18A:14-50. The Commissioner is constrained to direct the Board to admonish the responsible election officials and to take necessary precautions to prevent a recurrence of such violation.

*CHARGE NO. 7*

With regard to Charge No. 7, absent proof establishing fraud (see *In the Matter of the Annual School Election Held in the School District of the City of Trenton,* 1972 *S.L.D.* 205, 216), the Commissioner determines that the procedural irregularities of omitting addresses of four voters on the poll list, and particularly of noting an erroneous address opposite the signature of one voter which she alleged was not in her own handwriting, do not afford sufficient reason to vitiate the election. *In the Matter of the Annual School Election Held in the Borough of Totowa,* 1965 *S.L.D.* 62, 64-65 However, he feels obliged to denounce the failure of officials to observe the clear mandate of statutory provisions, here *N.J.S.A.* 18A:14-48, governing the conduct of school elections, and sternly admonishes them to be more attentive in the future to their statutory responsibilities.

The Commissioner finds and determines, therefore, that the announced results of the election will stand, with the exception of Candidate Carol Ann Fabianovicz, whose seat on the Board of Education of the Borough of Audubon Park for a three-year term is declared vacant due to failure to elect.

COMMISSIONER OF EDUCATION

April 20, 1978

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**In the Matter of the Annual School Election Held in the School District of the Township of East Hanover, Morris County.**

## COMMISISIONER OF EDUCATION

## DECISION

For the Petitioner, Arnold L. Simon, Esq.

The announced results of the balloting at the annual school election held on February 14, 1978 in the School District of the Township of East Hanover, Morris County, for one member of the Board of Education for a full term of three years were as follows:

| | *At Polls* | *Absentee* | *Total* |
|---|---|---|---|
| * Ben Fressola | 287 | 4 | 291 |
| **Donald Lanigan | 342 | 2 | 344 |

* Candidate Fressola was an announced candidate whose name appeared on the official ballot.

**Candidate Lanigan was a write-in candidate whose name did not appear on the ballot.

Pursuant to a letter request dated February 17, 1978 from Candidate Fressola, a recount of the ballots cast and an inquiry into alleged irregularities in the conduct of the election were conducted by an authorized representative of the Commissioner of Education at the Morris County voting machine warehouse and at the office of the Morris County Superintendent of Schools, respectively, on March 6, 1978.

The results of the recount, not considering eighteen questionable write-in ballots cast for Candidate Lanigan, are as follows:

| | *At Polls* | *Absentee* | *Total* |
|---|---|---|---|
| Ben Fressola | 287 | 4 | 291 |
| Donald Lanigan | 324 | 2 | 326 |

Candidate Lanigan having received the greater number of ballots cast, there is no need to address the questionable eighteen ballots cast on his behalf.

Candidate Fressola alleges that various employees of the Board distributed literature and otherwise campaigned for the election of Candidate Lanigan during their employment hours on school premises. Candidate Fressola also alleges that Board employees distributed literature on behalf of Candidate Lanigan within one hundred feet of the polling place in violation of *N.J.S.A.* 18A:14-81; that election officials were present in the voting booths while voters were casting

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ballots; and that a teaching staff member secured pupil registration lists, with home telephone numbers, for use by Candidate Lanigan in his campaign.

The proofs in the matter establish that the literature complained of herein is a flyer by which Candidate Lanigan announced his bid for election to the Board as a write-in candidate. One side of the flyer is a message seeking voter support addressed to ''Dear Friends'' over the signature of Candidate Lanigan. The reverse side of the flyer sets forth a biographical sketch of his professional and civic experience. A legend on both sides of the flyer states:

''Paid for by Donald W. Lanigan [followed by his home address]'' (C-2)

Candidate Fressola complains that the flyer was distributed among Board employees by a teacher during school hours and that the flyer was distributed within one hundred feet of the polling place on election day.

Emma Spier, a teaching staff member employed by the Board, testified that she was a campaign worker for Candidate Lanigan and did conduct campaign work in school on her lunch hour. She testified she did distribute the flyers in school, talked with a custodian and a teacher's aide during school hours eliciting support for Candidate Lanigan and requested the teacher's aide to distribute a packet of the flyers.

Finally, the proofs establish that several of the flyers were actually in the polling place during the election. The flyers were quickly removed by the Judge of Elections when the matter was brought to her attention.

Candidate Fressola brought forward no proofs to establish that any election official was improperly present in the voting booth at any time during the election.

The teacher testified that she did secure a list of all pupils enrolled in the Board's Central School which list contained the pupils' home addresses and telephone numbers. She testified that she gave the list to another campaign worker for use in Candidate Lanigan's campaign.

It is observed that *N.J.A.C.* 6:3-2.1 *et seq.* sets forth State Board rules and regulations in regard to pupil records and the dissemination thereof. Pupil records include personal data such as names and addresses. Specifically, *N.J.A.C.* 6:3-2.5 provides in pertinent part as follows:

''(a) Only authorized organizations, agencies, or persons as defined herein shall have access to pupil records.''

*N.J.A.C.* 6:3-2.5(d) sets forth in full the definition of authorized organizations, agencies, and persons who are considered to have access to pupil records. There is no authority for a teaching staff member to independently secure a list of pupils' names, addresses, and telephone numbers for use in an election campaign.

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Finally, it is observed that the Board has a written policy in regard to political campaign activities occurring on school premises and during working hours of its employees. Pertinent parts of the policy provide as follows:

"A. Neither school facilities, school personnel nor pupils may be involved during school hours in any activities on behalf of the candidates.

"B. No campaign literature may be distributed on school premises or at a school sponsored function.***" (C-1)

The facts show that Emma Spier, a teaching staff member in the employ of the Board, did improperly secure a pupil registration list with personal data for use in the election campaign and further violated the Board's own policy (C-1) with respect to her involvement during school hours in her effort to elicit support for Candidate Lanigan.

* * * *

The Commissioner has considered the proofs offered and as set forth above in regard to the allegations.

The Commissioner abhors the action of Emma Spier, a teaching staff member in the Board's employ, securing a list of all pupils enrolled in the Central School for use in an election campaign. It is clear that the teacher, by virtue of her employment, was able to secure such a list. Furthermore, the Board's own policy clearly forbids school personnel from engaging in campaign activities for a chosen candidate during school hours or on school premises.

The Commissioner hereby reprimands Emma Spier and directs that a copy of this decision be placed in her permanent personnel file.

The Commissioner has considered the proofs offered in support of the remaining allegations of irregularities and finds no merit therein. There is no showing that the will of the electorate has been thwarted.

Accordingly, the Commissioner determines that Donald Lanigan has been elected to the Board of Education of East Hanover for a full term of three years.

Except as provided above, with respect to Emma Spier, the matter is dismissed.

COMMISSIONER OF EDUCATION

April 20, 1978

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**In the Matter of the Special School Election Held in the School District of Rumson-Fair Haven Regional High School District, Monmouth County.**

## COMMISSIONER OF EDUCATION

## DECISION

For the Board of Education, Zager, Fuchs, Leckstein and Kauff (Abraham J. Zager, Esq., of Counsel)

The Board of Education of the Rumson-Fair Haven Regional High School District, hereinafter "Board," conducted a special election on January 10, 1978 wherein the voters of the district were asked to consider two propositions to raise funds by the issuance of bonds and/or expend the sum of $190,000 for capital outlay purposes. Both propositions were approved. The Board now avers, however, that subsequent to the election it was found that there had been an inadvertent failure to conform to the precise statutory prescription of *N.J.S.A.* 18A:14-5 with respect to the establishment of the required number of polling places and that this fact requires validation of the election by the Commissioner of Education. It requests such validation by Declaratory Judgment of the Commissioner.

The admitted error herein is that the Board established only two polling places in the district for the January 10, 1978 election whereas four should have been provided in conformity with the statutory prescription. *N.J.S.A.* 18A:14-5 The statute in its entirety provides that:

> "Whenever at two consecutive annual school elections more than 500 ballots shall be cast in a polling district, the board shall establish a polling district and polling place for each 500 ballots or part thereof cast at the last annual school election, and prescribe the boundaries thereof, which shall coincide with the boundaries of one or more of the election districts of the municipality or municipalities composing the school district, so that as nearly as practicable an equal number of voters shall be eligible to vote in each polling district, but, if at any two subsequent annual school elections held in the entire school district, the number of votes cast in any polling district shall be less than 500, the number of polling places may be reduced by the board to such number as may be necessary to conform with the provisions of this section unless and until the vote so cast in a future school election in any polling district shall exceed said number."

The factual situation which required that four polling districts, and places, were required on January 10, 1978 is that in each of the two prior annual school elections the total ballots cast exceeded 1500. Specifically, in the 1976 election a total of 1505 ballots was cast and the total cast in the 1977 election was 1606. The statutory requirement that when the total of ballots cast exceeds 500 in two such annual elections "***the board shall establish a polling district and polling

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place for each 500 ballots or part thereof***'' was clearly not met. The Board avers, however, that the error herein was caused inadvertently. The Board further avers that it has received no complaints that voters were hampered in the exercise of their right to vote or that anyone was denied the right to cast a ballot. The question in the context of such avowals is whether the election may be legally held to be valid or must be held to be so flawed as to require it to be set aside.

The Commissioner has been called upon many times to consider irregularities in school elections and has determined that unless the irregularities have been clearly shown to have affected the result of the election the announced result must stand. The citations in support of such determination, *In the Matter of the Conduct of the Annual School Election in the Borough of Palisades Park,* 1963 *S.L.D.* 99, are equally applicable in the instant matter and are recited as follows:

> ''***It is well established that irregularities which are not shown to affect the results of an election will not vitiate the election. The following is quoted from 15 *Cyc.* 372, in a decision of the Commissioner in the case of *Mundy v. Board of the Borough of Meiuchen,* 1938 *S.L.D.*, at p. 194:
>
> > 'Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the courts are disposed to give effect to elections when possible. And it has been held that gross irregularities when not amounting to fraud do not vitiate an election.'
>
> ''The following is quoted from *Hackett v. Mayhew,* 62 *N.J.L.* 481, similarly quoted *In re Canvasser's Returns,* 25 *N.J.L.J.* 115, excerpts from which are found on pages 148 and 149, respectively, of *N.J.S.A. Title* 19:
>
> > 'It was never the legislative intent, nor is it the proper statutory construction, to defeat the vote of the citizen by an act for which he was neither directly nor indirectly responsible, nor for a negligent or willful act of a municipal official, nor for the misconception of any legal duty or form required in the preparation of ballots issued by such an official for distribution to the voters.'
>
> ''In the decision of the Supreme Court *In re Clee,* 119 *N.J.L.* 310, at page 330, it was said:
>
> > 'It is the duty of the court to uphold an election unless it clearly appears that it was illegal. *Love v. Freeholders,* 35 *N.J.L.* 269, 277; public policy so ordains. *Cleary v. Kendall, supra.*'
>
> ''The following is quoted from *In re Smock,* 68 *A.2d* 508:
>
> > 'Obviously not every infraction of the election laws will invalidate the contest.'***'' (at 101)

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(See also *In the Matter of the Annual School Election in the Township of Jefferson*, 1960-61 *S.L.D.* 181.) Further, *In the Matter of the Contested Annual School Election Held in the Borough of Keyport*, 1959-60 *S.L.D.* 131 the Commissioner was also required to consider an inadequate number of polling places as the result of an "error in judgment" and found that even the failure of an election official to perform a "directory duty" was insufficient cause to void an election (at 133).

Accordingly, the Commissioner finds and determines that the announced results of the election conducted by the Board on January 10, 1978 in the Rumson-Fair Haven High School District stand as the legal and valid results of such election. The Board is therefore directed to exercise the authority granted it by the electorate according to the precise terms of the two approved propositions. The Board is further directed to comply with the provisions of *N.J.S.A.* 18A:14-5 in planning for future annual or special school elections.

COMMISSIONER OF EDUCATION

April 21, 1978

**In the Matter of the Special School Election Held in the School District of West Morris Regional, Morris County.**

**COMMISSIONER OF EDUCATION**

**ORDER**

For the Complainant, Robert I. Elms, *Pro Se*

For the Respondent Mount Olive School District, Arnold H. Chait, Esq.

For the Respondent West Morris Regional School District, David Rand, Esq.

The above-entitled matter having been opened before the Commissioner of Education on December 6, 1977 by Robert I. Elms by the filing of a letter of complaint alleging that both the Mount Olive Township Board of Education and the West Morris Regional Board of Education, hereinafter "Regional Board," were responsible in connection with the special election conducted by the Regional Board on December 6, 1977 for the content and distribution of printed materials in violation of *N.J.S.A.* 18A:42-4 and *N.J.S.A.* 14-97; and

The voters of both Mount Olive Township and the remaining constituent municipalities of the Regional District having approved the referendum question

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authorized by the Board of Review pursuant to *N.J.S.A.* 18A:13-51, *et seq.*, which referendum question proposed that Mount Olive be permitted to withdraw from the Regional District; and

An inquiry having been conducted by a representative of the Commissioner at the Extension Services Building, Morris Plains, on December 22, 1977; and

The Commissioner having reviewed in the light of applicable law the aforementioned complaint, the documentation, and the testimony of witnesses entered into the record by both complainant and the respective Boards; and

The Commissioner having also considered the above in conjunction with the previous decision *In the Matter of the Annual School Election Held in the School District of Mount Olive, Morris County,* 1975 *S.L.D.* 556; and

The Commissioner having determined that there is insufficient evidence within the record upon which to form a conclusion that there was violation of the applicable election laws of such magnitude to set aside the expressed will of the voters who by an overwhelming majority approved the aforementioned referendum question; now therefore

IT IS ORDERED that the announced results of the special election held in the West Morris Regional School District on December 6, 1977 shall stand; and

IT IS FURTHER directed that this order, the subject matter of which shall be further amplified in a subsequent detailed decision, be issued to advise the respective aforementioned Boards and the complainant of this determination which has pronounced relevancy to the forthcoming annual school elections on February 7 and February 14, 1978.

Entered this 12th day of January 1978.

COMMISSIONER OF EDUCATION

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## COMMISSIONER OF EDUCATION

## DECISION

For the Complainant, Robert I. Elms, *Pro Se*

For the Respondent Mount Olive School District, Arnold H. Chait, Esq.

For the Respondent West Morris Regional School District, David Rand, Esq.

Robert I. Elms, hereinafter "petitioner," a resident of the Township of Mount Olive, appeared in person at the State Department of Education on December 1, 1977 to protest the content and method of distribution of printed materials disseminated by the Mount Olive Board of Education and the West Morris Regional Board of Education in connection with the special election scheduled for December 6, 1977 pursuant to the decision of the Board of Review *In the Matter of the Petition of the Township of Mount Olive for Withdrawal from the West Morris Regional School District, Morris County,* 1977 *S.L.D.* 1162. Petitioner did not at that time implement his announced intention of filing a Motion for Emergent Relief asking that the forthcoming election be set aside. Instead, he filed a letter of complaint dated December 1, 1977 with accompanying exhibits all of which were received by the Commissioner of Education on December 6, 1977, the date of the special election.

The letter of complaint alleges that the Mount Olive Board violated *N.J.S.A.* 18A:42-4 which provides in pertinent part that:

> "No literature which in any manner and in any part thereof promotes, favors or opposes *** the adoption of any *** public question submitted to any *** school election shall be given to any public school pupil *** for the purpose of having such pupil take the same to his home or distribute it to any person outside of said building***."

Petitioner further alleges that both the Mount Olive Board and the West Morris Regional Board violated *N.J.S.A.* 18A:14-97 which in relevant part states:

> "No person shall print, copy, publish, exhibit, distribute or pay for printing, copying, publishing, exhibiting or distribution or cause to be distributed in any manner or by any means, any circular, handbill, card, pamphlet, statement, advertisement or other printed matter having reference to any election *** or to the adoption or rejection of any public question at any annual or special school election unless such *** printed matter shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed, copied or published or of the name and address of the person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and

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address of the person or persons by whom the same is printed, copied or published.''

An inquiry was conducted by a representative of the Commissioner at the Morris County Extension Service Building, Morris Plains, on December 22, 1977. The report of the inquiry follows:

At the outset of the inquiry the Boards moved for dismissal of the complaint on procedural grounds that petitioner had not submitted with his complaint a petition signed by ten qualified voters and that he had filed the complaint prior to the announced results of the election contrary to the requirements of *N.J.S.A.* 18A:14-63.12. The Commissioner's representative recommends that that Motion, held in abeyance for action of the Commissioner, be denied in consideration of the timeliness of petitioner's initial appearance at the State Department of Education and the pronounced relevance of the complaint to similar election law violations detected *In the Matter of the Annual School Election Held in the School District of the Township of Mount Olive,* 1975 *S.L.D.* 556. In that matter, wherein petitioner was also the complainant, the Commissioner determined that election materials had been posted and distributed in violation of *N.J.S.A.* 18A:42-4 and *N.J.S.A.* 18A:14-97. The Commissioner, however, allowed those election results to stand on the basis that he found

> ''***nothing in the record before him which would lead him to the conclusion that the circumstances and irregularities *** resulted in the will of the voters being thwarted.***'' (at 561).

In the instant matter petitioner alleges that the aforementioned Boards through their scheduled public meetings and distribution of materials presented the public with a biased view by emphasizing the advantages of deregionalization and failing to present the disadvantages. (Tr. 16-17) Those printed materials which petitioner alleges are improper are as follows:

1. Exhibit B: Mt. Olive PTA News, Fall Issue 1977, printed, four pages

2. Exhibit C: Six page printed informational bulletin bearing the name and address of the Mount Olive Board entitled ''What Deregionalization Means to You''

3. Exhibit D: Eleven page duplicated informational brochure entitled ''Road to Unity, Economy and Opportunity''

4. Exhibit E: Twelve page, printed brochure entitled as No. 3, above, bearing the name and address of the Mount Olive Board

5. Exhibit F: Fourteen page printed informational bulletin entitled ''Withdrawal Facts and Figures'' bearing the name of the West Morris Regional Board.

Testimony at the hearing by the West Morris Regional Superintendent shows that Exhibit F was printed at the Regional Board's district office with

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Regional Board funds and was distributed principally to those who attended a number of informative meetings sponsored by the Regional Board in the constituent municipalities throughout the regional district.

An examination of the document reveals that advantages and disadvantages are given equal emphasis in its informative presentation of data and issues. In no place does that document instruct voters how to vote. The document does bear on its face the name and address of the Regional Board albeit not in statement form. It does not state who printed it. It is recommended that the Commissioner determine that Exhibit F was distributed in substantial compliance with *N.J.S.A.* 18A:14-97. (Tr. 24-30)

Exhibits C, D and E were duplicated or printed at the expense of the Mount Olive Board and either mailed to boxholders at bulk rate or distributed at informational public meetings conducted either by that Board or the Regional Board. The contents thereof strongly favor and recommend the Mount Olive Board's proposal to withdraw from the regional district by predicting favorable educational, financial and community results. They do not, however, instruct voters how to vote. Exhibits C and E bear on their face the name and address of the Mount Olive Board. Exhibit D bears no such identification. No one of the three exhibits states who paid for or printed the brochures.

The representative recommends that the Commissioner determine that the form of Exhibits C and E, with the exception that they did not state on their face the name and address of the printer, were in substantial compliance with the requirements of *N.J.S.A.* 18A:14-97 and that the form of Exhibit D was not in compliance therewith for failure to state on its face the name and address of the Board and that it was duplicated and paid for by the Board.

Exhibit B was paid for by the Mount Olive PTA and consists of numerous articles unconnected with the special election. It also contains one article summarizing the results of a study authorized by the Mount Olive Board in connection with its proposal to withdraw from the regional district. The article emphasizes the importance of voting at the special election, generally favors deregionalization, but does not instruct readers how to vote. Exhibit B, in keeping with a longstanding practice, was distributed throughout the schools for children to take home to their parents. (Tr. 38, 46-47, 53) The Commissioner's represent ative recommends that, inasmuch as that article merely reports the results of a study and gives information on the date of the election, it be determined that it was not in violation of the election laws and that its distribution through pupils was not violative of *N.J.S.A.* 18A:42-4.

Testimony of witnesses at the hearing provides convincing proof that at the numerous meetings conducted by both the West Morris Regional and the Mount Olive Boards ample opportunity was afforded the public to raise questions and make statements for and against the proposed deregionalization. It is clear that petitioner himself did so and heard read those advantages and disadvantages of the proposal as enunciated by the County Superintendent. (Tr. 35, 68-69, 73-77) Accordingly, it is recommended that the Commissioner dismiss peti-

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tioner's allegation that the informational public meetings sponsored by the Board were biased and otherwise inappropriate.

This concludes the report of the inquiry.

* * * *

The Commissioner has carefully reviewed the controverted matter and finds the record amply supportive of the findings of his representative which he holds henceforth for his own. Respondents' Motion to Dismiss on procedural grounds is denied for the reasons previously expressed. Similarly dismissed is petitioner's allegations of impropriety in the conduct of public, informational sessions by the Boards.

This matter is importantly differentiated from *Mount Olive, supra,* in that no violation of *N.J.S.A.* 18A:42-4 was found to have occurred herein since public school pupils were not utilized to carry printed electioneering materials to their parents. The remaining allegations merit attention.

The Commissioner perceives that the Boards herein failed to place on the face of publications relating solely to the then forthcoming election a statement of their names and addresses, the names and addresses of the printers and that they had paid for the printing. While the Boards may have perceived them solely as informational brochures, the fact that they referred to a public question at a special school election required full compliance with *N.J.S.A.* 18A:14-97. The Commissioner cautions these Boards and all other boards of education in this State to adhere precisely to the requirements thereof in relation to all future elections.

The Commissioner is further constrained to admonish boards of education, in matters of deregionalization, to give full and fair publicity in publications and at public meetings to both the advantages and disadvantages including those iterated by the County Superintendent in his report issued pursuant to *N.J.S.A.* 18A:13-52. Although an individual board may adopt a stance favoring or opposing deregionalization, it should act in accord with the dicta enunciated in *Peter P. Lucca v. Lower Camden County Regional High School District No. 1,* 1968 *S.L.D.* 166, as follows:

> "***A board of education not only has the right, but it also has the duty to disclose fully and fairly all relevant facts to the voters in its endeavor to inform and to secure approval of all its proposals.***" (at 168)

Nevertheless, the Commissioner perceives within the record insufficient violation to overturn the overwhelming vote of the electorate favoring deregionalization. Accordingly, petitioner's prayer for relief is denied and the announced results of the special election of December 6, 1977 are affirmed.

COMMISSIONER OF EDUCATION

April 21, 1978

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**Board of Education of the City of Garfield,**

*Petitioner,*

*v.*

**Mayor and Council of the City of Garfield, Bergen County,**

*Respondents.*

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Nasarenko & Meola (Nicholas P. Nasarenko, Esq., of Counsel)

For the Respondents, Walsh, Scuito & Dimin (Anthony J. Scuito, Esq., of Counsel)

Petitioner, the Board of Education of the City of Garfield, hereinafter "Board," appeals from an action of the City Council of the City of Garfield, hereinafter "Council," certifying to the Bergen County Board of Taxation a lesser amount of appropriations for school purposes for the 1977-78 school year than the amount certified as necessary by the Board. The facts of the matter were adduced at a hearing before a representative of the Commissioner of Education at the State Department of Education, Trenton, on September 28, 1977. The report of the Commissioner's representative is as follows:

At the annual school election held March 29, 1977, the voters rejected the Board's proposal to raise by district taxation for current expenses the amount of $4,330,796. The Board thereafter submitted its proposed budget to Council for its determination of the amount necessary to operate a thorough and efficient school system in the City of Garfield for the 1977-78 school year pursuant to the obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation between the parties, Council made its determination and certified to the Bergen County Board of Taxation an amount of $4,105,796 for current expenses, a reduction of $225,000 from the amount originally proposed to the voters by the Board.

The Board contends that Council's action was arbitrary and capricious and documents its need for restoration of the reduction recommended by Council with written testimony and a further oral exposition at the time of the hearing. Council maintains that it acted properly and that the Board failed to sustain its burden of proving that Council's appropriation is insufficient to provide a thorough and efficient system of education in the school district.

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Council denies that its reductions were arbitrary or capricious and avers that the amounts certified were made after deliberations with respect to the needs of the Board. Council asserts also that the remaining funds will be sufficient to operate and maintain a thorough and efficient system of public schools within the district.

After examining the record in its entirety and weighing the testimony of the witnesses, the hearing examiner finds that Council's reductions are neither arbitrary nor capricious. The hearing examiner recommends, therefore, that the Commissioner make his determination on the basis of the analysis of the supporting statements, documentation and testimony about the specific budgetary items now in consideration.

As part of its determination, Council suggested items of the budget in which it believed economies could be effected without harm to the educational program as follows:

| *Account Number* | *Item* | *Board's Proposal* | *Council's Proposal* | *Reduction* |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J213 | Sal., Tchrs. | $2,594,413 | $2,454,413 | $140,000 |
| J214 | Sal., Oth. Instr. | 239,035 | 224,035 | 15,000 |
| J610 | Sal., Custs. | 294,483 | 264,483 | 30,000 |
| J630 | Heat | 125,000 | 115,000 | 10,000 |
| J640 | Utilities: | | | |
| | Water | 7,666 | 5,666 | 2,000 |
| | Elect. | 70,000 | 58,000 | 12,000 |
| | Tel. | 14,800 | 13,800 | 1,000 |
| J820 | Empl. Ins. | 229,620 | 214,620 | 15,000 |
| | TOTALS | $3,575,017 | $3,350,017 | $225,000 |

On the basis of the documentary evidence and oral testimony adduced at the hearing, the findings and recommendations of the hearing examiner with respect to each of the items in dispute are set forth as follows:

*J213 Salaries—Teachers* *Reduction $140,000*

The Board asserts that it employed one hundred ninety-five teaching staff members for the 1976-77 school year and budgeted for one hundred seventy-six teachers with the knowledge that that number would return for the 1977-78 school year. The Superintendent testified that the Board knew that nine teaching staff members would not return and therefore were not included in the 1977-78 budget. He stated that as of September 1, 1977 the Board had employed one hundred eighty-six teachers, an increase of ten above its proposed budget presented to Council. He stated further that, although the Board budgeted for one

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hundred seventy-six teachers, a gross reduction of nineteen from the 1976-77 budget, it knew that one hundred eighty-six teaching staff members would be needed for the 1977-78 school year. (Tr. 8-20)

Council alleges, and the Superintendent admitted, that the Board budgeted for ten less teachers because it knew that, if those salaries were listed, the budget would exceed its permissible maximum appropriation pursuant to *N.J.S.A.* 18A:7A-25. (Tr. 11, 20) Council asserts that as of June 30, 1977 the Board had a balance of unexpended funds in the J213 line item in the amount of $80,675.86. (Tr. 15) Council also noted that the Board's pupil enrollment had decreased by one hundred fifteen pupils between June 1976 and September 1, 1977. (Tr. 27)

The Board's auditor proffered extensive testimony with regard to line item transfers of funds at the conclusion of the 1976-77 fiscal year. The Board's audit report of June 30, 1977 did show an overexpenditure of $2,566.64 in the J213 line item rather than an unexpended balance of $80,675.86 as alleged by Council. (Tr. 38-39; (C-1, Exhibit A-4, at p. 1) The auditor testified that, as of August 8, 1977 and as the result of Council's $225,000 reduction, all of the salary line items would produce a deficit of $51,379.20 in the 1977-78 budget. (Tr. 39-42; J-2, at p. 2; Exhibit B)

The Superintendent testified that there were no overcrowded classes in the district at the date of the hearing. (Tr. 25)

In view of the facts stated above, particularly the Board's admission that it deliberately budgeted ten less teachers, it is recommended that the reduction of $140,000 be sustained.

*J214 Salaries—Other Instructional Staff* *Reduction $15,000*

Council contends that the Board budgeted an amount of $14,906 for the position of Dean of Boys and that the individual to hold that position was on professional leave of absence and would not return for the 1977-78 school year, nor was the position to be filled by another employee. The Superintendent concurred with Council's assertion and further testified that the Board had effectuated additional economies with regard to the J214 line item as follows:

1. Assigned all department chairpersons to teaching assignments which resulted in a saving of the equivalent of two teachers, or approximately $30,000.

2. Transferred one guidance position from the high school to elementary school for a saving of approximately $19,000.

3. Eliminated one librarian position for a saving of approximately $12,000. (Tr. 78-79)

In accordance with these facts, it is recommended that the reduction remain intact.

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*J610 Salaries—Custodians* *Reduction $30,000*

Council's proposal to reduce this line item was based upon the claim that the Board in 1977-78 had budgeted for one less custodian than in 1976-77. The Board concedes that a custodian retired in August 1977, subsequent to the preparation of the proposed budget and had not been replaced at a saving of $11,138. (Tr. 102-103)

It is recommended, therefore, that $18,862 of the reduction be restored and $11,138 be sustained.

*J630 Heat* *Reduction $10,000*

The Board contends that it estimated a 9.5 percent increase in the cost of fuel oil based upon its experience during the 1976-77 school year. There was testimony that the price per gallon of fuel oil varied from 34.5 cents to 44.4 cents per gallon during a six month period. (Tr. 134-138)

In view of the rising cost and uncertainty of the actual cost of fuel oil, the reduction of $10,000 should be restored.

*J640 Utilities:*

*Water* *Reduction $2,000*

The Board's actual expense for water for the 1976-77 budget was $4,418.40. The auditor testified that the Board had been advised by the City Water Department that a new water ordinance would double the cost for 1977-78. (Tr. 140)

Council stipulated on the record that it did not intend to increase the rates it had charged the school system for the 1976-77 school year and that any increase in this line item would be due to increased consumption. (Tr. 141) Therefore, it is recommended that the reduction remain undisturbed.

*Electricity* *Reduction $12,000*

Council stipulated that the amount of $12,000 should not be reduced from the Board's line item. (Tr. 142) It is therefore recommended that $12,000 be restored to this line item.

*Telephone* *Reduction $1,000*

The record reveals that the Board budgeted $15,064.01 in 1976-77 and its expenditures amounted to $11,254.28. (J-1; C-1) Council asserts that the Board's budget of $14,800 is in excess of its actual need.

In view of the facts, an allocation of $13,800 for 1977-78 should be adequate for the Board under conditions of economy, therefore, the $1,000 reduction should be sustained.

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The Board asserts that its budget for 1976-77 was $198,844 while its expenditures amounted to $204,701.51 for health benefits including a dental plan. (Tr. 146-147) Further, it was advised on July 8, 1977 by the New Jersey Department of the Treasury that the former rates would be increased on an average of 7.4 percent, effective September 1, 1977. (P-4) The auditor testified that the Board could expect a similar increase in January 1978 and, therefore, the budget reflected a potential increase of fifteen percent for health benefits. (Tr. 149-152)

The Board's argument is compelling and it is recommended that the $15,000 reduction by Council be restored.

The summary of recommendations regarding each of the line items and amounts in dispute are set forth in the following chart:

| *Account Number* | *Item* | *Council's Reduction* | *Amount Restored* | *Amount not Restored* |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J213 | Sal., Tchrs. | $140,000 | $ -0- | $140,000 |
| J214 | Sal., Oth. Instr. | 15,000 | -0- | 15,000 |
| J610 | Sal., Custs. | 30,000 | 18,862 | 11,138 |
| J630 | Heat | 10,000 | 10,000 | -0- |
| J640 | Utilities: | | | |
| | Water | 2,000 | -0- | 2,000 |
| | Elect. | 12,000 | 12,000 | -0- |
| | Tel. | 1,000 | -0- | 1,000 |
| J820 | Empl. Ins. | 15,000 | 15,000 | -0- |
| | TOTALS | $225,000 | $55,862 | $169,138 |

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and the exceptions thereto filed by the Board pursuant to *N.J.A.C.* 6:24-1.17(b).

The Board in its exception avers, *inter alia,* that:

"1. The non restoration of any of the monies in the J213 Salaries of Teachers in the amount of $140,000.00 would necessitate the dismissal of approximately 10 teachers as well as a serious impact upon the educational system. It was further shown that there was a decrease of one hundred fifteen students but that the teacher decrease was not a direction (sic) reduction on the student enrollment. The hearing examiner failed to point

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out that the previous year's budget restoration was not utilized in the computation of the budget cap due to the time which said notification was released.

"2. The non restoration of funds in the J214 Salaries Other Instructional Staff in the amount of $15,000.00 would create serious budgetal problems in the future with the return of the individual who is out on leave of absence***."

(Board's Objections to the Hearing Examiner Report)

The Commissioner does not agree with these exceptions. The record shows, with respect to the recommended reduction of $140,000 in line item J213 that the Board accounted for 176 teaching staff members in its 1977-78 current expense budget and so informed Council. Subsequently, however, the Board employed 186 teaching staff members. The ten additional teaching positions were not included in the budget submitted to Council subsequent to the voters' rejection of the Board's proposal. The record further shows that the Board deliberately budgeted for ten less teaching staff members in order that it would not exceed its maximum permissible appropriation pursuant to *N.J.S.A.* 18A:7A-25. Such an action by the Board cannot be condoned. Nor did the Board adequately sustain its burden of proof of the need for these positions.

The Board's exception with respect to line item J214 is without merit. The record shows that the position of Dean of Boys was open and not to be filled for the 1977-78 school year. The Board's budget in the amount of $14,906 for such a position was, therefore, in excess of its actual need. The Commissioner is constrained to observe that *N.J.A.C.* 6:3-1.10 *et seq.* does not provide for the category of Dean of Boys. If the Board desires to continue such a position title, it must secure approval of the county superintendent in accordance with *N.J.A.C.* 6:11-1.1 *et seq.*

The hearing examiner's report is complete, thorough and well reasoned; therefore, the Commissioner adopts the findings therein as his own. Accordingly, the Commissioner certifies to and directs the Bergen County Board of Taxation to raise the additional amount of $55,862 for current expenses for school purposes for the 1977-78 school year.

The additional amount of $55,862 for current expenses for the 1977-78 school year means the 1977-78 current expense budget shall be $5,203,036. Using a $5,203,036 1977-78 current expense budget, the 1978-79 equalization aid shall be $576,771. The maximum permitted net current expense budget for the 1978-79 school year shall be $5,013,868.

COMMISSIONER OF EDUCATION

April 21, 1978

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**Richard and Joan Duckett, parents of Deidre Duckett,**

*Petitioners,*

*v.*

**Max H. Shaw, Superintendent of Schools, and Board of Education of South Orange-Maplewood, Essex County,**

*Respondents.*

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioners, William H. Sheil, Esq.

For the Respondents, Kimmelman, Wolff and Samson (Ronald E. Wiss, Esq., of Counsel)

Petitioners Richard and Joan Duckett, parents of Deidre Duckett, appeal from a decision of the South Orange-Maplewood Board of Education, hereinafter "Board," denying their child the right to school attendance because of an allegation that petitioners' domicile is in the City of Orange. The Board asserts that its action was lawful and maintains that the pupil has no right to an education in its schools since she is not domiciled within its district. The matter is submitted on the pleadings, Briefs of counsel and an oral argument heard on October 27, 1977, at the State Department of Education, Trenton, before a representative of the Commissioner. The entire record, including the transcript of the oral argument is presently before the Commissioner for determination.

Certain uncontroverted facts are stipulated by the parties as follows:

1. Petitioners occupy a residence which is located in the geographical boundaries of both the Village of South Orange and the City of Orange.

2. Petitioners have been registered voters in the Village of South Orange since 1963 and have voted in the Village of South Orange in state and federal elections and have voted in the South Orange-Maplewood School Board elections for fourteen years in District #8, South Orange.

3. Petitioners' property is serviced by the South Orange Post Office and by the South Orange sanitation department and other municipal services.

4. Petitioners attend church at Our Lady of Sorrows Church, South Orange, and at Seton Hall Chapel.

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5. All of petitioners' social, personal and business affiliations are with the Village of South Orange.

6. Petitioner Richard Duckett has been a coach and instructor for the South Orange Suburban Basketball Team (1970-1976), coach of South Orange Little League (1965-1976), coach of South Orange Little League Summer All-Star Team (1969-1976), co-founder and coach of South Orange Suburban Little League Summer Basketball Team (1973-1976); he has also been coordinator for South Orange Paddle Tennis League (1975), life guard at South Orange Pool (1970-1974), Sports Chairman of the South Orange Village Fourth of July program, and a member of the South Orange Knights of Columbus.

7. Petitioner Joan Duckett has been a volunteer worker at the Montrose School Library, South Orange (1974-1976), a volunteer worker in the kindergarten at the Montrose School (1976-1977), head of parent volunteers for the South Orange swim team (1975-1976), and a member of the South Orange Platform Tennis Team (1974-1975).

8. The physical aspects of petitioners' property are such that there is no access to the City of Orange from the property. The house fronts on Page Terrace, South Orange, and the boundaries of the property cross two distinct school districts; namely, South Orange-Maplewood and the City of Orange.

9. Petitioners pay real property taxes to both the Village of South Orange and the City of Orange. Taxes paid to South Orange in 1976 amounted to $131.50. Taxes paid to the City of Orange in 1976 amounted to $1,796.02. Attached to the Stipulation is a copy of a survey dated May 17, 1957, which shows the boundary lines between the City of Orange and the Village of South Orange as it crosses petitioners' property. (J-1)

Petitioners base their argument upon the stipulated facts which demonstrate that they "live" in the Village of South Orange. Petitioners' house fronts on Page Terrace, South Orange, with no direct access from their property to the City of Orange. The property receives all of its municipal services from South Orange including police and fire protection, garbage collection and postal service. They assert that the family's social, business and personal life is oriented to the Village of South Orange where they vote and worship, and participate in volunteer and recreational activities. Petitioners argue that, since they "live" in South Orange, by applying the concept of domicile to the parents, the child must be held likewise to reside in South Orange. *Mansfield Township Board of Education v. State Board of Education,* 101 *N.J.L.* 474 (*Sup. Ct.* 1925)

The Board denies that petitioners' child is domiciled in South Orange and thus entitled to free education under *N.J.S.A.* 18A:38-1. It contends that the instant matter is directly on point with the Commissioner's decision in the case of *Hy Laufer and Marga Laufer, parents of Robert Mark Laufer and Gregory Alan Laufer v. Board of Education of the Township of Scotch Plains-Fanwood Regional Schools,* 1970 *S.L.D.* 424.

The Commissioner finds that petitioners' true permanent home is entirely

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situate on land in the City of Orange. (J-1) The Commissioner determines that the facts in the instant matter are so similar to those in *Laufer, supra,* to render petitioners' claim *stare decisis,* and so holds.

Accordingly, the Petition is dismissed and the Commissioner enters Summary Judgment on behalf of the South Orange-Maplewood Board of Education.

COMMISSIONER OF EDUCATION

April 24, 1978

**Lois Scola,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Ringwood, Passaic County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Corrado & Higgins (Robert Corrado, Esq., of Counsel)

Petitioner, a duly certificated teacher and spouse of a member of the Borough of Ringwood Board of Education, hereinafter "Board," alleges that the Board's policy which discourages the employment of relatives of Board members is illegal and without force and effect as it pertains to an action taken by the Board to exclude her name from a list of approved substitute teachers during the 1976-77 school year. Petitioner further alleges that the Board's action against her is unreasonable and discriminatory since it bears no relation to the administration of a thorough and efficient system of education and precludes her from being engaged as a substitute teacher in the Borough of Ringwood School District, thereby limiting her right to earn a livelihood in her chosen profession.

Petitioner prays for an order of the Commissioner of Education setting aside the controverted Board policy and directing the Board to restore her name to the approved list of eligible substitute teachers. The Board rejects petitioner's allegations and avers that its policy affecting the exclusion of her name from

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a list of its approved substitute teachers is in all ways proper and legally correct.

The parties have moved this matter before the Commissioner on Cross-Motions for Summary Judgment. Accordingly, the Commissioner's adjudication of the matter controverted herein is rendered on the record before him and the supporting Briefs of counsel.

The undisputed facts giving rise to this controversy are set forth as follows:

Petitioner is a duly certified and qualified teacher who has previously served as an occasional per diem substitute teacher in the Board's employ. On June 21, 1976, the Board adopted the following policy:

*"BOARD MEMBER CONFLICT OF INTEREST*

"1. A Board member shall not have any direct or indirect interest in any contract with or claim against the Board. In the event a Board member should have a direct or indirect interest with a company which furnishes goods or services to the school district, the member shall declare his interest and refrain from any debate or vote upon the question. This policy is designed to prevent placing a Board member in a position where interest in the public schools and his interest in his place of employment (or other indirect interest) might conflict and to avoid appearance of conflict of interest even though such conflict may not exist.

"2. The Board discourages the employment of relatives of members of the Board of Education." (Board's Brief, Exhibit A)

Subsequent to the adoption of this policy, petitioner applied for a position as substitute teacher in the Board's employ for the 1976-77 school year.

On September 20, 1976, the Board at its regular meeting approved a motion to employ two persons, other than petitioner, as substitute teachers for the 1976-77 school year. Six Board members voted in favor of the motion and petitioner's husband abstained from voting. The motion was carried by 6 ayes, 0 nays and one abstention. (Board's Brief, Exhibit B)

Thereafter, at the same meeting, the Board entertained a motion to employ petitioner as a substitute teacher for the 1976-77 school year. This motion failed to be approved by the Board members present by a vote of 3 ayes, 3 nays and 1 abstention. The sole abstention was that of petitioner's spouse. (Board's Brief, Exhibit B)

Subsequently, on September 27, 1976, petitioner's attorney directed a letter to the Board (Board's Brief, Exhibit C) taking issue with paragraph 2 of the Board's policy (Exhibit A, *ante*), the effect of which excluded petitioner from being approved by the Board as a substitute teacher for the 1976-77 school year.

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Petitioner's attorney demanded in his letter to the Board that such portion of the controverted policy be rescinded or supplemented with language which would exempt substitute teachers from its provisions.

On October 12, 1976 the Board at its regular meeting considered a motion to approve petitioner as a substitute teacher for the 1976-77 school year. The motion was defeated by a vote of 4 ayes, 3 nays and 1 abstention by petitioner's husband. Such vote represented a lack of a majority vote of the full membership of the 9 member Board to approve the Motion. (Board's Brief, Exhibit D)

Several past rulings by the Commissioner pertinent to the matter herein controverted upon which the parties rely are incorporated by reference in *Shirley Smiecinski v. Board of Education of the Township of Hanover*, 1975 *S.L.D.* 478.

The Commissioner observes that the prevailing circumstances in *Smiecinski, supra*, are analogous to the instant matter. The Commissioner determined in that instance that the board acted within its discretionary authority to adopt a policy which discouraged the employment of relatives of board members. Consequently, the action taken by the board not to employ petitioner as a substitute teacher for the 1974-75 school year because she was the wife of a board member was upheld. That board adopted a policy regarding the employment of relatives of board members which is, with minor exceptions in wording, identical to the Board policy controverted herein:

> "***The Board of Education discourages the employment of relatives of members of this Board***." (at 478)

In upholding the policy of the Hanover board the Commissioner determined further that such policy could not be set aside absent evidence that it was being implemented by that board in a discriminatory manner.

Petitioner takes specific issue with the word "discourage" in the Board's policy herein and in *Smiecinski, supra*, by alleging that such word is vague and defective in that it fails to categorically and unequivocally state that a relative of a Board member is ineligible for employment. Petitioner argues that the wording of this policy leaves the Board option to discriminate on an individual basis when the question of the employment of a substitute arises.

The Commissioner will not comment on the wisdom of the choice of words used by the Board in promulgating the controverted policy except to say that the Board has the discretionary authority to provide further clarification by revising its policy if it is deemed appropriate.

The Commissioner has carefully reviewed the record and the arguments advanced by the parties herein. In the Commissioner's judgment, petitioner's arguments contesting the wording or the application of the Board's policy in the instant matter are not persuasive in rendering a determination in her favor.

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Accordingly, absent a finding of illegal, improper or discriminatory abuse of such policy by the Board, the Commissioner hereby grants the Board's Cross-Motion for Summary Judgment in its favor.

The instant Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

April 24, 1978

**Coaches of Eight, Inc.,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Lakehurst and William F. White, County Superintendent of Schools, Ocean County,**

*Respondents.*

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Shackleton, Hazeltine, Zlotkin & Dasti (Jerry J. Dasti, Esq., of Counsel)

For the Respondent Board of Education, Sim, Sinn, Gunning, Serpentelli & Fitzsimmons (Kenneth B. Fitzsimmons, Esq., of Counsel)

For the Respondent Ocean County Superintendent of Schools, Joseph J. Degnan, Attorney General (Alfred E. Ramey, Jr., Deputy Attorney General)

Petitioner appeals from a determination of the Ocean County Superintendent of Schools, in which the County Superintendent would not approve a proposed pupil transportation contract award to petitioner from the Board of Education of the Borough of Lakehurst, hereinafter "Board."

The facts of the matter are not in dispute. Petitioner sought an early determination by way of injunctive relief compelling the Board to sign and honor the proposed contract. A representative of the Commissioner of Education denied the request for injunctive relief at the conclusion of an oral argument held at the State Department of Education, Trenton, on September 22, 1977. (Tr. 35)

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*N.J.A.C.* 6:24-1.1. There was no appeal. Memoranda of Law were filed thereafter and the matter is submitted for Summary Judgment by the Commissioner.

The Board owns its buses and heretofore employed its drivers and provided for the ordinary maintenance of its vehicles. For the 1977-78 school year, the Board sought bids on a transportation contract which stipulated that the successful bidder would provide bus drivers and all necessary maintenance services while the Board would supply gasoline, oil, and liability insurance for the buses and drivers. In short, the Board would own the buses, but the successful bidder would do practically everything else. (Tr. 2-4)

Petitioner was the sole bidder. Subsequent to the receipt of that bid on July 29, 1977, the Board met and adopted a motion that the bid be accepted subject to the approval of the County Superintendent. (Tr. 13, 17)

The County Superintendent notified the Board by letter dated August 24, 1977, that he would not approve the proposed contract because it was not in compliance with *N.J.A.C.* 6:21-16.2 and *Wills Bus Service, Inc. v. Greater Egg Harbor Regional High School District,* 1960-61 *S.L.D.* 207, aff'd State Board of Education 1962 *S.L.D.* 247, dis. New Jersey Superior Court, Appellate Division 248. Not having the required approval of the County Superintendent, the Board hired its own drivers as it had done in previous years. (Tr. 17-18) This Petition of Appeal followed.

The authority of the County Superintendent in this matter is set forth in *N.J.S.A.* 18A:39-2 which reads:

> "Any board of education having power to provide for the transportation of school pupils in its district to and from school may provide such transportation by a bus or buses owned by it *or* may enter into contract for such transportation, approved by the county superintendent, for a term not exceeding four years.***" *(Emphasis added.)*

Further, *N.J.A.C.* 6:21-16.2 provides:

> *"All* transportation contracts *shall be made* on forms prescribed by the Commissioner of Education." *(Emphasis added.)*

In the instant matter a transportation contract was devised which is not the form approved by the Commissioner. (See: Transportation Contract attached to Attorney General's Memorandum of Law.) This contract form provides for contingencies when a board of education lets a contract for the full transportation service, *i.e.,* a contractor provides both the buses and the drivers.

The Commissioner commented in *Wills Bus Service, supra,* as follows:

> "***[A] board of education [is] given *two alternatives* in providing transportation: (a) A board [can] advertise for bids for furnishing complete

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transportation service, i.e. driver, bus, maintenance, etc., or (2) it [can] purchase a bus, supply its own driver and assume the cost and burden of maintenance, gasoline, supervision, etc.***"

*(Emphasis added.)* (1960-61 *S.L.D.* at 211)

Although the Commissioner's decision in *Wills Bus Service, supra,* concerned a board's authority to lease buses (and, incidentally, provide its own drivers and services), the options available to that board are equally applicable here. The Commissioner reiterates that the Board may provide the full transportation service including buses, drivers, and maintenance, or it may contract the full transportation service. Any fusion of the ownership of the buses and the services which might be contracted privately could lead to such a wide variety of convenience arrangements that supervision of the performance contracts by the County Superintendents would be virtually impossible.

It is noticed, also, from the record, that petitioner did not comply with another statutory requirement. Specifically, a statement must be submitted prior to receipt of a bid, or it must accompany a bid setting forth information as to certain stockholders. *N.J.S.A.* 52:25-24.2 Petitioner did not comply with this requirement. Petitioner submits that noncompliance in that regard was inadvertent and should be waived. Petitioner recently submitted the required information in an effort to cure the defect in the bidding requirements. (Petitioner's Memorandum of Law, at pp. 11-13)

The Commissioner determines that petitioner's failure to comply with *N.J.A.C.* 6:21-16.2, standing alone, is sufficient reason to dismiss the Petition of Appeal. The Commissioner directs attention to this form which contains several provisions demanding specific performance pursuant to statute and State Board regulations. (See Form: NJDE 1001–7 (Rev. 5/76).) This determination does not remove petitioner's obligation for compliance with all other statutes and regulations regarding the subject of the instant dispute.

The Commissioner affirms the determination of the County Superintendent noticing that it is his duty to act pursuant to his statutory authority to insure that the rules and regulations of the State Board are followed. *N.J.S.A.* 18A:39-2; *N.J.A.C.* 6:21-16.2 The Board's proposed contract is *ultra vires* and therefore it is set aside.

The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

April 24, 1978

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**In the Matter of the Tenure Hearing of**

**Abraham Altschuler,**

**School District of the Township of Neptune, Monmouth County.**

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Laird, Wilson & McDonald (Andrew J. Wilson, Esq., of Counsel)

For the Respondent, Mirne, Nowels, Tumen, Wooley, Magee, Kirschner & Graham (Michael B. Kirschner, Esq., of Counsel)

Abraham Altschuler, hereinafter "respondent," a tenured elementary school principal employed by the Neptune Township Board of Education, hereinafter "Board," has been charged with unbecoming conduct and incapacity to properly carry out his duties and obligations pursuant to the applicable provisions of *N.J.S.A.* 18A:6-10 *et seq.* The charges were preferred against respondent by the Superintendent of Schools and certified to the Commissioner of Education by the Board by resolution dated August 31, 1977. Respondent was suspended without pay effective September 1, 1977.

Respondent's Answer was filed with the Commissioner on November 7, 1977 subsequent to his securing representation of counsel. Respondent does not contest the substance of the three counts certified against him which includes a statement of evidence to that effect. Respondent does, however, seek to provide supplemental documentation and written legal argument to the Commissioner so as to mitigate any penalty which may be imposed upon him. Additionally, respondent maintains that his actions are not the proper subject to be considered by the Commissioner pursuant to the provisions of *N.J.S.A.* 18A:6-10 *et seq.*, but rather that the essence of such charges must appropriately be considered according to the provisions of *N.J.S.A.* 18A:16-1 *et seq.* and the pertinent decisions previously rendered in such matters.

A conference of counsel which was originally set down for December 3, 1977, was cancelled due to a court appearance by respondent's attorney and subsequently held on December 29, 1977 at the State Department of Education, Trenton. It was agreed by the parties at that time to waive a hearing and to submit this matter directly to the Commissioner by the filing of supplemental documentation and written legal argument in support of their respective positions. All the information was subsequently filed by the parties with the Commissioner on or before February 21, 1978.

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The charges against respondent as preferred by the Superintendent and certified by the Board are hereinafter set forth in their entirety:

"Pursuant to the provisions of R.S. 18A:6-10, et seq., the following charges of conduct unbecoming a Principal and incapacity to properly carry out his duties and obligations and conduct otherwise improper, are hereby preferred against Abraham Altschuler, a Principal under tenure in the Neptune Township School System, to wit:

*CHARGE #1*

"Mr. Altschuler is the Principal of the Summerfield Elementary School and as such is in charge of and directly responsible for the maintenance of an elementary school activities fund established by the Board of Education under the provisions of R.S. 18A:11-1(d.).

"This fund is maintained under the title of 'Summerfield School Activities Fund.' An audit of this account by the District's auditor, Frank G. Fluhr, for the fiscal period July 1, 1976 to July 11, 1977, disclosed fifteen separate checks on fifteen separate dates for various amounts, drawn to the order of 'cash' and all endorsed by Abraham Altschuler. The total amount represented by these fifteen checks is in the sum of $10,950.00.

"Of this total of $10,950,00, there was redeposited to the Summerfield School Activities Fund, the total sum of $9,145.30 represented by ten separate deposits on various dates. There is, as of this date, a deficiency of $1,804.70 in this account, which remains unaccounted for by Mr. Altschuler.

"The audit as prepared by the District's auditor reveals:

(A) Fifteen separate misappropriations of school funds by Mr. Altschuler

(B) A deficiency of $1,804.70 in the account which is unaccounted for.

"This charge is based upon the audit of the Summerfield School Activities Fund and specifically referred to in Schedule A thereof and supported by the exhibits attached thereto, as contained in the written statement of evidence being presented with the charges.

*CHARGE #2*

"In the administration of the fund referred to in Charge #1, Mr. Altschuler used funds drawn on checks of the fund to Petty Cash to support recorded receipts by a deposit of these funds on two separate dates. The first being October 8, 1976 and the second on February 10, 1977.

"The total sale of school pictures as appears from the statement of the vendor, Maude-Randolph, was in the amount of $2,051.00. The total re-

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ceipts recorded for sales is in the amount of $2,045.00. A deficiency of $6.00.

"The Petty Cash balance on hand June 30, 1976 was in the amount of $5.64. Of this amount, $3.00 was disbursed for petty cash purposes, leaving a balance of $2.64 unaccounted for.

"This charge is based upon the aforementioned audit and specifically referred to in Schedule B thereof as contained in the written statement of evidence.

*CHARGE #3*

"In the administration of the fund referred to in Charge #1, Mr. Altschuler, issued eight separate checks drawn on the account's fund on six different dates when there remained in the Activities Fund insufficient funds to meet the checks issued. As a result these checks were returned by the bank marked 'insufficient funds' resulting in penalties totalling $40.00 to be charges against said account.

"This charge is based upon the aforementioned audit and specifically referred to in Schedule C thereof as contained in the written statement of evidence."

It is observed that respondent was provided with an opportunity by the Board to file a written statement in response to the charges preferred against him prior to their certification to the Commissioner. A review of respondent's reply reveals that he does not make specific reference to the charges against him but, rather, he sets forth in some detail the merits of his past efforts as an employee of the Board. Consequently, the Commissioner finds that the uncontradicted evidence in support of the charges against respondent establishes that the charges are true.

The Commissioner will now address the supplemental documentation filed by respondent together with the legal arguments of the parties.

Respondent in the prefatory statement of his Memorandum asserts that he suffers from an emotional or mental illness the nature of which causes him to be diagnosed as a "***compulsive (pathological) gamb[ler]***" (R-5) as reported by the head psychologist of a program for compulsive gamblers administered and operated by the Veterans Administration Hospital, Cleveland, Ohio (Brecksville Unit). Respondent maintains that the results of his actions which form the basis of the Board's charges against him are the resultant effects of his illness. He maintains that he previously had an exemplary record as a employee of the Board.

Respondent relies upon the psychological reports (R-4, 5) of his condition and certain letters (R-1, 2, 3) and literature in support of this contention. These documents describe his efforts to obtain assistance subsequent to the time charges

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were certified against him by the Board and he was suspended from his position.

On September 21, 1977, respondent sought and received counseling for himself and his family through the Jewish Family and Children's Service, Monmouth County. (R-1, 2) Thereafter, respondent was referred to a psychiatrist for psychiatric evaluation and recommendation. A letter from the psychiatrist dated December 12, 1977 (R-3) expresses optimism regarding respondent's rehabilitation provided that the level of motivation he exhibited as the result of two visitations could be sustained.

The record also reveals that respondent voluntarily enrolled in the Veterans Administration Hospital in Ohio on December 19, 1977, to seek assistance for his problem in a program for compulsive gamblers. There, he took part in the full range of the program including: psychological assessment and testing, individual interviews and counseling, group therapy, participation in Gamblers Anonymous meetings, and also received medical examinations and care. Respondent was discharged from the program on January 23, 1978. (R-5)

The Commissioner has reviewed the contents of two reports from the head of the program at the Veterans Administration Hospital, the first of which represents an interim report of the staff involved with the program (R-4) and the latter is a complete psychological evaluation dated January 23, 1978 (R-5) from Dr. Alida M. Glen, psychologist and program administrator.

Additionally, respondent relies on certain literature which has been published in the form of interviews and reports concerning the problem of compulsive gambling. (Respondent's Memorandum, Exhibits A-1 through A-4)

The final psychological evaluation report (R-5) is the most informative inasmuch as it pertains to the description, diagnosis, treatment and prognosis of the problem which respondent avers is affecting his behavior.

This diagnostic report describes respondent's behavior as that of a compulsive (pathological) gambler commencing as early as 1971. The cardinal features of this problem are reported to be a dependence on gambling, loss of self-control, and interference with normal functioning, which are described as a "***progressive behavior disorder in which an individual has a psychological uncontrollable preoccupation and urge to gamble.***" (R-5)

In respondent's case, as reported by the psychologist, his behavior from 1971 to date has caused him to spend a considerable amount of funds which did not belong to him for which restitution had to be made by his family and friends. Other types of behavior resulted in the re-financing of his home, writing worthless checks which brought legal action against him in 1977, and ultimately resulted in a divorce from his wife and separation from his family in January 1977. As indicated in the psychologist's evaluation of respondent:

"***The gambling disrupted his family, badly hurt his reputation in the

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community and prevented him from carrying out his job properly and honestly.***'' (R-5)

The psychologist's report is concluded by the following prognosis of respondent which reads in pertinent part as follows:

''***Compulsive (pathological) gambling can be effectively treated, and the prognosis is good if the veteran can demonstrate:

1) that he is abstaining from gambling with G.A. [Gamblers Anonymous] (since no growth can take place if he returns to it)

2) that he is continuing to engage actively in individual therapy, leading to personal growth

3) that he is regularly employed

4) that he is attempting (as well as he can) to meet his financial obligations, and to at least begin to make restitution on his debts and loans

5) improvement in relationships with wife and children (as far as possible because of the divorce)

6) no further criminal or unethical charges.

''At this time I believe [respondent] has plans to carry out the above, and is well motivated to do so. His actual participation and progress can be confirmed by others. I believe he can be considered an arrested compulsive gambler if he is able to carry out these plans successfully for a year or more.'' (R-5)

Respondent argues in his Memorandum that the condition from which he suffers, as hereinbefore set forth, can only result in a finding and determination by the Commissioner that the Board's certification of tenure charges against him are premature at best and that, as a tenured employee, he has the right to demand that he be placed on leave of absence pursuant to the applicable provisions of *N.J.S.A.* 18A:16-2 and 4 which read as follows:

''Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination, the scope whereof shall be determined under rules of the state board, at least once in every year and may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal physical or mental health.

''Any such examination may, if the board so requires, include laboratory tests or fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data.'' (*N.J.S.A.* 18A:16-2)

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And,

> "If the result of any such examination indicates mental abnormality or communicable disease, the employee shall be ineligible for further service until proof of recovery, satisfactory to the board, is furnished, but if the employee is under contract or has tenure, he may be granted sick leave with compensation as provided by law and shall, upon satisfactory recovery, be permitted to complete the term of his contract, if he is under contract, or be reemployed with the same tenure as he possessed at the time his services were discontinued, if he has tenure, unless his absence shall exceed a period of two years." (*N.J.S.A.* 18A:16-4)

It is respondent's contention that the provisions of the above-cited statutes may be invoked by an employee as well as a local board of education. In support of this contention respondent relies on previous rulings of the Commissioner *In the Matter of the Tenure Hearing of David Bernstein, Matawan Regional Board of Education,* 1967 *S.L.D.* 73; *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), *cert.* den 74 *N.J.* 251 (1977); and *Edward C. Crews v. Bernards Township Board of Education,* 1975 *S.L.D.* 382.

The Commissioner in this instance finds no merit in respondent's interpretation of the statutory and decisional law upon which these arguments are grounded.

It is clear that *N.J.S.A.* 18A:16-2, *ante,* permits local boards of education to require "***additional individual psychiatric or physical examinations***whenever in the judgment of the *board,* an employee shows evidence of deviation from normal physical or mental health.***" *(Emphasis supplied.)*

In the instant matter respondent's school evaluations accompanied by the Superintendent's letter of January 6, 1978 attest to the fact that the Superintendent could not

> "***recall any instance when [respondent's] conduct as a professional was anything other than exemplary up to the date of events leading to his suspension***." (P-1)

Additionally, the Commissioner finds that respondent's reply to the statement of evidence and the charges against him does not disclose any information which would have been helpful to the Board in arriving at a determination with respect to his physical or mental health prior to the time tenure charges were certified against him.

The record of this matter reveals that respondent did not elect to seek psychiatric help for his problem until four months after the Board's charges were filed against him. In fact, such assistance was not seriously entertained by

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respondent until December 23, 1977 when he entered the Veterans Administration Hospital. (R-5) This finding by the Commissioner is supported by the comments contained in respondent's interim report prepared by one of the staff members of the hospital which states that:

> "***[Respondent] joined GA [Gamblers Anonymous] several years ago but [he was] never serious about it. Suspended from principal's job August 1977 (without pay) but still [would not] recognize seriousness of the problem. [He] feels money provides 'status'***." (R-4)

It was during this time, the Commissioner observes that it is also reported that respondent

> "***[b]egan 'syphoning' money from synagogue ($13,000—replaced, later $20,000 replaced?)***." (R-4)

The pattern of such behavior has been described in his final psychological evaluation as disrupting his family, badly hurting his reputation and

> "***prevented him from carrying out his job properly and honestly.***" (R-5)

The record further reveals that all of these past activities were not divulged to the Board by respondent, nor did he request the relief from the Board which he now seeks *ex post facto* before the Commissioner.

The Commissioner finds that the final psychological evaluation report prepared by the Veterans Administration Hospital upon respondent's discharge on January 23, 1978 is at best speculative with respect to his chances for rehabilitation and would require that the Board gainfully employ him in his present position as a condition for his possible rehabilitation. (R-5)

The Commissioner does not agree that such continued employment would be in the best interest of respondent, the pupils, parents and community at large, or the Board, in view of the circumstances hereinbefore set forth.

In the Commissioner's judgment respondent, by his own admission, is not capable of performing his duties as principal and, consequently, one of the significant criteria for his possible rehabilitation is absent.

Similarly, the Board may not hold respondent's position in abeyance pending his efforts to become rehabilitated and continue to pay him. Such payment without employment service would be counterproductive in light of the very nature of the problems which he allegedly suffers, those of a compulsive gambler. (R-5)

In each of the cases cited by respondent, *Bernstein, supra, Gish, supra,* and *Crews, supra,* the respective boards had identified what they considered a deviation from normal physical or mental health by the employee in question

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and for that reason required the appropriate examinations of these employees as authorized by *N.J.S.A.* 18A:16-2.

*In the Matter of the Tenure Hearing of Emma Matecki, School District of New Brunswick,* 1971 *S.L.D.* 566, aff'd State Board of Education 1973 *S.L.D.* 773, aff'd Docket No. A-1680–72 New Jersey Superior Court, Appellate Division, 773, the Commissioner held that a single incident of conduct unbecoming a teacher was sufficient grounds to cause her dismissal. In the instant matter, however, there are many instances of unbecoming conduct during the course of the 1976-77 school year specifically set forth in Charge No. 1 as indicated by the report of the school auditor in subparagraphs (A) and (B), as well as those set forth in Charges Nos. 2 and 3. In *Redcay v. State Board of Education,* 130 *N.J.L.* 369 (*Sup. Ct.* 1943), aff'd 131 *N.J.L.* 326 (*E.&A.* 1944) it was held that:

> "***Unfitness for a task is best shown by numerous incidents. Unfitness for a position under a school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it may also be shown by many incidents.***"
> (130 *N.J.L.* at 371)

Moreover, the Commissioner has previously held *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional,* 1972 *S.L.D.* 302 in pertinent part that:

> "***[T]eachers of this State *** are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.***" (at 321)

The Commissioner has previously ruled *In the Matter of the Tenure Hearing of Martin Groppi, Manchester Regional School District,* 1970 *S.L.D.* 159, that respondent's failure to account for certain class monies for which he was responsible as class advisor was sufficient to warrant his dismissal as a teaching staff member.

In the Commissioner's judgment the corollary between teachers and school administrators who share this enormous responsibility as teaching staff members in the employ of a local board of education needs no further amplification.

Accordingly, the Commissioner finds and determines that respondent, by a series of incidents of unbecoming conduct as an elementary principal, has shown his unfitness to be continued in his employment in the Neptune Township

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School System. The Commissioner denies respondent's request to have this matter determined on the grounds of alleged emotional or mental illness and directs that respondent be dismissed from his employment with the Neptune Township Board of Education, effective as of the date of his suspension by the Board.

COMMISSIONER OF EDUCATION

April 25, 1978

## STATE BOARD OF EDUCATION

## DECISION

Decided by the Commissioner of Education, April 25, 1978

For the Petitioner-Appellee, Laird, Wilson & McDonald (Andrew J. Wilson, Esq., of Counsel)

For the Respondent-Appellant, Mirne, Nowels, Tumen, Wooley, Magee, Kirschner & Graham (Michael B. Kirschner, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed with clarification as follows:

(1) Employees covered by 18A:16-2 can request the examination process subject to Board approval.

(2) Board must determine whether leave of absence will be granted.

(3) Tenure charges may be certified based on conduct arising out of physical or mental illness.

September 6, 1978

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**William Mueller,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Glen Ridge, Essex County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

## ORDER

For the Petitioner, Schwartz, Steinberg, Tobia & Stanziale (Kent A. F. Weisert, Esq., of Counsel)

For the Respondent, Barry A. Aisenstock, Esq.

This matter having been opened before the Commissioner of Education on May 4, 1976 by the filing of a Petition of Appeal wherein it is alleged, *inter alia*, that the Board of Education of Glen Ridge, hereinafter "Board," arbitrarily, capriciously, and in violation of not only the prevailing negotiated agreement but also the statutes and the Federal and State Constitutions refused to reemploy petitioner as a teacher for the 1976-77 school year; and

A conference of counsel having been conducted at the State Department of Education, Trenton, on August 12, 1976 wherein it was stated to the Commissioner's representative that the issues to be litigated and the relief sought before the Commissioner were separate and apart from those issues and requests for relief rising from the same factual context which would have been filed before a tripartite arbitration panel whose award was issued on March 14, 1977; and

The Commissioner having considered the terms of the arbitration panel's report wherein for breach of the negotiated agreement by failing to provide the required evaluations the Board was ordered to pay petitioner a sum equal to two years' salary for teaching and coaching, less partial mitigation, if applicable; and

The transcripts of four days of testimony taken before that tripartite arbitration panel having, by common consent of respective counsel and the Commissioner's representative, been introduced into evidence on October 26, 1976 in lieu of further and repetitive testimony by the same witnesses (J-10, A through D); and

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The Board having filed on January 22, 1977, a Notice of Motion with supporting Brief seeking dismissal of the Petition of Appeal; and

The Commissioner having considered the Board's argument that petitioner is barred from litigating the same facts and issues before both the Commissioner and an arbitration panel, in which argument the Board cites *Esplanade Amusement Co. v. City of Asbury Park,* 42 *A.2d* 206 (*Chan. Div.* 1945) wherein it was said by the Court:

> "***Considerations of policy forbid litigants to patronize at the same time and in the same controversy several courts of concurrent jurisdiction in quest of the most serviceable position.***" (at 208)

and

The Commissioner having similarly considered the arguments set forth in petitioner's Statement in Lieu of Brief that the Motion should not be granted on grounds that the issues being litigated and the relief being sought before the tripartite panel are not identical to those before the Commissioner for his determination; and

The Commissioner having also considered the arguments set forth in petitioner's Brief in Support of Position of Grievant filed December 1, 1976 before the tripartite arbitration panel; and

The Commissioner having concluded that the relief sought by petitioner before both the tripartite arbitration panel and the Commissioner so overlaps that, should petitioner prevail in both forums, the relief granted could be such a comingling of awards that justice would not be served (see Brief in Support of Grievant, at pp. 47, 52-53); and

The Commissioner having concluded that the agreed upon Issue A of the aforesaid conference of counsel memorandum which concerns alleged violations of the negotiated agreement has been litigated before the arbitration panel and should not be relitigated herein; and

The Commissioner having also concluded that Issues B and C of the memorandum concerning alleged statutory and constitutional violations have not been litigated before the arbitration panel and are properly before the Commissioner; now therefore

IT IS ORDERED that the Board's Motion to Dismiss is granted with respect to the aforementioned Issue A; and

IT IS ORDERED that the Board's Motion to Dismiss is denied with respect to Issues B and C, *ante;* and

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IT IS FURTHER ORDERED that in accordance with the agreed upon procedure a hearing examiner report be prepared and sent to the litigants who may, if they so choose, file exceptions thereto pursuant to *N.J.A.C.* 6:24-1.17(b). (Tr. 15)

Entered this 30th day of June 1977.

COMMISSIONER OF EDUCATION

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Schwartz, Steinberg, Tobia & Stanziale (Kent A.F. Weisert, Esq., of Counsel)

For the Respondent, Barry A. Aisenstock, Esq.

Petitioner, a long time resident of Glen Ridge, who was employed as a nontenured teacher and coach from September 1973 through June 1976 by the Board of Education of Glen Ridge, hereinafter "Board," alleges that the Board's determination not to reemploy him for the 1976-77 year was arbitrary, unreasonable, violative of his statutory and constitutional rights and contrary to the Board's employment policies set forth in its negotiated agreement with the Glen Ridge Education Association, hereinafter "Association." Conversely, the Board asserts that his non-reemployment was a legal exercise of its discretionary authority to determine who shall teach in its schools.

A hearing was conducted at the office of the Morris County Superintendent of Schools, Morris Plains, on October 26, 1976 by a hearing examiner appointed by the Commissioner of Education. Respective counsel and the hearing examiner agreed on that date that transcripts of testimony of witnesses taken before a tripartite arbitration panel on September 21, 1976 and October 5, 6 and 18, 1976 would be submitted and received into evidence in lieu of duplicative testimony before the hearing examiner. Those transcripts were marked into evidence as J-10A, B, C and D with numerous other relevant documents. (Tr. 3, 5-10) Subsequently Briefs were submitted by the parties.

On January 22, 1977, the Board filed Notice of Motion to Dismiss on grounds that petitioner was barred from litigating the same facts and issues before both the Commissioner and the arbitration panel. An interlocutory Order of the Commissioner dated June 30, 1977 recognized that there was indeed an overlapping of issues before the two forums. That Order dismissed the issue of violation of the negotiated policy and also directed that a hearing examiner report

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be prepared on the remaining cognizable issues of alleged statutory and constitutional violations and petitioner's plea for reinstatement, which plea was not addressed in the Finding of Fact, Reasoning, Conclusions and Award of the tripartite arbitration panel. (P-5)

The arbitration panel found that the Board, contrary to requirements in the negotiated policy, had failed to bring to petitioner's attention evidence of unsatisfactory performance or to provide him with assistance in overcoming those deficiencies. (P-5, at pp. 33-35) For those and other related violations of the agreement, the Board was directed, *inter alia*, to compensate petitioner a sum equal to twice his salary and coaching stipend less mitigation in the amount of his earnings from alternate employment. (P-5, at p. 35)

Pursuant to the Commissioner's Order of June 30, 1977, the hearing examiner sets forth his findings of fact relative only to the issues rising from petitioner's allegations of arbitrariness, capriciousness and statutory and constitutional violations. Those stipulated facts which form the contextual basis of the dispute are as follows:

Petitioner, who had taught social studies in the Glen Ridge High School since September 1973, was given notice on April 9, 1976, pursuant to *N.J.S.A.* 18A:27-10 that he would not be reemployed for the ensuing school year. When petitioner protested that the Board's determination was improper, he requested, and was provided a statement of reasons and two opportunities to appear before the Board to rebut those reasons. (J-3C and E; Stipulation of Facts) Those reasons, as further amplified in the Board's letter of May 20, 1976, were as follows:

> ***
>
> "1. *Lack of Diversification of Methodology.****
>
> "2. *Failure to Adapt Teaching Style and Materials to Various Levels of Student Achievement.****
>
> "3. *Difficulty in Establishing an Effective Learning Atmosphere.****
>
> "4. *Insufficient Follow Through of Essential Student Assessment Procedures.****
>
> "5. *Such Other Reasons as Stated in the Observation and Evaluation Reports.****
>
> "6. *The Board Has an Obligation to Seek Out the Most Outstanding Professionals to Serve in the Glen Ridge Schools.****" (*Emphasis in text.*)
>
> (J-3E)

Petitioner argues that, while monetary award may properly be ordered by an arbitration panel, the matter of his plea for reinstatement with tenure for

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reasons of arbitrariness, capriciousness or statutory or constitutional violations is within the jurisdiction of the Commissioner. Petitioner contends that the Board acted in such an unlawful, unreasonable, frivolous, contradictory and arbitrary manner, in violation of its own stated policies in the negotiated agreement, that his own disadvantage emanating therefrom is an injustice which may be remedied only by reinstatement to his teaching position with legal expenses for the instant action. (Brief of Petitioner, at pp. 13-26)

The Board argues, conversely, that, although petitioner's teaching performance was not unsatisfactory, it seeks the best qualified, highly motivated, superior teachers and is not legally obligated to employ on a tenured basis a teacher who is merely satisfactory. (Respondent's Brief, at pp. 2-3) The Board denies that its reasons for petitioner's non-reemployment were in any way predicated upon his place of residence. It further asserts that the principal's cautionary words to him regarding his professional association with pupils who were his neighbors were properly offered to assist him in assuming his teaching duties. (*Id.*, at pp. 5-6) For these and the further reasons set forth in its Brief, the Board contends the Petition of Appeal should be dismissed. (*Id.*, at p. 7)

The hearing examiner has examined the principal's evaluation reports based on his observations of petitioner's classes and finds few candid criticisms or substantive constructive suggestions for improvement. (J-4 through J-9) By contrast, the principal's summary report, which was presented to the Board in March 1976, although it commended petitioner for his loyalty and his conscientiousness in preparing for his classes, asserted that his teaching was pedantic, overly rigid and lacking in vitality and pupil involvement. (P-3A) Such criticism does not permeate the principal's written evaluations shared with petitioner. (J-4 through J-9)

The principal testified that in conferences he made numerous suggestions to petitioner for improvement of his teaching which he did not reduce to writing because he

> "***was dealing with someone who was very nervous during the evaluation process, particularly when I was in the classroom. At that point I made a conscious decision that he needed a great deal of encouragement***. I felt if indeed I was going to comply with the spirit of the contract *** that those things I put into writing had to be as positive a statement as I could possibly make.***" (Tr. J-10C, at p. 10)

A review of additional testimony of the principal and petitioner supports the conclusion that, although the principal had concerns over petitioner's teaching performance, with but one exception, he failed to make them known in sufficient time to satisfy the terms of the negotiated policy. That policy required, *inter alia*, that nontenured teachers thrice annually be afforded both constructive supervision by their superiors for the purpose of identifying deficiencies and specific suggestions and assistance for improvement. (*Id.*, at pp. 3, 6-7, 26, 34-38, 41, 50-54, 78, 97, 108; Tr. J-10A, at pp. 23, 27, 54-57; Tr. J-10D, at pp.

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18-24; J-2) The single exception noted above was on the principal's summary evaluation dated March 8, 1976 which listed areas of weakness in petitioner's***[a]bility to communicate and establish a rapport with students***'' and his ''***[w]illingness to innovate new ideas and techniques.***'' (J-9T)

The hearing examiner finds, however, that the principal had such concerns over petitioner's performance and discussed them with the Superintendent. This finding is based on the testimony of the Superintendent that he and the principal had discussed petitioner's performance and the question of his reemployment for at least one and one-half hours in December 1975. (Tr. J-10D, at p. 23; see also pp. 15-79.) The Superintendent stated that, prior to making his recommendation of non-reemployment, he had personally examined petitioner's evaluation reports, considered both the principal's oral and written comments and concluded that petitioner was an average teacher who did not meet the high standards of performance required of teachers in the Glen Ridge district. (*Id.*, at pp. 3-5, 78, 88)

A search of the record fails to convince the hearing examiner that the determination not to reemploy petitioner was either arbitrary, capricious or without valid reason. The arbitration panel found that agents of the Board had failed to provide either notice of unsatisfactory performance or assistance to overcome those shortcomings as required by the negotiated policy. Absent such requirements, a substantial award has been ordered by the panel. Accordingly, and in keeping with the Commissioner's interlocutory Order, *ante*, that alleged violation of the agreement is not a proper subject of further findings in this report. The Commissioner, however, must determine whether petitioner's allegations in the instant matter require relief in the form of reinstatement.

The record does not support a finding that the Board's action violated statutory requirements pursuant to *N.J.S.A.* 18A:27-10, which requires that a nontenured teacher be notified of his employment status for the ensuing year on or before April 30. Petitioner was so notified on April 9. Pursuant to *Donaldson v. Board of Education of North Wildwood,* 65 *N.J.* 236 (1974), petitioner was given reasons for his non-reemployment and, accompanied by counsel, was afforded two informal appearances to refute those reasons. Similarly, the Board complied with *N.J.S.A.* 18A:27-3.1 *et seq.* and *N.J.A.C.* 6:3-1.19 by providing in the 1975-76 school year three classroom observations and evaluations with conferences as required.

Petitioner alleges that the reasons given were not the true reasons for the Board's action and asserts that the actual reason for his non-reemployment was that he was an alumnus of Glen Ridge High School and had resided in Glen Ridge for many years. (Petition of Appeal, at p. 12) A careful review of the record reveals no credible evidence supporting such an allegation. The principal testified that he indeed advised petitioner in 1973 of points to consider in teaching pupils who were also his neighbors in Glen Ridge. (Tr. J-10C, at pp. 29, 40-42) The testimony of petitioner on this matter was that the principal, upon notifying him that he would not be reemployed, had stated that the community

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expected more of him, from which he inferred that the principal was saying that more was expected from him as a teacher than of other teachers. (*Id.*, at pp. 53-54)

The hearing examiner is unable to conclude from the principal's testimony, or from the limited testimony of petitioner or any other evidence in the record, that either the Board, the principal or any other person in administrative authority discriminated against petitioner because he was a resident of Glen Ridge or that the Board's determination not to reemploy him was in any part based upon a consideration of his place of residence.

The fact that petitioner disagrees with the reasons given by the Board for his non-reemployment is abundantly evident. Mere disagreement, however, does not raise a cognizable issue. As was stated by the Commissioner in *Donald Banchik v. Board of Education of the City of New Brunswick, Middlesex County*, 1976 *S.L.D.* 78 wherein a principal disagreed with reasons for non-reemployment:

> "***The reasons given, related as they are to the broad areas of responsibility of a principal, are not frivolous and are entitled to a presumption of correctness. Absent a detailed listing of specific instances wherein the Board acted arbitrarily, capriciously, or unreasonably, the Commissioner will not direct that the Board's determination be subjected to further review.***"

And,

> "***Petitioner has no property right, as a nontenured employee, to continued employment. Nor does his termination or the reasons given therefore deprive him of the liberty to seek employment elsewhere. ***[*Board of Regents of State Colleges v. Roth*, 408 *U.S.* 564, 33 *L.Ed.* 2*d* 548, 92 *S.Ct.* 2701 (1972); *Perry v. Sindermann*, 408 *U.S.* 593, 92 *S.Ct.* 2694 (1972)] See *Sallie Gorny v. Board of Education of the City of Northfield et al., Atlantic County*, 1975 *S.L.D.* [669]. The matter of property rights of nontenure teachers to continued employment under New Jersey law are explicitly set forth in *Gorny* and need not be reiterated herein.
>
> "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 p. 342)***"
>
> (at 81-82)

In summary, the hearing examiner makes the following findings of fact:

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1. The principal's written evaluation reports of petitioner's performance did not candidly reflect his depth of concern and reservations about petitioner's teaching performance.

2. Those concerns and petitioner's evaluations were shared with the Superintendent who also recommended to the Board that petitioner not be reemployed.

3. The reasons given by the Board for petitioner's non-reemployment, *ante*, were not a sham, frivolous or without relevance to the functioning of the educational process.

4. Petitioner has failed to prove that he was not reemployed because he was a long term resident of Glen Ridge and an alumnus of Glen Ridge High School.

5. Petitioner was afforded the due process to which he was entitled pursuant to *N.J.S.A.* 18A:27-3.2 and 18A:27-10; *N.J.A.C.* 6:3-1.20; *Donaldson, supra;* and *Barbara Hicks v. Board of Education of the Township of Pemberton, Burlington County,* 1975 *S.L.D.* 332.

It is recommended that the Commissioner determine that the principal's less than candid written evaluations of petitioner's teaching performance were unresponsive to the cautionary dicta enunciated by the Commissioner in *Gorny, supra,* as follows:

> "***The Commissioner has observed that many problems have been created, with extensive litigation, as the result of evaluation programs conducted in an excessively charitable manner, whereby beginning teachers have not had the benefit of candid and complete constructive criticisms of their deficiencies and shortcomings. When evaluations fail to enlighten the beginning teacher regarding his/her deficiencies and provide no suggestions for improvement, the teacher is mistakenly led to believe that his/her services and performance are at least adequate. Subsequently, when reemployment is not offered, the teaching staff member is at a loss to understand the reasons.***" (at 681)

It is further recommended that the Commissioner determine that such imperfection did not result from bad faith, that the final recommendations of both the principal and the Superintendent were based on their total impressions of his performance, and that the Board's determination was an exercise of its statutory discretionary authority in conformity with that which was stated in *Gorny, supra,* as follows:

> "***In this case, petitioner was supervised and evaluated, but the reports of the evaluations were not discussed with her as provided by the Board's policy, nor were they all given to her as was also required. The record before the Commissioner shows that petitioner never received copies of

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several of the evaluations and that no conference followed the evaluations. Balanced against these imperfections is the evidence that the evaluations of petitioner's performance were not made in bad faith, and that the final recommendations of both the principal and Superintendent were based upon their respective total impressions of petitioner's overall performance as a teacher. As was previously stated, the Commissioner holds that the Board's determination, based upon such proper factors, was not arbitrary nor unreasonable.***'' (at 681)

It is also recommended that the Commissioner determine that the Board's decision not to reemploy petitioner was a valid exercise of its authority to decide who shall teach in its schools and that it is entitled to a presumption of correctness. *Schinck v. Board of Education of Westwood Consolidated School District,* 60 *N.J. Super.* 448 (*App. Div.* 1960); *Sally Klig v. Board of Education of the Borough of Palisades Park, Bergen County,* 1975 *S.L.D.* 168; *Boult and Harris v. Board of Education of Passaic,* 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.&A.* 1948) As was stated by the Court in *Schinck:*

''***We are mindful of the general principle that on appellate review we should not substitute our judgment for the specialized and expert judgment of the Commissioner and the Board, and also of the local school board, all of whom have been entrusted with the fulfillment of the legislative policy.***'' (60 *N.J. Super.,* at 476)

Finally, it is recommended that the Commissioner determine that petitioner's constitutional or statutory rights were not violated and that he is entitled to no further relief than that which has already been afforded him by the arbitration award resulting from the failure of the Board and its agents to adhere to the terms of the negotiated policy, *ante.* It is similarly recommended that the Commissioner deny petitioner's prayer for an order directing the Board to reinstate him to his former teaching position together with legal fees and expenses.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the entire record of the controverted matter including the pleadings, transcripts of testimony before the tripartite arbitration panel, Briefs of counsel, hearing examiner report and the exceptions thereto filed by petitioner. No exceptions were filed by respondent.

Petitioner's exceptions assert that the Board violated his statutory right pursuant to *N.J.S.A.* 18A:27-3.1 which states that in addition to a requirement of three annual evaluations of and conferences with nontenure teachers, the purpose thereof ''***is to recommend as to reemployment, identify any deficiencies, and to extend assistance for their correction and improve professional competence***.'' See Petitioner's Exceptions, at pp. 3-6. To the extent that candid notice of petitioner's shortcomings were not revealed to him fully by the principal, the Commissioner recognizes that the stated purpose of the statute

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was not met. Rather, the principal because of "kindly feelings" sought to shield petitioner from those deficiencies which he observed. Such misguided compassionate feelings, as recognized in *Gorney, supra,* are and have always been contrary to the goal of a thorough and efficient education. They inevitably engender in subordinates a false sense of security and deprive them of opportunity to forthrightly rectify the observed deficiencies. Thus, we are here confronted at once with both the outward compliance with the required observations and evaluations and the failure to candidly report to petitioner that which was observed.

Petitioner's argument that under such conditions he is entitled to reinstatement to his teaching position is the issue in the proceeding before the Commissioner. A thorough review of the record supports the validity of the findings of the hearing examiner with the single exception that, as already noted, there was not full compliance with the stated purpose of *N.J.S.A.* 18A:27-3.1. Accordingly, those findings are adopted, with that exception, by the Commissioner as his own.

Noncompliance with each and every provision of a negotiated agreement or of a statute does not *ipso facto* create entitlement to reemployment. As was stated in *Moses Cobb v. Board of Education of the City of East Orange,* 1975 *S.L.D.* 1047, aff'd State Board of Education 1976 *S.L.D.* 1135:

> "***The judgment of local boards of education, with respect to the employment or non-reemployment of nontenured teaching staff members, does not depend alone on such evaluations although they may constitute a part, even the principal part, of a total consideration. As the Court said in *Mary C. Donaldson v. Board of Education of the City of North Wildwood,* 65 *N.J.* 236 (1974):
>
> '***[T]*here are many unrelated but nonetheless equally valid reasons why a board,* having had the benefits of observation during the probationary period, *may conclude that tenure should not be granted.****' (at p. 241)***" (*Emphasis in text.*) (at 1055)

One such reason given, in the instant matter, was that the Board felt an obligation to seek out, to serve in the Glen Ridge schools, the most outstanding professionals. (J-3E)

Violation of one statute or a subsection thereof does not create automatic entitlement to reinstatement. In *David Payne v. Board of Education of the Borough of Verona, Essex County,* 1976 *S.L.D.* 543, aff'd State Board of Education 554, aff'd Docket No. A-1543-76 New Jersey Superior Court, Appellate Division, October 31, 1977, it was determined that the Verona board, which in March 1974 had executed a fourth year contract with Payne to teach in the ensuing year had capriciously withdrawn that contract without demonstrable reasons three months later. Despite that capriciousness, it was determined that, since the board had valid reasons not to reemploy Payne, it should not be required to do so. Accordingly, the Commissioner ordered the Verona board to

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pay Payne as a matter of equity, for its capriciousness, the entire amount of one year's salary with attendant emoluments.

In a number of recent cases, the Commissioner has determined that statutory requirements of notice of employment status or required evaluations were not provided to nontenured teachers pursuant to *N.J.S.A.* 18A:27-10 *et seq.* and *N.J.S.A.* 18A:27-3.1 *et seq.*, but that there existed valid reason for their non-reemployment. In certain of these instances boards were not required to reemploy those teaching staff members but were ordered to pay them appropriate amounts in consideration of their boards' noncompliance with statutory prescription. See *Patricia Bitzer v. Board of Education of the Township of Boonton, Morris County*, 1976 *S.L.D.* 376, aff'd State Board of Education 381; *Margaret Pelose v. Board of Education of the Township of South Brunswick, Middlesex County*, 1977 *S.L.D.* 232, aff'd State Board of Education 240; *John C. Roy, II v. Board of Education of the Township of Middle, Cape May County*, 1976 *S.L.D.* 569, aff'd State Board of Education 574; *Louis A. Foleno v. Board of Education of the Township of Bedminster, Somerset County*, 1978 *S.L.D.* (decided February 22, 1978).

In the instant matter, the Board, when confronted with the belated candid evaluation by the principal and the evaluation of its Superintendent, was required to make its decision in the best interests of the pupils. To do otherwise would be contrary to its constitutional and statutory mandate to provide a thorough and efficient education. The lengthy history of education in New Jersey validates the wisdom of the statutory authority of long standing conferred upon local boards to determine who shall teach in the school systems which they administer. This authority was recognized by the New Jersey Superior Court in *Porcelli et al. v. Titus et al.*, 108 *N.J. Super.* 301 (*App. Div.* 1969), *cert.* den. 55 *N.J.* 310 (1970) as follows:

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

That iteration of the Court is no less valid today following the passage of *N.J.S.A.* 18A:27-3.1, effective July 1, 1975. In the event of failure to provide the required number of evaluations, that statute mandates no procedure or penalty which would require reemployment of a nontenured teacher such as was provided by *N.J.S.A.* 18A:27-11, 12 in the event of failure to notify a nontenured teacher of employment status by April 30. Nor will the Commissioner violate the canons of statutory interpretation by concluding that such automatic reinstatement was the Legislature's intent. Had such been the intent, it would have been so stated. Rather, all of the statutes governing the employment of teachers must be read and interpreted *in pari materia*.

Petitioner as a nontenured teacher had no property interest in continued employment. As was applicably cited in *Gorny, supra,* from *Board of Regents of State Colleges v. Roth*, 408 *U.S.* 564, 92 *S.Ct.* 2701 (1972):

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> "***To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. *He must have more than a unilateral expectation of it*. He must, instead, have a legitimate claim of entitlement to it.***" (*Emphasis supplied.*) (92 *S.Ct.* at 2709)

There is ample evidence, in the instant matter, that the Board had valid reasons for denying an offer of reemployment to petitioner. Those reasons, based principally upon the final recommendations of the principal and the Superintendent were neither trivial nor superficial. Accordingly, the Board's determination must stand. For the failure of its agents to act in accord with terms of its negotiated agreement, the Board and the community it serves have already paid petitioner the substantial penalty of two years' salary and attendant emoluments. The Commissioner deems it inappropriate to award petitioner further financial remuneration for failure to comply with *N.J.S.A.* 18A:27-3.1 for the reason that that noncompliance, in fact, resulted from the same factual context which led to the tripartite arbitration panel's liberal award.

Absent a preponderance of credible evidence that petitioner's constitutional rights were violated, the Board's determination not to remploy him shall stand. The Commissioner so holds. Accordingly, it is determined that petitioner is entitled to no further relief than that which has been awarded by the arbitration panel. The Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

April 28, 1978

## STATE BOARD OF EDUCATION

### DECISION

Decided by the Commissioner of Education, April 28, 1978

For the Petitioner-Appellant, Schwartz, Steinberg, Tobia & Stanziale (Kent A. F. Weisert, Esq., of Counsel)

For the Respondent-Appellee, Riker, Danzig, Scherer, Debevoise & Hyland (Ronalds S. Newton, Esq., of Counsel)

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

October 4, 1978

Pending New Jersey Superior Court

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**John Scavelli,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Clayton, Gloucester County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Richard Berkey, Esq.

For the Respondent, Streitz and Streitz (Wayne Streitz, Esq., of Counsel)

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Borough of Clayton, hereinafter "Board," during the 1972-73 academic year, was discharged in June 1973 by the Board because of a reduction in force. He was reemployed for the 1976-77 year in the same position he had previously held, pursuant to the statutory mandate with respect to seniority entitlement (*N.J.S.A.* 18A:28-12), but alleges that the salary paid him upon his return was not commensurate with the "full recognition" which the statute demands be awarded him for prior service. The Board avers that petitioner was granted full recognition for his prior years of service and requests the Commissioner of Education to dismiss the Petition of Appeal.

The matter is submitted for Summary Judgment by the Commissioner on the pleadings and Memoranda of Law. The essential relevant facts upon which a determination may be based are not in dispute.

Petitioner was employed as an industrial arts teacher by the Board in the 1972-73 year and his salary for that year of $12,175 was the maximum payable to a teacher with a master's degree and 14 years of previous experience. Petitioner's position was, however, abolished for the 1973-74 year and was not reestablished until the 1976-77 year at which time petitioner was employed to fill it.

In the interim the Board's salary scales for teaching staff members increased to $14,325 in 1975 for a teacher with petitioner's education and experience in 1975 and to $14,795 in 1976. Additionally, the salary scales for those years contained other provisions not contained in the 1972-73 scales. Thus, the 1975-76 scale provided additional benefits for teachers with more than 20 years of service and the 1976-77 salary scale contained these notations:

"Upon completion of 20 years service a teacher shall receive an additional

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$300.00 in the following years (sic) contract in addition to their (sic) negotiated increase.

"Any teacher with 14 or more years experience will receive a minimum of *$800.00*" (*Emphasis in text.*) (Exhibit B)

The Commissioner determines this latter provision, applicable to teachers with 14 years of prior experience, must be interpreted to mean that a teacher in the employ of the Board at the 14th year salary level in 1975-76 was entitled to a minimum salary increase of $800 in 1976-77 although the salary scales *per se* were notated as follows:

*1975-76*

| *Years of Experience* | Master's Degree |
|---|---|
| 14 | $14,325 |

*1976-77*

| | |
|---|---|
| 14 | $14,795 |

It is observed that a "minimum salary increase of $800" for a teacher in the 14th year of experience in 1975-76 would establish a salary entitlement of $15,125 in 1976-77. As noted, *ante,* petitioner received a salary of $14,795 in 1976-77. Thus, the claim in the instant matter is for a reimbursement for $320 which petitioner avers is due him. In his view he was entitled to receive the same salary in 1976-77 as others similarly situated in the employ of the Board in that year who had also been employed in the prior year. He grounds such avowal on the statute *N.J.S.A.* 18A:28-12 which provides:

> "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,* and the time of service by any such person in or with the military or naval forces of the United States or of this state, subsequent to September 1, 1940, shall be credited to him as though he had been regularly employed in such a position within the district during the time of such military or naval service." *(Emphasis supplied.)*

The Board avers that "***[a] teacher returning to a school system after being terminated as a result of a reduction in force is not under the same circumstances as a teacher who uninterruptedly continued with the school system.***" (Board's Memorandum of Law, at p. 2)

The Commissioner does not agree with this latter argument. The request

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herein is not for credit on a negotiated salary scale for services not performed because of a voluntary or enforced leave of absence. If it were, the Commissioner would deny it. (See *John Mountain v. Board of the Township of Fairview*, 1972 *S.L.D.* 526, aff'd State Board of Education 1973 *S.L.D.* 777.) The request is, instead, for a "full recognition" for "previous years of service" which had clearly been performed and which the Board recognized at the time of petitioner's separation in 1973. A failure to grant the identical recognition in 1976 is directly contrary to the statutory plan applicable to all teaching staff members who are discharged as the result of a reduction in force and subsequently reemployed. *N.J.S.A.* 18A:28-12 The Commissioner so holds.

Accordingly, the Commissioner directs the Board to pay petitioner the additional sum of $320 so that his total salary for the 1976-77 year shall be $15,125 in recognition of his "14 or more years" experience and the Board's salary scale provision that teaching staff members with such experience were entitled to a "minimum increase" of $800 in that year. Petitioner's salary for the 1977-78 academic year shall be adjusted, if necessary, in accordance with this determination.

COMMISSIONER OF EDUCATION

April 28, 1978

**Louis S. Holly,**

*Petitioner,*

*v.*

**Board of Education of the City of Passaic, Passaic County,**

***Respondent.***

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Saul R. Alexander, Esq.

For the Respondent, Louis Marton, Jr., Esq.

Petitioner, a tenured teacher employed by the Board of Education of the City of Passaic, hereinafter "Board," appeals from an action of the Board which denied him a salary increment for the 1976-77 school year and alleges that the

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Board failed to comply with the statutory prescription set forth in *N.J.S.A.* 18A:29-14. Petitioner prays that the Commissioner direct the Board to pay him the salary increment denied him and, further, to constrain the Board from withholding his salary increase and/or salary for the 1977-78 school year. The Board admits that *N.J.S.A.* 18A:29-14, as amended, is applicable in the instant matter; however, it denies that it improperly withheld petitioner's salary increment for the 1976-77 school year.

On July 5, 1977 petitioner filed a Notice of Motion for Summary Judgment and supporting Memorandum of Law. It was stipulated at a conference of counsel held September 15, 1977 that the Board's written notice to withhold petitioner's salary increment for the 1976-77 school year was insufficient to meet the requirements of *N.J.S.A.* 18A:29-14 and that petitioner was entitled to Summary Judgment. It was further stipulated that the Board would ascertain whether any other written notice was provided petitioner within ten days subsequent to its action on April 26, 1976 to withhold his increment and if so, whether any other such written notice did indeed meet the requirement of *N.J.S.A.* 18A:29-14 which provides, *inter alia*, as follows:

> "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.****"
>
> *(Emphasis supplied.)*

The Board's written notice of April 27, 1976 to petitioner stated as follows:

> "By a roll call majority vote at the April 26, 1976 meeting of the Board of Education it was decided that your salary increment and/or salary adjustment will be withheld for the 1976-77 school year.
>
> "Please note that you have the right to appeal to the Commissioner of Education." (Attached to Petition of Appeal)

Subsequent to the conference of counsel, counsel for the Board addressed a letter to the Commissioner's representative dated September 16, 1977 which stated, *inter alia*, as follows:

> "On my return, I immediately conferred with the Superintendent of Schools and the High School Principal involved. My understanding is that no written notice was specifically served 'within the 10 day period following' adoption of Board resolution.
>
> "***Petitioner was afforded two (2) separate conferences with the Superintendent and Principal regarding his work deficiencies. It is further represented that written copy of the evaluation listing such deficiencies was personally delivered to him at a conference. The administration believed

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that in so doing, the statute was complied with insofar as written notice was concerned.***''

In the absence of a Brief by the Board, the Commissioner is constrained to decide the instant matter in the same manner that he decided in the case of *Anna Gill v. Board of Education of the City of Clifton, Passaic County* 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, wherein it was stated:

''***While there is no question that the Board may withhold salary increments by virtue of its authority at *N.J.S.A.* 18A:29-14, *it must follow the precise mandate set forth.****'' *(Emphasis supplied.)* (at 666)

The Commissioner is constrained to observe that the language of the statute is precise and that ''***[*i*]*t shall be the duty* of the board of education, within 10 days, *to give written notice* of such action, together *with the reasons therefor****.'' *(Emphasis supplied.)* In regard to statutory interpretation as applied to the instant matter found in *James McCabe v. Board of Education of the Township of Brick,* 1974 *S.L.D.* 299, aff'd State Board of Education 315, aff'd Docket No. A-3192-73 New Jersey Superior Court, Appellate Division, April 2, 1975 (1975 *S.L.D.* 1073), the Commissioner stated that:

''***In ascertaining the meaning 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 statute 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 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* (3*rd ed.* 1943), *Section* 4502***'' (at 312-313)

The Commissioner concludes, therefore, that the language of the statute is unequivocal. The Board's assertion that it complied with the statute when the Superintendent and the principal informed petitioner of his alleged deficiencies prior to its action to withhold his increment is without merit.

Accordingly, the Commissioner determines that petitioner's salary increment was improperly withheld by the Board for the school year 1976-77 and directs the Board to pay petitioner the amount which was withheld from him.

COMMISSIONER OF EDUCATION

April 23, 1978

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**Edith E. Trautwein,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Bound Brook, Somerset County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold (Richard H. Greenstein, Esq., of Counsel)

For the Respondent, Westling & Lime (William P. Westling, Esq., of Counsel)

Petitioner is a teacher with a tenure status who has been employed by the Board of Education of the Borough of Bound Brook, hereinafter "Board," since 1964. She has taught English in grades seven through twelve and her duties included teaching two eleventh grade honors classes during the 1975-76 academic year. The Board withheld petitioner's increment for the 1976-77 academic year, citing petitioner's excessive absences as its reason and stating that her standard of performance is lessened and her personal effectiveness is diminished even when she is present in the classroom.

Petitioner asserts that all of her absences are legitimate and that the Board has shown no good cause for its action in withholding her increment. Petitioner avers that the Board's action should be set aside because it did not comply with the provisions of *N.J.S.A.* 18A:29-14 which require the taking of a recorded roll call majority vote, nor did the Board give her written notice of its action together with reasons within ten days of such action as the statute requires.

A hearing in this matter was conducted on December 1, 1976 in the office of the Somerset County Superintendent of Schools before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner follows:

The salient facts in this matter are not in dispute.

Petitioner submitted four evaluations of her classroom and extra classroom performance which rate her excellent and good. (Exhibits L, M, N, O) These evaluations are dated September 1974, April 30, 1975, February 19, 1976, and April 16, 1976. Included in the evaluations are the following remarks: "Mrs. Trautwein handled the Middle States Evaluation for the English Department

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successfully''; ''***very conscientious about serving on committees which set department trends. She is unusually reliable''; ''You are a very competent teacher''; ''Is firm and fair.'' The evaluations also expressed administrative concern about petitioner's many absences.

The hearing examiner finds no fault with petitioner's competence. In fact the Board stated in its Memorandum that its coordinator ''***indicated that Mrs. Trautwein had provided well prepared lesson plans for her classrooms while absent and is a very efficient and well-organized teacher.***'' (Respondent's Memorandum, at p. 2)

In the hearing examiner's judgment the issues may be summarized as set forth in the conference agreements dated October 21, 1976 as follows:

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 record shows that petitioner was absent 238 ½ days from the time of initial employment in September 1964 through February 18, 1976. Her absences included 203 ½ days for personal illness and thirty-five days for illness in the family. During the 1971-72 academic year, petitioner was absent sixty-six days from September 16, 1971 through December 23, 1971. (Exhibits A, C) Petitioner supplied a medical certificate for this absence which the record reveals was for emergency surgery and the Board, thereafter, granted her ten additional sick days with pay pursuant to *N.J.S.A.* 18A:30-6 which provides for extended illness. Petitioner was absent an additional nineteen days from January 13, 1972 through May 26, 1972 and supplied a medical certificate in late May 1972 for these additional absences. A medical certificate was also supplied for her eight day absence from January 11 through 22, 1973 and on March 20, 1973 she was notified that a medical certificate would thereafter be required for all of her absences. (Exhibit A) From that date through February 18, 1976, seventeen medical certificates from four physicians were supplied to the Board for absences caused by her illnesses.

The statutes, *N.J.S.A.* 18A:30-1 *et seq.*, provide that teachers are entitled to a minimum of ten sick days each year and that the unused sick days may be accumulated for use during a protracted illness. Provision is also made to consider each employee's sickness individually and the Board may grant extra sick days in individual cases as was done for petitioner in the 1971-72 school year. *N.J.S.A.* 18A:30-6.

The record shows that petitioner was absent because of personal illness for nine days from September 1975 through February 18, 1976 and that she supplied medical certificates for each of her absences. She missed three additional days during the same time period for family illness. (Exhibit A) Petitioner contends that these absences are neither excessive as provided for by statute, nor are they

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excessive concerning absence for illness in her family because the teachers' negotiated agreement with the Board provides for such absence. (Tr. 53) She concludes that the Board's action in withholding the increment must be based on this performance period (1975-76) since she received increments for all previous years. (Petitioner's Memorandum, at p. 14) Further, petitioner states that she has complied with the Board's demand for medical certificates which show the legitimacy of her absences and that she has offered to cooperate in any way necessary if the Board should desire to investigate the medical reasons for any past absences, including giving the Board permission to contact the physicians involved. (Petitioner's Memorandum, at p. 2) Petitioner states further that she explained to the Board at a private meeting, held April 9, 1976, concerning her absences that she "planned surgical intervention" during the summer of 1976 which should alleviate all or most of the medical problem that necessitated her absences during the 1975-76 school year. (Exhibit D)

Petitioner also argues that the Board improperly considered her absences between the time period from February 1975 through March 1976 and not the 1975-76 school year. This consideration presents a slanted picture, she avers, since it shows thirty absences, whereas, she was actually absent ten days during the 1975-76 school year.

The Board concedes that it did not precisely follow the statutory prescription set forth in *N.J.S.A.* 18A:29-14 when it voted to withhold petitioner's increment. That statute reads as follows:

> "Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment."

The Board argues, nevertheless, that its actions throughout have followed the intent and purpose of the statute. The Board contends that the minutes of its April 19, 1976 meeting reflect the identity of the six members who were present and that the minutes show a unanimous vote of those six to withhold petitioner's increment. (Exhibit F; Respondent's Memorandum, at p. 3) Prior to this meeting, petitioner was advised on March 22 and notified on March 26 of her rights and was told that the Board would meet on April 9, 1976 to discuss her record of illness and personal leave. (Exhibit B) Petitioner attended this April 9 meeting with counsel and was told that the Board would consider her matter on its April 19 agenda. Her contract, approved at the same rate of pay

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that she received in 1975-76, was mailed to her on April 20 and she acknowledged receipt by signing it on May 19. (Respondent's Memorandum, at p. 3) The Board finally voted by roll call on July 26, 1976 to confirm its action of April 19. The vote was unanimous with eight members present. (Exhibit I)

The Board argues that petitioner clearly knew the reasons for the April 9 and 19 meetings, although she was not given written notice of the action taken and reasons therefor within ten days as required by *N.J.S.A.* 18A:29-14. The Board also asserts that its vote on April 19, which was 6-0, was a unanimous vote confirmed by another unanimous vote of those present on July 26, 1977.

In the hearing examiner's judgment, the Board's action of withholding petitioner's increment must be set aside because it was grounded on improper reasons and because its action did not follow the precise requirements of *N.J.S.A.* 18A:29-14.

The statutes clearly provide ten sick days each year for each employee. *N.J.S.A.* 18A:30-2 During the 1975-76 academic year petitioner was absent twelve days, nine for personal illness and three for illness in the family. She was paid for all of these absences as provided for by law and the teachers' negotiated agreement with the Board. There were no absences exceeding her entitlement, yet the Board considered her past record in making its determination irrespective of the fact that petitioner told the Board that pending surgery would alleviate her medical problem that necessitated her absences.

The Board does not challenge the legitimacy of any of petitioner's illnesses; rather, it states that her absences adversely affected her performance and that this fact alone was good cause to withhold her increment. (Respondent's Memorandum, at p. 6) Although the Board is not required to prove its reasons for withholding an increment, the record shows that:

1. Petitioner was absent nine days for personal illness and three days for family illness during the 1975-76 academic year.

2. These absences were within the provisions of the law and the negotiated agreement.

3. There is no showing whatsoever that petitioner was other than an "excellent/good" teacher. (Exhibits L, M, N, O)

4. Support for the Board's reasons for withholding the increment is reflected only in the Board minutes of April 9, 1976, which state that research has shown that substitute teachers are ineffective replacements for classroom teachers. (Exhibit D, at p. 2) There is no showing that her personal effectiveness is diminished when she is in the classroom, nor is there any *prima facie* showing that her standard of performance has been lessened as the Board contends.

In *Anna Gill v. Board of Education of the City of Clifton, Passaic County,*

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1976 *S.L.D.* 661, aff'd State Board of Education 666, the Commissioner determined that:

> "***there is no evidence before the Commissioner that the Board ever advised petitioner of the reason until it affirmed its own decision on October 16, 1974. In the Commissioner's view, such laxity on the part of the Board is not consistent with the legislative intendment of *N.J.S.A.* 18A:29-14 that the Board advise petitioner within ten days of the action taken and the reasons therefor.
>
> "While there is no question that the Board may withhold salary increments by virtue of its authority at *N.J.S.A.* 18A:29-14, it must follow the precise mandate set forth. In the instant matter, the Board failed to do so. Consequently, it is not necessary for the Commissioner to address the validity of the belated reason of absenteeism offered by the Board in support of its controverted action herein.***" (at 665-666)

For these reasons the hearing examiner recommends that petitioner be awarded the salary increment which was withheld by the Board for the 1976-77 school year.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and reviewed the record in this matter considering the several exceptions filed by the Board. The issues to be answered are set forth in the report as follows:

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?

There is no question that excessive absenteeism may constitute good cause for withholding a teacher's increment. The record shows quite clearly that the statutes mandate a minimum of ten days for personal illness be allowed to all persons steadily employed in each school year and that during the 1975-76 school year petitioner was absent ten days because of personal illness. *N.J.S.A.* 18A:30-2 She accumulated nine days for personal illness prior to the Board's action withholding her increment. The Board's determination to count petitioner's absences from February 1975 through March 1976 cannot be supported by law or precedent. To allow the Board to arbitrarily select its own time frame in which to record employee absences would render moot that portion of the statute, *ante*, which allows employees ten days for personal illness in each school year. A school year, or academic year for teachers, is defined as that period of time between the end of the general summer vacation and the beginning

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of the next. *N.J.S.A.* 18A:1-1 Teachers may be employed for a full school year, July 1 through June 30, as opposed to an academic year; however, such is not the case in this matter. Petitioner utilized three additional days' absence for family illness as granted by Board policy. Thus, the record clearly discloses that petitioner did not exceed her leave for personal illness entitlement during the 1975-76 school year and that the Board erred by counting days missed in the 1974-75 school year as a basis for concluding that she exceeded her statutory entitlement.

Having reached this conclusion it is not necessary to review fully the procedural aspects of the Board's actions in failing to notify petitioner as the statute demands. In pertinent part that statute states that:

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

> "******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.*****"* *(Emphasis added.)*

The Board did not so notify petitioner, thus its action was also procedurally defective.

Regarding petitioner's performance or lack thereof during her absences, the Commissioner refers to the documents in evidence which are her evaluations as a teacher. (Exhibits L, M, N, O) In part, they are laudatory of her performance, although they express concern about her past absences. They clearly cannot be considered as proof that her performance suffered by her absences. Further, teacher performance was not given as a reason for withholding her increment. (Exhibits D, F)

For these reasons, the Commissioner adopts the findings of the hearing examiner and directs the Board to pay petitioner the increment improperly withheld from her for the 1976-77 academic year.

**COMMISSIONER OF EDUCATION**

April 28, 1978
Pending State Board of Education

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**Committee to Save Bayard School, Elba Zeledon** *et al.*,

***Petitioners,***

*v.*

**Board of Education of the City of New Brunswick and Frank Reen, Superintendent of Schools of the City of New Brunswick, Middlesex County,**

*Respondents.*

## COMMISSIONER OF EDUCATION

## ORDER

For the Petitioners, Middlesex County Legal Services Corporation (Claudia Slovinksy, Attorney at Law, of Counsel)

For the Respondents, Terrill M. Brenner, Esq. (Robert A. Greenberg, Esq., of Counsel)

The Petition of Appeal in this matter having been filed before the Commissioner of Education on June 28, 1977; and

It having been alleged in the Petition that the New Brunswick Board of Education's determination in April 1977 to close its Bayard School effective September 1977 was an abuse of the Board's discretionary authority, procedurally defective and otherwise illegal; and

Petitioners having moved for interim relief wherein an injunction is sought to prevent the Board from effecting structural or other irreversible changes at the Bayard School; and

The Board having filed an Answer to both the Petition of Appeal and the Motion for Injunctive Relief on July 6, 1977; and

Oral argument on the aforesaid Motion having been heard by the Commissioner's representative at the State Department of Education, Trenton, on July 6, 1977; and

The Commissioner having considered petitioners' arguments that irreparable harm will result if the Board is not prevented from altering classrooms and other structural aspects and appurtenances of the Bayard School; and

The Commissioner having similarly considered the representations of respondent both at the oral argument and in the affidavit of the Board Secretary

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that it has not, is not now, nor will be engaged in irreversible structural changes in the Bayard School prior to a determination of the dispute; and

The Commissioner, after carefully balancing the aforesaid arguments, having determined that no irreparable harm will result if the Board carries out its planned minor renovations to a limited number of its Bayard School classrooms; and

The Commissioner having further concluded that, absent a showing of irreparable harm, an order for injunctive relief is not appropriate; now therefore

IT IS ORDERED that petitioners' Motion for Interim Relief be and is denied; and

IT IS FURTHER ORDERED that the matter proceed in accordance with agreements reached at a conference of counsel held July 6, 1977.

Entered this 9th day of August 1977.

COMMISSIONER OF EDUCATION

## COMMISSIONER OF EDUCATION

## ORDER

For the Petitioners, Middlesex County Legal Services Corporation (Claudia Slovinsky, Attorney at Law, of Counsel)

For the Respondents, Terrill M. Brenner, Esq.

The Petition of Appeal in this matter having been filed before the Commissioner of Education on June 28, 1977; and

Petitioners having subsequently moved for interim relief denied by Order of the Commissioner dated August 9, 1977; and

Three days of hearing in this matter having been completed whereupon petitioners moved for an order from the Commissioner restraining the Board from its determination to close the Bayard School and as a result transfer its pupils to other schools in the district; and

It being petitioners' contention that a transfer of Bayard pupils in September would necessitate a second transfer of the same pupils if petitioners are successful in their appeal to have the Bayard school reopened; and

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It being petitioners' contention that the sound working relationship between the parents and the school has resulted in improved educational achievement of the pupils; and

It being petitioners' contention that the closing of the Bayard School violates the provision of the thorough and efficient education statute in that the Board's determination lacked the necessary community involvement; and

It appearing that the Board's decision to close the school was based on reasons of economy; and

It appearing that the Board considered also the ethnic composition of the Bayard School which was overwhelmingly Hispanic; and

It appearing that the Board has already completed its plans to transfer pupils and teachers, set schedules for teachers, establish bus routes and let bids, and distribute supplies and equipment; and

It appearing that the Board's determination was in no way sudden, unannounced or arbitrary; and

It appearing that the Board has acted within its statutory authority pursuant to *N.J.S.A.* 18A:11-1; and

It appearing that a Commissioner's determination will subsequently be rendered on the merits of the Petition of Appeal and the proofs in support thereof; and

It appearing that no good reason has been set forth which would cause the Commissioner to substitute his judgment for that of the Board when it acts within the parameters of its authority *(John J. Kane v. Board of Education of the City of Hoboken, Hudson County,* 1975 *S.L.D.* 12); and

It further appearing that there is no showing of irreparable harm to petitioners; now therefore,

The injunctive relief requested would be inappropriate and petitioners' Motion for a judgment directing the Board to reopen the Bayard School for pupils for the 1977-78 academic year is denied.

Entered this 31st day of August 1977.

COMMISSIONER OF EDUCATION

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## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioners, Middlesex County Legal Services Corporation (Claudia Slovinsky, Attorney at Law, of Counsel)

For the Respondents, Terrill M. Brenner, Esq.

Petitioning parents of pupils enrolled in the Bayard Elementary School, both individually and as members of the Committee to Save Bayard School, allege that the April 18, 1977 action of the New Brunswick Board of Education, hereinafter "Board," closing the Bayard Elementary School was an illegal act of bad faith, contrary to constitutional requirement that a thorough and efficient educational program be maintained. The Board, conversely, denies that its closing of Bayard School was illegal or other than a proper exercise of its discretionary authority.

Petitioners twice moved for interim relief seeking an order of the Commissioner of Education to prevent the Board from effecting structural changes at Bayard School and to restrain the Board from closing Bayard School in September 1977. Oral argument was conducted on those Motions at the State Department of Education, Trenton, on July 6 and August 12. Orders were issued by the Commissioner on August 9 and August 31 denying interim relief, *pendente lite,* on the basis that the Board's contemplated structural changes at Bayard School were so minor as to be reversible and that there was no showing of irreparable harm to petitioners.

A hearing in the controverted matter was conducted on August 3 through 5, 1977 at the New Brunswick High School by a hearing examiner appointed by the Commissioner. Briefs were filed subsequent to the hearing. The hearing examiner reports as follows, setting forth first those uncontroverted facts which reveal the contextual setting of the dispute:

Bayard School, containing twelve classrooms, was erected in 1797 and enlarged in 1925. The district's highest concentration of pupils with Hispanic surnames was found in Bayard School's 200 pupils enrolled during 1976-77 in its nine pre-kindergarten through fourth grade classes which were housed principally in the 1925 addition. The school also contained a gymnasium, library and auxiliary instruction rooms. The older portion of the building housed central administrative offices for the school district. (Tr. II-106)

Following the municipal governing body's reduction of the Board's proposed 1977-78 budget by $1,400,000, an agreement was reached by the Board and the governing body to restore $1,050,000 of that amount to the Board thus effecting a lesser reduction of $350,000. The Board estimates that the closing of Bayard School and redistricting of its pupils will effect a savings of $102,700. The reduction of the budget was not appealed to the Commissioner. (Tr. II-92-

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113) The Board, at its April 18, 1977 meeting, for which adequate public notice was posted, adopted in public session the following resolution:

> "***Be It Resolved, that the New Brunswick Board of Education adjourn this open meeting and move into closed session to discuss matters of personnel the decisions or conclusions of which will be made known to the public at the next public meeting or as soon thereafter as the Board deems appropriate. This Board will reconvene this evening in Open Session at approximately 6:30 p.m.***" (Board's Exhibit, at p. 6)

The Board discussed in closed session the feasibility of closing Bayard and/or other schools and the resulting effect upon personnel and the budget. Immediately thereafter it reconvened in open session and unanimously adopted motions to accept a restoration of $1,050,000 by the municipal governing body to the Board's budget and to close Bayard School. (*Id.*, at pp. 6-7) Announcements of these actions were also made at the Board's regular public meeting on April 19. (Board's Exhibit 4, pp. 6-8) Thereafter, at a number of meetings petitioners and others, to no avail, sought to persuade the Board to rescind its action of April 18. (Tr. I-39-44, 73; Tr. II-24, 71-72; Tr. III-42-43) The Petition of Appeal was filed with the Commissioner on June 28, 1977.

Testimony of those who testified at the hearing is succinctly summarized as follows:

Parents of Bayard School pupils testified that they were frequent and welcome visitors to Bayard School and its classes. They asserted that teachers frequently visited in their homes and that such visits with their children's teachers, counselors and administrators promoted a wholesome working relationship between the home and the school which was effective in fostering their children's educational development and good discipline at the school. (Tr. I-28-33, 52) That such a close working relationship had been actively promoted and effected was corroborated by the principal and teachers of Bayard School and by liaison personnel whose assignment is district-wide. (Tr. I-78-90, 135-141, 147; Tr. II-4-8, 16-18, 37, 63)

Parents who testified expressed concern that such effective relationships between home and school might not exist in the schools to which their children would be reassigned. They expressed similar apprehension that their children might not have access to needed bilingual instruction classes of which there were seven at Bayard School. (Tr. I-44, 63) Parents testified, however, that they would attempt to continue to confer with their children's teachers wherever they were enrolled. Similarly, the principal and teachers of Bayard School and community liaison personnel employed by the Board testified that they would continue in their efforts wherever they might be reassigned to promote effective communication between themselves and parents. (Tr. I-44, 96-99, 141, 169; Tr. II-13, 27) The Board's coordinator of bilingual instruction testified that both Bayard School and all other elementary schools in the district were effectively providing bilingual instruction for pupils who needed it. (Tr. II-63, 74)

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Parents and teaching staff personnel who testified stated that they were neither consulted nor aware that the Board was considering the closing of Bayard School until the closing was announced after the April 18 meeting. (Tr. I-33, 38, 90, 150; Tr. II-8) The Bayard School principal testified that in her opinion the Board, prior to taking formal action, should have consulted with and solicited her aid and that of her staff in acquainting parents of pupils at Bayard School with details of the proposed closing. (Tr. I-126-128) The principal testified, however, that she had been aware for a period of thirteen years of sporadic proposals and related studies concerning the closing of Bayard School. (Tr. I-91) Similar testimony was heard from one parent who testified. (Tr. I-47)

The Board Secretary testified that during March 1977 the Board discussed the possible closing of three schools and that he had caused to be published on March 1 in a local newspaper an article concerning budget reductions and possible school closings under discussion. (Board's Exhibit 2, at p. 2) Of the Board's April 18 meeting he stated:

> "***Actually, there was discussion within that closed meeting, and the decision on those matters was reserved for the open session.***"
>
> (Tr. II-124)

The Board Secretary testified that the Board proposes to utilize Bayard School to house its child study teams and coordinators and that the space thus utilized, together with a reduction of teaching staff members resulting from the closing, will effect a net savings to the district of $91,300 in salaries and $11,400 in parking and rental costs. He testified also that the Board will bus pupils reassigned to Lincoln School at an estimated cost of less than $5,000 annually. (Tr. II-134)

The Superintendent testified that, following the reductions of its budget, the Board and its administrative officers had on a number of occasions discussed various proposals to economize, including the possibility of closing Bayard School. That testimony is corroborated by documentary evidence. (R-3 through R-6A) He related that on April 18 the possible closing of Bayard School had been an agenda item discussed at a monthly teachers' meeting to which representatives from each school in the district were invited but which no representative from Bayard School attended.

The Superintendent testified that anticipated 1977-78 enrollment approximated that of 1976-77 and that, of the 200 pupils at Bayard School in 1976-77, 35 had, in error, been allowed to enroll there although they lived in other attendance districts. He stated that those 35 pupils will, in the ensuing year, be enrolled in schools serving their own attendance districts, that 35 others will be in fifth grade classes, and that, of the remaining pupils, 45 will be bused to Lincoln School and 85 will walk to Lord Stirling School located two blocks from Bayard School. (Tr. III-13-18) He testified that in his opinion the instructional facilities and the educational programs, including bilingual instruction, at the schools to which former Bayard School pupils are reassigned are equal or superior to those at Bayard School. That opinion was echoed by the Board's

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supervisor of bilingual instruction who, in a deposition taken in lieu of oral testimony at the hearing, stated:

> "***I sincerely believe that the academic instruction will not be diminished in any way and I believe that the bilingual ESL and Native Language Instruction would not diminish***. [W]e've been able to increase the amount of English as a Second Language Instruction that is available to these students as they go on to one new building, which is Lincoln School.***" (R-8, at p. 38)

The supervisor of bilingual instruction stated that, of the 160 pupils in Bayard School receiving bilingual instruction, many, because of their ability to speak and read English, were not required by law to be enrolled in bilingual programs. (R-8, at pp. 10-18) She testified that all seven teachers at Bayard School who were engaged in bilingual instruction were reassigned to bilingual classes in other schools for the ensuing year and that the district was increasing by five the number of its bilingual instructional staff. (R-10, at pp. 18, 26)

Petitioners contend that the Board agreed while in private session to close Bayard School and redistrict its pupils and that such action, taken under guise of discussing personnel matters and followed in summary fashion by a vote in public meeting was violative of the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq*. Petitioners argue that the Board's reliance on the mere fact that a school closing would necessitate a transfer of teaching personnel makes a mockery of the Open Public Meetings Act which iterated that legislative desire that the public have the right to attend all meetings of public bodies save those where personal privacy or guaranteed rights of individuals would be in danger of unwarranted invasion. Petitioners also argue that the Board failed to give adequate notice to the public at its meeting of April 18 of the scope of its proposed discussions or of the reasons it was going into private session. (Petitioners' Brief, at pp. 3-5)

Petitioners contend further that the Board's closing of Bayard School violates *N.J.S.A.* 18A:7A-2(a)(6) which states:

> "A thorough and efficient system of education includes local school districts in which decisions pertaining to the hiring and dismissal of personnel, the curriculum of the schools, the establishment of district budgets, and other essentially local questions are made democratically with a maximum of citizen involvement and self-determination and are consistent with Statewide goals, guidelines and standards***."

Petitioners aver that the Board purposely excluded the public from all consideration and discussion of the closing of Bayard School and that opportunities furnished after the fact of its closing do not constitute compliance. Petitioners, maintaining that "***if a public meeting is to have any meaning or value, final decision must be reserved until fair opportunity to be heard thereat has been afforded***," cite *Cullum v. Board of Education of the Township of North Bergen,* 15 *N.J.* 285 (1954). (Petitioners' Brief, at pp. 6-7)

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Petitioners argue that the Bayard School staff, after years of effort, has demonstrated a cohesiveness with the inner city community it serves which is in unique compliance with the constitutional mandate of a thorough and efficient education. They aver that such excellence argues eloquently that Bayard School should continue as a model rather than be closed. *Robinson v. Cahill,* 62 *N.J.* 473 (1973) (*Id.*, at pp. 8-11)

The Board argues, conversely, that the Legislature had clothed it with discretionary authority to close a school if it considers that closing to make best use of the physical assets of the district. *Silverman v. Board of Education of the Township of Millburn,* 134 *N.J. Super.* 253 (*Law Div.* 1975); *Boult v. Board of Education of Passaic,* 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.&A.* 1948) The Board contends that its discretionary authority was in no way diminished by the passage in 1975 of *N.J.S.A.* 18A:7A-1 *et seq.* (Respondent's Brief, at pp. 1-2)

The Board maintains that, faced with severe time constraints precipitated by budget reductions necessitating a reduction in force, its private discussion of personnel matters involving the closing of a school and its subsequent vote in public session to close a school were in compliance with applicable law. The Board offers, as further justification for its closed session discussion, the fact that it was faced with litigation of the budget reduction before the Commissioner if it refused to accept the municipal governing body's modified reduction of $350,000, *ante.*

The Board contends that *Cullum, supra,* is importantly distinguishable for the reason that personnel matters therein were discussed in the absence of minority members of the North Bergen Board, whereas in the instant matter all Board members were present and privy to relevant discussions. (Respondent's Brief, at pp. 3-7) The Board also contends that its actions were in compliance with dicta of the Court in *Jones v. East Windsor Regional Board of Education,* 143 *N.J. Super.* 182 (*Law Div.* 1976) wherein it was said:

> "***The court does not find from the [Open Public Meetings] Act itself any requirement on the part of the public body to engage in public discussion. The requirement is that the public has the right to witness whatever discussion or lack of discussion the school board is involved in and thereafter decide for themselves by their franchise whether they want to keep people in office who do not discuss issues of public interest but merely decide them without discussion.***" (at 192-193)

The Board avers that it has provided and will continue to provide bilingual education with required parental involvement, pursuant to *N.J.S.A.* 18A:35-15 *et seq.* The Board contends also that its determination on April 18 to close Bayard School was not violative of *N.J.S.A.* 18A:7A and was, in any event, after April 18, subjected to the scrutiny of segments of public opinion which attempted at numerous well-attended meetings to convince the Board that it should rescind its action. (Respondent's Brief, at pp. 7-12) Thus, the Board holds that its action was a legal exercise of its discretionary authority in the best

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interests of pupils of the entire district, that its action was legally taken for good and sufficient reasons, and that the Commissioner should deny the relief sought by petitioners. (*Id.*, at pp. 12-15)

The hearing examiner, having carefully reviewed the pleadings, testimony and documentary evidence in the record and Briefs of counsel, herewith sets forth his findings of fact and recommendations to the Commissioner:

1. The Board in April 1977 was faced with time constraints which compelled it to determine by April 18 whether to accept the governing body's offer of settlement of the controverted budget. It was also under constraint of *N.J.S.A.* 18A:27-10, which requires that nontenured teachers be notified by April 30 of their employment status for the ensuing year.

2. The Board, having considered, *inter alia*, the closing of Bayard School and other schools since the reduction of its budget in February 1977, held its April 18, 1977 meeting, the time and place of which had been duly posted for three months. (Board's Exhibit 4, at pp. 3-4) That meeting was not a special meeting. Accordingly, the Board was under no compulsion to announce in advance to the public those items of business to be considered or acted upon in that meeting. Nor was the Board under legal obligation to allow public comment at that meeting. *Jones, supra* The allegations of violation of the Open Public Meetings Law are improperly before the Commissioner. Parties making such challenge should institute a proceeding in lieu of prerogative writ in the Superior Court within forty-five days of the action sought to be voided. *N.J.S.A.* 10:4-15 Accordingly, it is recommended that the Commissioner decline to rule on that issue for lack of jurisdiction.

3. The Board, after resolving to go into executive session for the purpose of discussing personnel matters, did discuss, *inter alia*, the closing of Bayard School which had as a corollary a reduction in force which would result in savings of $91,300 to the district.

4. After that discussion the Board reconvened in public session and determined both to accept the governing body's restoration of $1,050,000 to its budget and to close Bayard School. By the Board's own rules the April 18 meeting was a conference meeting at which it could conduct official business and at which the public was present but not allowed to speak.

5. The Board and its administrative agents met on numerous occasions after April 18 with citizens who protested the closing of Bayard School, but were unsuccessful in their efforts to cause the Board to rescind its actions.

6. Bayard School in 1976-77 was a cohesive, effective educational unit of dedicated teachers under strong leadership, effectively serving the needs of its pupils, among which was the highest concentration of children of Hispanic origin within the district.

7. All teaching staff members of the Bayard School faculty, except one

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nontenured teacher who was among those affected by the district's reduction in force, have been reassigned to comparable positions in which they may be expected to perform with similar effectiveness in the Board's educational program.

It is recommended that, based on the above findings of fact, the Commissioner determine that the Board acted in compliance with the Open Public Meetings Act on April 18 when it determined to close the Bayard School. It is further recommended that the Commissioner determine that there is within the record insufficient evidence to conclude that the Board's closing of Bayard School, effective September 1, 1977, was violative of *N.J.S.A.* 18A:7A-1 *et seq.* or of *Robinson, supra,* or an abuse of the Board's discretion. Lastly, it is recommended that the Commissioner dismiss the Petition of Appeal for the reason that petitioners have failed to meet their burden of proving the validity of the allegations therein. *Silverman, supra; Cullum, supra; Boult, supra; James Tolliver et al. v. Board of Education of the Borough of Metuchen,* 1970 *S.L.D.* 415; *Mrs. John Engle et al. v. Board of Education of the Township of Cranford,* 1974 *S.L.D.* 785, aff'd State Board of Education 1975 *S.L.D.* 1085; *John J. Caffrey, Jr., et al. v. Board of Education of the Township of Millburn,* 1975 *S.L.D.* 630

* * * *

The Commissioner has reviewed the entire record of the controverted matter, including the hearing examiner report and the exceptions thereto filed by petitioners pursuant to *N.J.A.C.* 6:24-1.17(b). No exceptions were filed by the Board.

Petitioners allege that the Board, by discussing the closing of Bayard School at its executive session of April 18, 1977, violated the Open Public Meetings Act. A review of the record convinces the Commissioner that the Board desired to discuss, in executive session, both the reduction of its budget by the municipal governing body and the effect of a school closing on individual professional and nonprofessional employees. The desire to shield individuals whose current positions of employment might or might not be altered or eliminated by a school closing was a valid consideration. Such discussions, however, are limited in scope and do not extend to the advisability of closing a given school, consideration of which should be held in public session. It is clear, however, that final action on the closing was reserved for the public session. (Tr. II-124)

Petitioners failed to avail themselves of their legal right to challenge the Board's actions of April 18. That right is provided by *N.J.S.A.* 10:4-15(a) as follows:

> "Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public; provided, however, that a public body may take corrective

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or remedial action by acting de novo at a public meeting held in conformity with this act and other applicable law regarding any action which may otherwise be voidable pursuant to this section***.''

Having exceeded the statutory time constraint of filing before a court within 45 days of the complained of action, petitioners now improperly seek a ruling declaring the meeting illegal from the Commissioner who was not clothed by the Legislature with jurisdictional authority over matters arising from the Open Public Meetings Act. Such a ruling, absent a showing of bad faith, illegality or thwarting of the legislative intent, as was found by the Court to have prevailed in *Cullum, supra,* would be inappropriate.

Petitioners, in the instant matter, charge that the Board did not act in good faith. Their conclusion is based primarily upon the limited nature of opportunity, prior to the Board's decision to close Bayard School, which was afforded the public to express opinions on that proposed course of action. While the Commissioner does not disagree with the contention that that opportunity was of limited scope, it cannot be claimed that it was non-existent. Numerous witnesses, including those called by petitioners, testified that for a period of years the fact that the closing of Bayard School had been considered by the Board was a matter of public knowledge. (Tr. I-47, 91) (See R-2, at pp. 76, 137.) The uncontroverted testimony of the Board Secretary convinces the Commissioner that, following a Board meeting attended by hundreds of citizens, there were published on March 25 newspaper articles stating that the closing of Bayard or other schools could result from reduction which the municipal governing body had made in the Board's budget in February. Therein, Bayard School was mentioned by name. (Board's Exhibit 2, at p. 2) Although members of the public could not conclude with certainty from newspaper accounts that the Board would choose to close Bayard School, they were afforded opportunity thereby to express in writing or in person to the Board and its members any opposition they had to that course of action.

The Commissioner is constrained, in spite of the very real fiscal and time constraints with which the Board was faced, to caution this Board and all boards of education that in so sensitive a matter as the proposed closing of a neighborhood elementary school the members of the public, as well as school employees, should be given ample opportunity to react to that proposal *before* final action is taken.

Nevertheless, given the factual context set forth by the hearing examiner, which the Commissioner henceforth adopts as his own, the Board's action to close the Bayard School was not without rational basis. Nor were members of the public precluded from expressing their opinions to the Board or its members in writing or in person from March 25 through April 18. Absent a preponderance of credible evidence that its decision was reached as the result of illegality, bad faith, abuse of discretion or that its action was contrary to the provisions of the Public School Education Act of 1975, the Board's determination must be upheld. The Commissioner so holds. *Schinck v. Board of Education of Westwood Consolidated School District,* 60 *N.J. Super.* 448 (*App. Div.* 1960), *Boult and*

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*Harris v. Board of Education of the City of Passaic*, 1939-49 *S.L.D.* 7 (1946), aff'd State Board of Education 15, aff'd 135 *N.J.L.* 329 (*Sup. Ct.* 1947), aff'd 136 *N.J.L.* 521 (*E.&A.* 1948)

Having failed to carry the burden of proof in support of their allegations, petitioners are not entitled to the relief which they seek. Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

May 1, 1978

**Board of Education of the Township of Gloucester,**

*Petitioner,*

*v.*

**Mayor and Council of the Township of Gloucester, Camden County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Maressa and Wade (John D. Wade, Esq., of Counsel)

For the Respondent, Charles G. Palumbo, Esq.

Petitioner, the Board of Education of the Township of Gloucester, hereinafter "Board," appeals from an action of the Mayor and Council of the Township of Gloucester, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Camden County Board of Taxation a lesser amount of appropriations for school purposes for the 1977-78 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on September 27, 1977 at the State Department of Education, Trenton, and November 14, 1977 at the Gloucester Township Municipal Building before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held March 29, 1977, the Board submitted to the electorate proposals to raise $3,774,668 by local taxation for current expense and $35,719 for capital outlay costs of the school district. These items

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were rejected by the voters and, subsequent to the rejection, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in Gloucester Township for the 1977-78 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determinations and certified to the Camden County Board of Taxation an amount of $3,337,316 for current expense and $35,719 for capital outlay. The pertinent amount in dispute is shown as follows:

*CURRENT EXPENSE*

| | |
|---|---|
| Board's Proposal | $3,774,668 |
| Council's Proposal | 3,337,316 |
| Amount Reduced | $ 437,352 |

The Board contends that Council's action was arbitrary, unreasonable and capricious and documents its need for restoration of the reductions recommended by Council with written testimony and a further oral exposition at the time of the hearing. Council maintains that it acted properly and after due deliberation and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. Council also supports its position with written and oral testimony. As part of its determination, Council suggested specific line items of the budget in which it believed economies could be effected as follows:

CHART I

| Account Number | Item | Board's Proposal | | Amount Reduced |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J110b | Sal., Bd. Secy. Off. | $ 81,400 | $ 75,400 | $ 6,000 |
| J130a | Exps., Bd. of Ed. | 9,500 | 6,000 | 3,500 |
| J213a | Sal., Tchrs. | 4,247,385 | 4,227,385 | 20,000 |
| J214b | Sal., Guid. Pers. | 100,521 | 95,790 | 4,731 |
| J215a | Sal., Prin. Secy. | 88,531 | 83,531 | 5,000 |
| J410a3 | Sal., Nurses | 103,290 | 102,290 | 1,000 |
| J510b | Sal., Bus Drivers | 238,185 | 230,128 | 8,057 |
| J535 | Purch. of New Vehicle | 13,000 | - 0 - | 13,000 |
| J540 | Pupil Trans. Ins. | 31,980 | 116,980 | 15,000 |
| J630 | Heat-Bldgs. | 185,000 | 165,000 | 20,000 |
| J640a | Water and Sewerage | 28,000 | 25,700 | 2,300 |
| J640c | Gas (not heating) | 11,500 | 8,500 | 3,000 |
| J640d | Telephone | 26,000 | 22,000 | 4,000 |
| J660d | Misc. Exps. | 795 | 750 | 45 |
| J710b | Sal., Repair of Bldgs. | 84,788 | 62,000 | 22,788 |

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| | | | | |
|---|---|---|---|---|
| J720c | Contr. Servs., Equip. Rep. | 18,020 | 13,020 | 5,000 |
| J730a | Repl. Equip. Instr. | 15,900 | 10,600 | 5,300 |
| J730b | Repl. Equip., Noninstr. | 15,900 | 9,900 | 6,000 |
| J730c2 | New Equip., Health Servs. | 1,500 | 1,000 | 500 |
| J730c4 | New Equip., Maint. of Plant | 3,500 | 2,000 | 1,500 |
| J730c6 | New Equip., Adm. | 5,000 | 1,000 | 4,000 |
| J740a | Upkeep of Grnds. | 5,250 | 2,750 | 2,500 |
| J810a | Pension | 92,000 | 80,000 | 12,000 |
| J820a | Property Ins. | 35,000 | 4,000 | (5,000) |
| J820b | Empl. Ins. | 318,200 | 313,200 | 5,000 |
| J920 | Food Servs., Oth. Exps. | 10,000 | 5,000 | 5,000 |
| | SUBTOTALS | $5,770,145 | $5,599,924 | $170,221 |
| From Free Approp. Bal. | | | | 267,131 |
| | TOTAL REDUCTION | | | $437,352 |

The hearing examiner has carefully considered the line item reductions in the light of the evidence adduced at the hearing and the written testimony of the parties. The hearing examiner herewith sets forth his recommendations concerning certain major reductions proposed by Council:

*J110b Salaries, Board Secretary's Office* *Reduction $6,000*

The hearing examiner finds the goal of the Board in training a replacement for its retiring secretary necessary for a smooth transitional period.

*J130a Expenses, Board of Education* *Reduction $3,500*

There is no evidence in the record that shows this item to be necessary to the thorough and efficient education of the pupils in the district.

*J213a Salaries, Teachers* *Reduction $20,000*

The hearing examiner finds that this restoration of funds is necessary because of the increase in handicapped pupils in the district. (Tr. I-19)

*J214b Salaries, Guidance Personnel* *Reduction $4,731*

The hearing examiner finds these funds necessary to provide additional counseling services for the pupils of the district beyond a ten month period.

*J215a Salaries, Principal's Secretary* *Reduction $5,000*

The hearing examiner finds the restoration of $2,500 necessary to enable the Board to provide some degree of clerical assistance for the assistant principal.

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*J410a3 Salaries, Nurses* *Reduction $1,000*

This item is necessary to the safety and health of the pupils in the district.

*J510b Salaries, Bus Drivers* *Reduction $8,057*

There is no evidence in the record that shows this item to be necessary to the thorough and efficient education of the pupils in the district.

*J535 Purchase of New Vehicles* *Reduction $13,000*

This sum is not recommended to be restored as the record shows the purchase of two new vehicles from the previous budget. (Tr. I-37-38)

*J640a Water and Sewerage* *Reduction $2,300*

This represents an estimated 6 percent increase over last year. The record is devoid of any evidence of actual percentage increases.

*J640c Gas* *Reduction $3,000*

The remaining budgeted amount represented a 26 percent increase over last year's expenditure.

*J640d Telephone* *Reduction $4,000*

There is no evidence in the record that shows this item to be necessary to the thorough and efficient education of the pupils in the district.

*J710b Salaries, Repair of Buildings* *Reduction $22,788*

The restoration of $19,788 would enable the Board to restore its summer maintenance program. (Tr. I-44)

*J720c Contracted Services, Equipment Repair* *Reduction $5,000*

The recommended restoration in this line item is the same as last year's expenditure, plus a 7 percent increase.

*J730a Replacement of Instructional Equipment* *Reduction $5,300*

The restoration of these funds is necessary to the thorough and efficient education of the pupils in the district.

*J730b Replacement of Noninstructional Equipment* *Reduction $6,000*

The record shows that a new truck was purchased in the spring of 1977. (Tr. I-48) No restoration is necessary for that purpose.

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| | |
|---|---|
| *J810a Pension* | *Reduction $12,000* |
| *J820b Property Insurance* | *Reduction $5,000* |

This restoration of $10,000 and $5,000 is necessary to permit payment at the equivalent of last year's rate and to cover new employees. (Tr. II-50-51)

The restoration of $60,000 of the $267,131 reduction of free appropriation balance by Council is explained as follows:

The Audit Report for July 1976 to June 30, 1977 shows—

| | |
|---|---|
| Free Approp. Bal. | $397,035 |
| Approp.-Tax Purposes (Tr. I-34) | 150,000 |
| Balance | $247,035 |
| Reduction-Free Approp. Bal. | 267,131 |
| Overexpenditure | ($20,096) |

(B-1, Section A-2)

This represents, in effect, an anticipated overexpenditure of the free appropriation balance by the amount of $20,096, an impropriety in itself but, further, leaving no provision for unexpected emergencies that may arise during the 1977-78 school year. In *Board of Education of the City of Perth Amboy v. Mayor and Council of the City of Perth Amboy and Board of School Estimate of the City of Perth Amboy, Middlesex County,* 1977 *S.L.D.* 228 the Commissioner stated that "***while there is no statutory mandate with respect to a board of education maintaining an appropriated current expense balance, it is unreasonable to expect a *** school budget to have no provision for unexpected emergencies that may arise.***" (at 230)

Accordingly, by recommending the restoration of $60,000 the hearing examiner finds that the deficit in free appropriation balance is rectified and the Board has an approximate $40,000 minimal free balance remaining.

In summary, the following amounts are recommended to be restored:

CHART II

| Account Number | Item | Amount of Reduction | Amount Restored | Amount not Restored |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J110b | Sal., Bd. Secy. Off. | $ 6,000 | $ 6,000 | $ - 0 - |
| J130a | Exps., Bd. of Ed. | 3,500 | - 0 - | 3,500 |
| J213a | Sal., Tchrs. | 20,000 | 20,000 | - 0 - |

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| | | | | |
|---|---|---|---|---|
| J214b | Sal., Guid. Pers. | 4,731 | 4,731 | - 0 - |
| J215a | Sal., Prin. Secy. | 5,000 | 2,500 | 2,500 |
| J410a3 | Sal., Nurses | 1,000 | 1,000 | - 0 - |
| J510b | Sal., Bus Drivers | 8,057 | - 0 - | 8,057 |
| J535 | Purch. of New Vehicle | 13,000 | - 0 - | 13,000 |
| J540 | Pupil Trans. Ins. | 15,000 | 15,000 | - 0 - |
| J630 | Heat-Bldgs. | 20,000 | 15,000 | 5,000 |
| J640a | Water and Sewerage | 2,300 | - 0 - | 2,300 |
| J640c | Gas (not heating) | 3,000 | - 0 - | 3,000 |
| J640d | Telephone | 4,000 | - 0 - | 4,000 |
| J660d | Misc. Exps. | 45 | - 0 - | 45 |
| J710b | Sal., Repair of Bldgs. | 22,788 | 19,788 | 3,000 |
| J720c | Contr. Servs., Equip. Rep. | 5,000 | 4,000 | 1,000 |
| J730a | Repl. Equip. Instr. | 5,300 | 5,300 | - 0 - |
| J730b | Repl. Equip. Noninstr. | 6,000 | - 0 - | 6,000 |
| J730c2 | New Equip., Health Servs. | 500 | - 0 - | 500 |
| J730c4 | New Equip., Maint. of Plant | 1,500 | - 0 - | 1,500 |
| J730c6 | New Equip., Adm. | 4,000 | - 0 - | 4,000 |
| J740a | Upkeep of Grnds. | 2,500 | - 0 - | 2,500 |
| J810a | Pension | 12,000 | 10,000 | 2,000 |
| J820a | Property Ins. | (5,000) | | |
| J820b | Empl. Ins. | 5,000 | 5,000 | - 0 - |
| J920 | Food Servs., Oth. Exps. | 5,000 | - 0 - | 5,000 |
| | SUBTOTALS | $170,221 | $108,319 | $ 61,902 |

Balance of free appropriations 1975-76 per audit report not anticipated by Board $135,131

Estimated appropriation free unappropriated balance 1976-77 $ 13,200

| | | | |
|---|---|---|---|
| Free Approp. Bal. | $267,131 | $ 60,000 | $207,131 |
| TOTALS | $437,352 | $168,319 | $269,033 |

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the instant matter including the report of the hearing examiner and observes that exceptions have been filed by the Board pursuant to *N.J.A.C.* 6:24-1.17(b). The Commissioner accepts the report of the hearing examiner except as hereinafter noted. The Board pleads continued expenditure from, and resultant overexpenditure of, line item J130a subsequent to the filing of the Petition of Appeal. The Commissioner determines that its overexpenditure in this sector of its budget required a commensurate reduction in other line items of the budget, since the Board has failed in its burden to prove its needs in J130a.

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The Commissioner observes that in certain items the Board's exceptions are based on conclusionary statements as in J215a, 640d and 740a. Such statements of themselves are not sufficient to maintain the Board's burden of proof and do not meet the guidelines of the New Jersey Supreme Court in the case of *Board of Education of the Township of East Brunswick v. Township Council of East Brunswick*, 48 *N.J.* 94 (1966).

The Commissioner finds the record barren of proof that field trips involving bus drivers are part of the mandate of *N.J.S.A.* 18A:7A-1 *et seq.* as alleged by the Board in support of its rationale as set forth in line item J510b.

The Board alleges its need to purchase a new vehicle, but no analysis is made to show the use and scheduling of the proposed new bus nor that such use cannot be accomplished by the proper scheduling of two previously purchased vehicles. That omission is fatal to the Board's request that restoration be made to line item J535.

In considering line item J810a, Pensions, the Commissioner has examined the statement from the Division of Pensions showing the proposed payment by the Board to the Public Employees' Retirement system of $94,509 and determines the need for restoration of an additional $2,000 not included in the hearing examiner's report.

Finally the Commissioner determines that the Board's pleading that this matter be decided precisely as in the matter *Perth Amboy, supra,* is inappropriate. Restoration of funds to the free balance has been made sufficient to generate an immediate surplus of $39,904. The Commissioner, observing that historically the Board has maintained a free balance, deems the aforestated restoration sufficient.

Accordingly, it is found and determined that in addition to the amounts previously certified to the Camden County Board of Taxation, the amount of $170,319 for current expenses is required for a thorough and efficient operation of the school district during the 1977-78 school year. The Commissioner certifies to the Camden County Board of Taxation to be raised by public taxation the amount of $170,319 in addition to the amount previously certified for the current expenses of Gloucester Township School District for the 1977-78 school year.

The Board is authorized to appropriate to the revenue portion of its 1977-78 current expense budget the amount of $207,131 from its unappropriated free balance. This is in addition to its original appropriation of $150,000 for a total appropriation of $357,131.

The net effect of the aforementioned actions is to increase the current expense tax levy from $3,337,316 to $3,507,635. The equalization aid for the 1978-79 school year is thereby increased by $92,466 from $3,950,403 to $4,042,869. The maximum permitted net current expense budget for 1978-79 is thereby increased by $154,710 from $7,949,079 to $8,103,789.

COMMISSIONER OF EDUCATION

May 5, 1978

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**Ruth Levitt and Esther Sasloe,**

*Petitioners,*

*v.*

**Board of Education of the City of Newark, Essex County,**

*Respondent.*

**COMMISSIONER OF EDUCATION**

**ORDER**

For the Petitioners, Paul J. Giblin, Esq.

For the Respondent, Cecil Banks, Esq.

This matter having been decided by the Commissioner of Education and incorporated by reference herein as *Ruth Levitt and Esther E. Sasloe v. Board of Education of the City of Newark, Essex County,* 1977 *S.L.D.* 1063 wherein petitioners alleged that the City of Newark Board of Education, hereinafter "Board," assigned them to positions of long term substitutes prior to their regular full-time employment, thereby denying them tenure protection and other benefits as full-time teaching staff members; and

The Commissioner having rejected the Board's argument that petitioners' claims were untimely and found that they had acquired tenure during the period of time therein controverted, whereby, the Commissioner directed the Board to compensate petitioners accordingly; and

Subsequent thereto the Commissioner, having been apprised by counsel for petitioners in writing in February and again on March 7, 1978 that the Board had failed to comply with the Commissioner's original ruling or his subsequent directive of February 15, 1978 to that effect, accordingly directs the Board without further delay to comply with his original ruling in this matter on or before May 30, 1978; and

Absent written notification to be filed with the Commissioner by the Board to this effect on or before the date hereinbefore set forth, this matter will be directed to the office of the State Attorney General for further proceedings; now therefore

IT IS SO ORDERED this 8th day of May 1978.

COMMISSIONER OF EDUCATION

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**Elna A. Large,**

*Petitioner,*

*v.*

**Board of Education of the Borough of Roseland, Essex County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Malovany & Rochkind (Mark H. Rochkind, Esq., of Counsel)

For the Respondent, Riker, Danzig, Scherer & Debevoise (Peter N. Perretti, Jr., Esq., of Counsel)

Petitioner, a teacher with certification in elementary education when initially employed and who in May, 1977 acquired certification in music education, has been in the continuous employ of the Board of Education of the Borough of Roseland, hereinafter "Board," since 1967. Petitioner protests her reassignment from the position of full-time vocal music teacher to a new position as vocal music teacher, four days per week. Petitioner claims entitlement to a full-time teaching position by reason of her tenure status. The Board contends that its action was legal and proper and argues that petitioner's seniority rights entitled her to first choice to a four day per week music teaching position and denies petitioner's entitlement to a full five day per week elementary teaching position.

A conference of counsel was held December 8, 1976 at the State Department of Education, Trenton, where it was agreed that the matter would be submitted to the Commissioner of Education for adjudication based on the pleadings, facts and memoranda of law.

Petitioner was first employed by the Board September 1, 1967 and taught on the elementary level as a classroom teacher and supplemental teacher for the school years 1967-68 and 1968-69. Petitioner was assigned to teach vocal music on September 1, 1969, a position in which she served until its abolishment by action of the Board at its meeting of April 22, 1976. Subsequently, the Board offered petitioner a new position as vocal music teacher, four days per week which she accepted, under protest. Petitioner served in this four-fifths position for the fall semester of 1976 and received four fifths of the amount of salary she would have received for a full-time position. Commencing with the second semester of the 1976-77 school year petitioner was offered and accepted a fifth day of teaching duties as a supplemental teacher and since that time she has been receiving full pay. At issue is a determination of petitioner's seniority

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rights and her possible entitlement to back pay on a full contractual basis for one half of the 1976-77 school year.

The Commissioner is constrained to point to the impropriety of the Board in the assignment of petitioner to a position for which she is not properly certified. The "Regulations and Standards for Certification" do not permit the holder of an elementary teaching certificate, encompassing numerous common branch subjects, to teach for more than half time in a subject matter area such as vocal music for which there are special teaching certificates. *N.J.A.C.* 6:11-6.2(b)

The Commissioner has examined the record before him and determines that the Board erred in denying petitioner entitlement to a full five day per week elementary position by virtue of her tenure status and consequent seniority rights. Petitioner alleges that she was granted tenure at the end of her second year which, the Commissioner notices, the Board cannot do unless all classroom teachers are accorded the same right. The record reveals no such action by the Board. See *Rall v. Board of Education of the City of Bayonne,* 104 *N.J. Super.* 236 (*App. Div.* 1969) as follows:

> "***We regard the foregoing construction of the statute as so obvious from its language and apparent purpose as to defy the contention that it authorizes a local board to simply select an individual member of an employment category who has served less than three years and confer tenure upon him alone, by name, *ad hoc,* without in any way undertaking to fix a specific, generally applicable, shorter-than-three-years term of service for achievement of tenure by members of that individual's staff category or of any category inclusive of his.***"
>
> (at 243)

Petitioner holds seniority rights to a full-time elementary teaching position with full service rights established by the tenure statutes *N.J.S.A.* 18A:28-5 and *N.J.A.C* 6:3-1.10(h) and (i). When she was first employed she held certification as an elementary classroom teacher and performed on the elementary level as assigned by the Board. Petitioner's subsequent service for seven years as a vocal music teacher, albeit improper, was again by assignment of the Board which determined that such assignment in its judgment best met the needs of the district. Petitioner could have been assigned within the scope of her certification held at the time of initial employment, that of an elementary classroom teacher. The Commissioner observes that the teacher seniority list of September 1, 1976 indicates that there were numerous teachers of elementary grades with fewer years of service than petitioner.

Accordingly, the Commissioner directs the Board to restore to petitioner one fifth of her salary for the fall semester of the 1976-77 school year. The Commissioner further directs the Board to determine immediately petitioner's seniority as an elementary classroom teacher as established by law and in accord therewith to assign petitioner to a full-time elementary classroom position. The Commissioner observes that petitioner is currently receiving full salary and

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suffers no financial deprivation. He further directs the Board to expedite the reassignment of petitioner with minimal disruption to the education of the pupils in the system.

COMMISSIONER OF EDUCATION

May 12, 1978

**In the Matter of the Annual School Election Held in the School District of the Township of Lakewood, Ocean County.**

**COMMISSIONER OF EDUCATION**

**DECISION**

For the Petitioner, Eugene Jume, Esq.

For the Respondent, Sharkey & Sacks (Richard K. Sacks, Esq., of Counsel)

Petitioner, Gail Gobar, a candidate for a seat on the Board of Education of the Township of Lakewood, hereinafter "Board," alleged in a letter of February 22, 1978 to the Commissioner of Education that there were eleven procedural irregularities in the conduct of the annual school election held on February 14, 1978. An inquiry was conducted by a representative designated by the Commissioner of Education at the Ocean County Administration Building, Toms River, on March 8-9 and April 5, 1978. The report of the Commissioner's representative follows:

The announced results of the balloting for the election of school board members was not challenged; however, allegations of improper conduct were made with the assertion that such conduct could possibly have influenced the election of certain candidates.

The principal allegations are set forth in their entirety by Candidate Gail Gobar as follows:

"1. Chaos at the polls caused by insufficient personnel and inexperienced personnel and, at times when there were 2 voting machines, only one was operating;

"2. Electioneering at the polls;

"3. A member of the Board of Education who placed an ad supporting the candidacy of Friedman, Ashen and Bono working the voter registration books along with his wife being a challenger at the same poll;

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"4. A Board of Education member bringing the registration votes and part of the polling place paraphernalia to the Board of Education office, leaving the keys in the machine and forgetting to tally the votes relative to the budget. This same Board of Education member signed a voucher to be paid for his work;

"5. An interpreter at one of the polls who previously had been a challenger for the Friedman, Ashen and Bono slate;

"6. The unavailability of sample ballots at the polls;

"7. The late mailing of the Absentee Ballots occasioned by the failure of the Board Secretary to deliver the Absentee Ballots to the County Clerk's office;

"8. The late delivery of the voting machines occasioned by the delay, once again, by the Board Secretary in delivering the strips containing the names of the candidates to the Election Board;

"9. The failure to issue challenger credentials;

"10. Improper appointment of poll workers and polling place officials; and

"11. Improper voters assistants at the polls."

The Commissioner's representative does not find it necessary to deal *seriatim* with each charge filed by Candidate Gobar. Several of the charges are similar and therefore will be grouped and discussed, *post*.

The testimony supported the allegation that insufficient personnel were on hand to conduct the election in an efficient and orderly manner. One election worker testified that she was responsible for four registration books, two each for voting districts nos. 7 and 15. (Tr. I-124) Another election worker testified that in addition to working alone on two registration books, she also dispensed the poll list, the voter slips and the voting machine for each voter at district no. 20. (Tr. I-200) Other witnesses tesified that there was no judge of elections nor inspector of elections at polling district no. 4. (Tr. I-125; Tr. II-121) Additional testimony revealed that at least three polling districts failed to open at the appointed hour of 2:00 p.m.

There was testimony that all attempts to contact the Board Secretary on the day of the election were unsuccessful. Subsequently, a representative of the Ocean County Board of Elections was contacted and arrived at polling district no. 4 to aid the workers with the problems they had encountered. (Tr. I-128; Tr. II-112-136) The Board Secretary testified that he learned on the morning of the day of the election that the judge of election for district no. 20 would not appear. He testified that when he learned that the judge of election would not appear "***it was too late to do anything about it***" (Tr. II-196) and, further, that he was busy with other election matters. (Tr. II-205) He testified that he

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made no attempt to secure substitute election workers for those who were absent and failed to appear at the polls. (Tr. II-204-205)

With regard to the allegations, as set forth *ante*, the pertinent statute *N.J.S.A.* 18A:14-6 states, *inter alia*, as follows:

> "Each board of education shall *** *appoint a judge of elections, an inspector of elections,* and *two clerks of elections for each polling district therein,* and may appoint additional clerks for any polling district, not exceeding one for every two signature copy registers used therein, to act as election officers***." *(Emphasis supplied.)*

The representative has examined all such testimony and the record of the hearing and finds that allegations nos. 1, 10 and 11 are true in fact. There was insufficient evidence to support the allegation that there was electioneering at the polls and therefore recommends that allegation no. 2 be dismissed.

With regard to allegation no. 3, the Board Secretary testified that a member of the Board telephoned him on the day of the election to volunteer to work at the Spruce Street polling district no. 4 because there was a shortage of election workers. The Board Secretary testified that he agreed that it would be a good idea for the Board member to work at the polling place but that the Board member should contact the Board of Elections. (Tr. II-198) The Board Secretary testified that he did not see the need to inform the Board member of the potential prohibition of board of education members to serve in the capacity of election worker. (Tr. II-197-200) *N.J.S.A.* 18A:14-6 states, *inter alia*, as follows:

> "***They shall be appointed from the qualified voters of the school district, *who are not members *** of the board of education****."
> *(Emphasis supplied.)*

The Board member and other witnesses testified that he indeed worked on the voter registration books during the course of the election. The testimony also shows that the Board member worked at a polling place where his wife served as a challenger. The testimony and record is clear that allegation no. 3 is true in fact.

The School Business Administrator testified that subsequent to the close of the polls the results of the election were delivered to the Board Secretary and it was discovered that the Statement of Result failed to include the votes counted for or against the current expense and capital outlay budget items in at least two polling districts. (C-12, C-20) He testified that on the night of the election it was determined that the machines could not be opened to ascertain the actual count for the budget proposition. The School Business Administrator testified that on February 15, 1978, he received a telephone call from an employee of the Ocean County Board of Elections who requested that he accompany him to open the machines to ascertain the actual votes cast for and against the budget proposals. He testified that three machines were opened and the votes counted on February 15, 1978, the day after the election. (Tr. I-64-66) The Board

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Secretary testified that he did not believe that it was necessary to immediately return to the two polling places, open the machines and count the votes cast for the current expense and capital outlay items. He testified, further, that on the following day he did not accompany the Ocean County Board of Election employee to open the voting machines to ascertain an actual count. He testified that he requested that the School Business Administrator count the missing votes cast. (Tr. II-245, 248-249) The record further discloses that the Statements of Results for polling districts nos. 20 and 3 were inaccurately completed by the election workers. (C-19, C-21)

The testimony, evidence and record of the hearing sustains that portion of allegation no. 4 with regard to the failure to tally the votes relative to the budget. *N.J.S.A.* 18A:14-60

Allegation no. 5 may be true in fact; however, there is no evidence nor is there any charge that any illegal votes were cast.

The testimony shows that the Board did not determine that sample ballots were to be used in the election. *N.J.S.A.* 18A:14-29 Allegation no. 6, therefore, does not rise to the level for consideration as an irregularity with regard to the election. Similarly, there is no showing that allegations nos. 7 and 8, although true in fact, prevented or hindered any qualified voter from exercising his franchise at the election.

The final serious allegation is that the Board Secretary failed to issue challenger credentials as required by *N.J.S.A.* 18A:14-15, 16, 17. The testimony of the Board Secretary supports the allegation. He testified that he provided a list of the challengers and included the list in each of the election suitcases delivered to the various polls. He testified that he overlooked the provisions of *N.J.S.A.* 18A:14-17 which requires that the Board Secretary furnish each challenger a mark of identification to be worn by each challenger. (Tr. II-192-194)

* * * *

The Commissioner has reviewed and considered the report of his representative and the findings and conclusions contained therein. It is clear from the report that the annual school election in Lakewood in February 1978 was marked in some instances by confusion, that preparation for it was incomplete and that certain acts, contrary to law, were permitted by the Board. The Commissioner must state for the record again that he abhors all such irregularities as subversions of the electoral process which act to thwart the will of the people and he repeats a prior admonition as a point of reference to the findings herein *In the Matter of the Ballots Cast at the Annual School Election in the Borough of Fort Lee,* 1959-60 *S.L.D.* 120:

> ''***Boards of Education have a responsibility to see that school elections are conducted in strict compliance with the statute. Informal, loose procedures and the ignoring of statutory provisions have no place and cannot be condoned in the holding of any school election.***'' (at 120-121)

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It is axiomatic that a great responsibility rests with school officials for the proper conduct of all elections. In considering the irregularities in the instant matter, the Commissioner deems it appropriate to direct the Board of Education of the Township of Lakewood and its Secretary to confer with the Ocean County Superintendent of Schools, at a time well in advance of the next school election, to review the plans and preparations which the Board has made. It is so directed.

In consideration of those allegations found to be true in the instant matter, there is no evidence that those duly registered voters were denied the opportunity to cast their votes in this election. However, as the Commissioner stated *In the Matter of the Election Inquiry in the School District of the Borough of South River,* 1974 *S.L.D.* 1040:

> ''***The evidences of irregularities brought to light by the inquiry, while not condoned in any way by the Commissioner, do not warrant the setting aside of the election results. It is the clear intent of the law that elections are to be given effect whenever possible. It has been held by the courts of this State that gross irregularities, when not amounting to fraud, do not vitiate an election. *Love v. Board of Chosen Freeholders,* 35 *N.J.L.* 269 (*Sup. Ct.* 1871); *Stone v. Wyckoff,* 102 *N.J. Super.* 26 (*App. Div.* 1968) It is clear that irregularities and deviations from election laws by election officials provide insufficient grounds for voiding an election if the will of the people has been fairly expressed and determined and has not been thwarted. *Petition of Clee,* 119 *N.J.L.* 310 (*Sup. Ct.* 1938); *In re Livingston,* 83 *N.J. Super.* 98 (*App. Div.* 1964) It is only when the deviations from statutory procedure are so gross as to produce illegal votes which would not have been cast or to defeat legal votes which would have been counted, so as to make impossible a determination of the will of the people, that an election will be set aside. *In re Wene,* 26 *N.J. Super.* 363 (*Law Div.* 1953) sets forth the rule as follows:
>
> > 'The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or by defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will.***' (26 *N.J. Super.* at 383)***'' (at 1048)

For the reasons stated, the Commissioner determines that the announced results of the annual school election in the Township of Lakewood will stand.

COMMISSIONER OF EDUCATION

May 16, 1978

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**In the Matter of the Tenure Hearing of**

**Chris A. Gervasio,**

**School District of the Township of Ewing, Mercer County.**

## COMMISSIONER OF EDUCATION

## DECISION

For the Complainant Board, Abbotts and Abbotts (John Abbotts, Esq., of Counsel)

For the Respondent, Ruhlman and Butrym (Edward J. Butrym, Esq., of Counsel)

Seventeen charges of unbecoming conduct or other just cause were filed against respondent, a teacher with a tenure status, by the Board of Education of the Township of Ewing, hereinafter "Board," certifying that the charges would be sufficient, if true, to warrant his dismissal. Respondent was suspended without pay. A hearing was held on February 3, March 17, 18 and 31, 1977 in the office of the Mercer County Superintendent of Schools, Trenton. Forty-four documents are marked in evidence and Briefs were filed after the hearing. The Board withdrew Charge No. 5 and Charges Nos. 7 and 8 were combined as a single charge. The report of the hearing examiner follows:

*CHARGE ONE*

> "That on June 21, 1976, the said Chris A. Gervasio did improperly absent himself from the school to which he was assigned teaching duties by falsely taking sick leave when in fact the said Chris A. Gervasio was not ill but did proceed to Montclair State College with a female pupil in his class under the age of eighteen (18) years, he well knowing that he did not have permission from the parents of said female pupil and well knowing that he did not have permission of the administration of the school, the same being in violation of express instructions of the administration and contrary to the rules and regulations concerning the conduct of the professional teaching staff."

The principal of Fisher Junior High School testified that he was notified of this incident by the pupil's mother. When he investigated further he learned that respondent had called in sick for that day. He testified that he held a conference with respondent who admitted taking two girls to Montclair State College on the day in question. (Tr. I-38-42) In evidence are the Board Policy Manual, a principal's bulletin and a Superintendent's bulletin each demanding that certain procedures be followed by teachers prior to taking pupils on field

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trips. These procedures provide, *inter alia*, for prior notice and approval by the principal and for a field trip permission slip to be signed by the parent of each pupil. (P-1, 3, 4) The principal testified also that he learned after the trip that respondent did have the parents' permission to take the pupil referred to herein to Montclair State College. He testified that respondent's absentee record was exemplary and that he missed only two days because of illness during the 1975-76 academic year. (Tr. I-43-44, 50)

Respondent admitted that he called in sick between 5:30 and 6 a.m. on June 21 but asserted that he felt better around 10 a.m. (Tr. III-80, 108) He testified further that he had no duties that day other than homeroom duties and that school was held for only a half day session. He testified that one of the girls he transported to Montclair was his niece and that he had permission from the other pupil's parents to take her along. (Tr. III-83-84, 87) He admitted not having the school administrators' permission to take the aforementioned trip, but asserted that the school was not involved. (Tr. III-109)

The hearing examiner finds that the record supports the charge in that respondent did report himself ill on the morning of June 21, 1976 and that he later transported his niece and another female pupil to Montclair State College. The testimony supports his contention that he had parental approval and that the trip was educationally worthwhile. He did not have administrative approval as required by Board policy and the principal's and Superintendent's bulletins. (P-1, 3, 4)

The hearing examiner recommends that the Commissioner of Education determine that respondent violated the express rules of the Board in this charge and that this violation represents conduct unbecoming a teacher.

*CHARGE TWO*

"That on or about June 16, 1976, the said Chris A. Gervasio did fail to grade examination papers of students in his class contrary to the express direction of his Department Head."

*CHARGE THREE*

"That on June 16, 1976, the said Chris A. Gervasio did improperly grade the students in his class by giving them marks and grades on report cards prior to grading final examination papers, the same being contrary to express rules and regulations of the School."

Charges Nos. 2 and 3 are being combined because they are related.

The testimony of the principal, vice-principal and the head of the business department to which respondent was assigned adequately supports Charges Nos. 2 and 3. Respondent admitted that final examinations had to be given and graded, except for pupils who were exempt, and he testified that he accomplished this task. He admitted also that the graded papers were to be submitted to his

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department head for filing. (Tr. III-110-113; P-11, 12, 13) The record shows that only eighteen papers were eventually handed in and that there is no grading mark on any one of them. (C-1)

Respondent testified that he reviewed each paper (approximately one hundred twenty-five in number) and recorded each grade on a separate piece of paper but not in his roll book. He testified that he would be able to recall the grade of any single test for the purpose of explaining its worth to any interested parent even though none of the papers were marked by him. He testified that he relied heavily on the pupil's work for the entire year and used the final examination grades only if they were so significant as to alter the year's grade of any pupil. (Tr. III-110-114) He testified further that he gave each paper a mark in his own mind. (Tr. III-115) His reason for handing in only eighteen papers for filing is that he left the papers in his desk drawer and that they were stolen along with his keys, roll book and planbook. He did not report this theft to the school administrators. (Tr. III-110-120)

The hearing examiner finds respondent's testimony incredible. It is simply not believable that a teacher can review one hundred twenty-five papers and remember each pupil's grade. (Tr. III-120-127) Neither is the following testimony credible: "***I had them home that night to grade them. They were already marked. It would be like these papers here, they wouldn't have anything on them.*** (Tr. III-119) Finally, respondent admits that he posted final grades for two of his classes prior to the time they took the final examination. He stated that he knew examinations had to be given but that he was under the impression that they did not have to count. (P-13)

The hearing examiner finds that respondent's testimony and reasoning regarding these two charges cannot be supported by the believable evidence. The hearing examiner recommends that the Commissioner determine that respondent failed to give some examinations as required by the school administrators, that he posted final grades for some of his pupils prior to giving any examinations, and that these infractions and his resultant testimony regarding these incidents represent conduct unbecoming a teacher.

*CHARGE FOUR*

> "That on September 17, 1975, the said Chris A. Gervasio did, contrary to express instructions and regulations, keep students in his classroom after 4:00 P.M. closing time without specific approval by an administrator and did permit his classroom to become untidy and littered with cigarette butts and did fail to secure said room properly upon leaving the same."

The Board's proofs are grounded in the testimony of the principal and in a document prepared by the principal concerning his conversation with respondent. (P-14) The principal testified that a night custodian had reported to him about the condition of the classroom.

Respondent conceded that he met with the principal concerning the alle-

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gations made by the custodian but he denies being in the classroom with pupils beyond 4:00 p.m. He asserted that the room was tidy when he left and that he locked the door. (Tr. III-136-138)

The hearing examiner cannot find the Board's proof sufficient in this charge to recommend that respondent was in fact responsible for the condition of his classroom as reported by the custodian. If he left the room by 4:00 p.m., as he testified, perhaps another person made use of the room before the custodian arrived at about 5:30 p.m. The hearing examiner recommends that Charge No. 4 be dismissed.

*CHARGE FIVE*

This charge was withdrawn by the Board.

*CHARGE SIX*

"That on April 29, 1975, the said Chris A. Gervasio did, contrary to the rules and regulations, take three students from school property to a local bank without permission of any member of the administrative staff and without advance approval for the same."

The Board submitted a document in evidence attesting to the fact that respondent took three pupils to a local bank without the required approval of the school administration. Respondent signed this document and indicated that he "***read the above and agree[s] that in essence the above took place and is accurate." (P-15; Tr. III-139-147)

The hearing examiner finds that the evidence and testimony of the principal support the charge and he recommends that the Commissioner determine that the violation of school rules as shown represents conduct unbecoming a teacher.

*CHARGE SEVEN*

"That on June 22, 1976, contrary to rules and regulations, and express instructions from superiors, the said Chris A. Gervasio did transport a female student to school."

*CHARGE EIGHT*

"That on June 22, 1976, the said Chris A. Gervasio did take a female student off of school property without permission of the parent, without signing out of school, and without permission of an administrator or any of his superiors."

Respondent admitted that he transported a female pupil to school and that he drove her away from the school; however, he offered an explanation. He stated that he was leaving during his free period to get a cup of coffee and that the pupil asked him to drive her to a "deli" and he did. Later, on his way back

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to school he met her and transported her back to the school. He offers as reason for her free time that school was open only for those pupils who wished to return for June report cards. The pupil, the same one he transported to Montclair (Charge No. 1) had given him a signed stamped envelope so that her report card could be mailed to her and he intimated that she did not have to be in school at all. He testified that he did not have parental approval to transport the pupil this time and that her parents became quite upset when they learned of the incident through the school principal. (Tr. III-147-150) He testified that she was required to be in school. (Tr. III-150)

The vice-principal testified that he and the principal had just finished counseling respondent about taking pupils away from the school grounds and just two minutes later he was observed transporting a pupil in his car. (Tr. II-119-121; P-16, 17, 18)

Respondent's testimony regarding this incident is not believable. He testified that he was merely going to "run across the street for a cup of coffee" and that the pupil met him and asked to be driven to "another deli." (Tr. III-149) He testified that he dropped her off and met her again on his way back to school. He questioned her return, but then drove her back to the school. (Tr. III-149-150) He stated later that the girl was going across the street and he was going "***down the road. Maybe a half mile or so." (Tr. III-154)

The hearing examiner finds this testimony to be deliberately misleading or untrue. He recommends that the Commissioner determine that respondent did transport a pupil to and away from school as stated in Charges Nos. 7 and 8 and that these infractions represent conduct unbecoming a teacher. (Tr. II-119-121)

*CHARGE NINE*

"That on March 25, 1976, the said Chris A. Gervasio did, contrary to rules and regulations, issue a pass to a student who was not a member of the class at the time said pass was issued."

Respondent admitted issuing the pass and had a conference with his superiors concerning that incident. The evidence shows that his was not the first such occurrence but was a continuing infraction which respondent had been warned about previously. He explained that his issuance of passes had been "cut down." (P-20; Tr. III-156-164) The hearing examiner finds this charge to be true in fact and recommends that the Commissioner determine that it represents conduct unbecoming a teacher.

*CHARGE TEN*

"That on February 18, 1976, the said Chris A. Gervasio failed to report for assigned lunch duty at Room 4B, Fisher Junior High School, knowing said duty had been assigned and, thereafter, failed and refused to give satisfactory explanation for said failure to report to said assigned duty for a period of seven (7) days and only after repeated requests."

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Respondent again admitted missing his assigned lunch room duty as charged; however, he stated he told his superior the reason and later gave it in writing. (Tr. III-166-170) On direct examination he testified that he was working with three pupils on business math problems and simply forgot the clock. Under cross-examination he testified that he also counseled them about personal problems although he has no special preparation in this area. (Tr. III-166, 169-170)

The hearing examiner finds this charge true in so far as respondent missed his lunch duty. His reason for missing the duty cannot be a valid excuse for missing an important supervisory assignment. There is no need for a further finding regarding his giving a reason for missing his assignment. Suffice it to say that the essence of the charge is that he missed an assigned duty while preoccupied with matters of lesser importance at that time.

The hearing examiner recommends that the Commissioner determine that this represents conduct unbecoming a teacher.

*CHARGE ELEVEN*

"That on January 22, 1976, the said Chris A. Gervasio did, knowing the same to be untrue, mark two students in his homeroom class absent when, in fact, they were present to the knowledge of the said Chris A. Gervasio."

The Board did not sustain its burden of proof on this charge. The record shows that the two boys were marked absent, but this was adequately explained by respondent. He did commit an inadvertent error concerning one boy; however, the hearing examiner is convinced this error was oversight, not negligence. The hearing examiner recommends that Charge No. 11 be dismissed.

*CHARGE TWELVE*

"That on June 15, 1976, the said Chris A. Gervasio did, knowing the same to be false, give to his superior a book inventory of the books entrusted to his care which indicated that said books were locked in a closet when, in fact, said books were in an unlocked closet and in other areas and said inventory was incorrect, some eighty-three (83) business training books having been found missing and some sixty (60) business math books having been found missing, contrary to the rules and regulations and contrary to said false audit."

Respondent admitted that some of his books were missing, at the end of the school year, but he denied deliberately misleading his superiors with his book inventory. (P-23) In the hearing examiner's judgment, respondent's book inventory was either deliberately misleading or conceived so perfunctorily as to be of no practical use to the school officials or himself. His testimony regarding this charge is unclear. The record shows that the Board had a precise policy for issuing books and keeping records of them. (P-3, at p. 16) Respondent admitted both that he did not follow these directives and that he told his department chairman that he stored his books in a locked closet in his room. He testified,

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however, that the lock on his closet was broken, so he took the books to his mother's home. (Tr. III-172-175) When it was discovered that the books were not in his closet, he admitted this fact to the school principal who demanded that the books be returned. Fifty-one books were missing that were accounted for on respondent's inventory. (Tr. III-10-22) Respondent admitted at that time that he could not account for the missing books and he was compelled to pay for them. (Tr. III-22; P-27)

The hearing examiner finds this charge to be true in fact. The record discloses that respondent had little or no idea about the quantity or the condition of his books, nor did he have a plan to have sufficient books available for his pupils in the coming school year. On the one hand, he testified that books were not handed out to each pupil and that thirty books collected at the end of each class were sufficient for his needs. On the other hand, he testified that pupils were given books and they were not collected at the end of each class. The result was that he did not know how many books he had or where they were. Nevertheless, he submitted a false inventory list to his department chairman. (P-23; Tr. III-172-192)

The hearing examiner recommends that the Commissioner determine that this charge is true in fact and that it represents conduct unbecoming a teacher.

*CHARGE THIRTEEN*

> "That on a day or days prior to an inspection on June 23, 1976, the said Chris A. Gervasio permitted his classroom to become littered with trash on the floor, permitted a desk entrusted in his care to be badly mutilated with students' names carved on the top thereof and permitted a blackboard to be damaged with a large hole in the middle of the same, all of which said damage was duly inspected on the aforesaid date of June 23, 1976."

The principal testified that the physical condition of respondent's room was "absolutely appalling" when he inspected it. Trash was strewn about the classroom, desks were carved with names, particularly respondent's desk was carved to a depth of one quarter inch and had to be replaced. The floor was so badly marked that some marks could not be removed and there was a hole in the chalkboard the size of a softball. He testified that he had never in all his experience seen a room in such deplorable physical condition. (Tr. II-27-29) The principal has been an educator for twenty-nine years. (Tr. I-33)

Respondent admitted that the damage was done and that he had a responsibility to protect school property; however, he denied that any of this damage was done while he was present in the classroom. (Tr. IV-13-14) Respondent's testimony regarding the hole in the chalkboard was evasive. He testified that he was not required to remain in his classroom between the changing of classes although he later testified that he was required to be in his doorway during such times to supervise pupils in the hallways. He testified that when he went to the kitchen to see a teacher the damage was done in his absence. He contradicted this statement on direct examination by testifying that he went only a few doors

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from his room to see another teacher. He did not report the damage to the chalkboard until two days after school was out for the year. The hole had been covered with construction paper. (Tr. II-29; Tr. IV-4-16)

In the hearing examiner's judgment the testimony of the principal is sufficient to support this charge. Respondent admitted that the damage to the chalkboard was done between classes when he was in charge of his classroom. For reasons known only to himself, he covered the damaged board with construction paper and did not report the damage. (Tr. II-29) Although the Board could not prove directly that respondent caused or allowed damage to his desk or pupil desks, it must be observed that such deep carvings in a teacher's desk take considerable time to execute and that the carvings could not occur between classes. Regarding this desk mutilation and the generally poor condition of the room about which the principal testified, it must be said that respondent had, at the very least, a duty to report damage and vandalism to his superiors. If it was perpetrated when he was not in his classroom, the reason for reporting the vandalism is stronger.

The hearing examiner determines that the testimony of the principal and respondent is sufficient to find that the charge is true in fact. (Tr. II-27-32; Tr. IV-4-16; P-24)

*CHARGE FOURTEEN*

> "That on June 15, 1976, the said Chris A. Gervasio did, before an Awards Assembly held on said date, improperly grant business math awards for highest academic achievement, second highest academic achievement and honorable mention to three named students who were not members of his business math course."

Respondent admitted that he inadvertently submitted the wrong names of two of his pupils for the achievement awards assembly. He testified that he had only two hours to make his selection, inferring that he was pressured by time which undoubtedly caused his error. (Tr. IV-23)

The record shows that respondent had ten days in which to make his selections and he did not. His department chairman thereafter requested that he submit the pupils' names and respondent promised to have them ready within two hours. He admitted that the awards were significant and that he called the affected parents to apologize for his error. His apology was offered after the principal directed him to notify the pupils' parents. (Tr. I-140-144; Tr. IV-21-25)

The hearing examiner finds that respondent carelessly selected the names of two ineligible pupils for the awards assembly. This error made at a public meeting undoubtedly caused embarrassment to the pupils who received awards in error, to parents whose sons/daughters did not receive an earned award and to the administration, as well as respondent himself, as the principal testified. (Tr. II-33-40; P-28, 29, 30)

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The hearing examiner concludes that Charge No. 14 is true and constitutes just cause as set forth by the Board in its statement of charges against respondent.

*CHARGE FIFTEEN*

"That on April 15, 1976, the said Chris A. Gervasio did permit a student in his class to lie across three or four desks contrary to the rules and regulations with respect to discipline and structure in classrooms."

The evidence shows that the school administrators notified respondent of their continuing concern for his lack of classroom structure and for maintaining a "loose" classroom atmosphere. (P-33, 34) An assistant principal testified that he had received complaints of noise from other teachers whose classrooms were near respondent's. As he passed respondent's classroom door on April 15, 1976, he noticed pupils milling around, sitting on the windowsill and one pupil lying across four pupil desks while respondent was instructing several pupils around another desk. He testified that the pupil lying down was fifteen feet from respondent and in his direct line of vision. Nevertheless, the assistant principal had to call the pupil three times before he was recognized. The pupil then sat up. (Tr. III-51-56; P-43)

Respondent admitted that a pupil was lying across several desks; however, he testified that he did not give him permission to do so and that he disciplined the pupil by giving him after school detention. He admitted, also, that he had been counseled by his principals on more than one occasion about the structure and conduct of his classroom. (Tr. IV-26-34)

The hearing examiner finds Charge No. 15 true in fact and recommends that the Commissioner determine that it constitutes "other just cause" as set forth in *N.J.S.A.* 18A:6-10.

*CHARGE SIXTEEN*

"That on or before July 8, 1975, the said Chris A. Gervasio did permit property belonging to the Ewing Township School Board and entrusted in his care, to be damaged and destroyed, namely, he did permit a wall telephone to be ripped from the wall; he did permit his desk to be encrusted with writing, carving and defacing; did permit plaster above the door in the classroom known as C-122 to be pulled off and did permit the rear wall of said classroom to be defaced by writing and graffiti."

Respondent generally denied this charge. He testified that he did not permit the destruction of any school property, although he admitted that an already loosened wall telephone was ripped from the wall by pupils he could not identify. He taped the hole and placed the instrument in his classroom closet. (Tr. IV-35-38) He testified, also, that any damage to his desk occurred when he was not in his classroom. He testified that the plaster above his door was cracked and that the regular opening and closing of the door over a long period of time caused the crack and the aperture to become enlarged. Respondent admitted that pupils also wrote on the walls of his classroom; however, he testified that when

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he caught them, he made them clean the walls and at other times he scrubbed the walls himself. (Tr. IV-38-43) He denied that his classroom was in extremely poor condition. (Tr. IV-43-44) The principal testified that respondent's classroom was the worst in the school building. (Tr. II-48-50; P-31)

The hearing examiner observes that respondent did not deny that the conditions set forth in this charge did in fact exist; however, he specifically denied that he permitted any such actions and asserts specifically that pupils did not pull plaster from the wall. (Tr. II-47; Tr. IV-39-41)

The hearing examiner relies on the experience and testimony of the principal and finds this charge to be true in fact. The principal's testimony is clear and unequivocal. He testified that teachers are responsible for the condition of their classrooms and that respondent's classroom was in extremely poor condition. Respondent never reported any incidents of vandalism or damage. (Tr. II-47-55) The hearing examiner recommends that the Commissioner determine that Charge No. 16 is evidence of other just cause as defined by statute.

*CHARGE SEVENTEEN*

> "That on the abovementioned dates and at other times and places, the said Chris A. Gervasio did commit said acts of unbecoming and unprofessional conduct despite repeated warnings, requests to cease and desist, instructions and conferences with superiors at which time all of the said acts of unbecoming and unprofessional conduct were pointed out to the said Chris A. Gervasio which were acknowledged by him to have been committed and which he promised and agreed to rectify and correct but which were deliberately, knowingly and intentionally again committed to the disruption of the education and well-being of his and other students, to the detriment of the teaching profession and the school system of the Township of Ewing and to the discredit and disruption of the professional teaching staff, the administrators of the School and the Board of Education of the Township of Ewing."

The principal testified that the administrators spent many hours in the previous two years trying to help respondent and that they held many conferences with him concerning the conduct of his classroom, his teaching abilities, and his results with his pupils. (Tr. II-55-63; P-5, 6, 7, 9, 10, 13, 14, 15, 18, 20, 25, 26, 30, 31, 33, 35, 37, 38, 39, 43) The principal testified that respondent was usually receptive and his responses were positive in that he would say he'd "correct that" and "try to do better," but that he never improved. He testified that respondent's colleagues were upset because pupils could easily get late passes to their classes from respondent. He testified also that his plan book was almost illegible and practically useless to a substitute teacher. (Tr. II-67-71) The principal testified that he spent between thirty-five to forty hours during the 1975-76 school year in conferences with respondent. Additional time was spent preparing many memoranda to respondent. By contrast he spent only two or two and one-half hours per year in conferences with other tenure teachers. (Tr. II-81-82) He testified that other teachers asked to have their room assignments

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changed to get away from respondent's classroom and that a teacher who shared his classroom asked to be assigned elsewhere because respondent's room was in horrible condition with food on the floor, dirty desks and an unpleasant odor. (Tr. II-83-84) He testified also that respondent was the only teacher of the sixty staff members who did not keep a plan book for a week in advance for the benefit of substitute teachers. He testified that, since respondent has been replaced, these concerns have totally abated. (Tr. II-85, 96)

The hearing examiner finds in his review of the testimony and the record that Charge No. 17 is true in fact. The record shows many attempts by the school administration to resolve the recurring problems with respondent and that their attempts were fruitless. (See Exhibits, *ante*.) It is also notable that respondent does not deny most of the specifics of Charges Nos. 1 through 16; rather, he gave an explanation for each infraction which presented the situation as he viewed it. The hearing examiner recommends that the Commissioner determine that Charge No. 17 is in fact true and that respondent's total performance as set forth in detail in the testimony of the principal, assistant principals, respondent's own testimony, and in the many Exhibits, represents conduct unbecoming a teaching staff member.

In summary the hearing examiner finds that Charges Nos. 1, 2, 3, 6 through 10, and 12 through 17 are true in fact as set forth in detail under each specific charge. Charges Nos. 4 and 11 are recommended for dismissal and Charge No. 5 was dropped by the Board.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the report of the hearing examiner and notices that no exceptions have been filed thereto, despite the fact that the hearing examiner found conduct unbecoming a teacher or other just cause as set forth by statute in fourteen of the seventeen charges. *N.J.A.C.* 6:24-1.17(b); *N.J.S.A.* 18A:6-10

It is not necessary in this matter to comment on any one of the specific charges or the hearing examiner's findings and recommendations. Suffice it to say, that in consideration of these charges and the findings in the aggregate, the Commissioner perceives the emerging picture of a teacher who could not or would not follow simple routine procedures expected of all teaching staff members. The result was continual disorder both in and out of the classroom as well as general unrest between the teacher and his superiors and colleagues which necessitated an unusual number of conferences and meetings between respondent and his superiors and the generation of many written memoranda and records resulting therefrom.

It is not reasonable to expect school administrators to spend an inordinate amount of time counseling and directing a tenure teacher on such routine and required duties. The principal testified in this regard that thirty-five to forty

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hours were spent in conferences with respondent in the 1975-76 school year. This is valuable time which could better have been utilized in other ways for the benefit of the educational program.

The record clearly discloses that respondent's effectiveness as a teacher had so diminished that the instructional process in his classes suffered. The record discloses, also, that gross physical damage occurred to his classroom and its temporary and permanent furnishings.

For these reasons, the Commissioner adopts the findings and recommendations of the hearing examiner as his own and holds that the record discloses a pattern of unbecoming conduct by respondent which is unprofessional. It is further determined that respondent has forfeited the tenure protection that the statutes afford teaching staff members who have complied with their minimum requirements.

Such a conclusion is consistent with many previous decisions of the Commissioner. *In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck,* 1971 *S.L.D.* 284; *In the Matter of the Tenure Hearing of Francis Bacon, School District of the Township of Monroe,* 1971 *S.L.D.* 387, aff'd State Board of Education 1972 *S.L.D.* 663; *In the Matter of the Tenure Hearing of Kathleen M. Pietrunti, Township of Brick,* 1972 *S.L.D.* 387, aff'd State Board of Education 1973 *S.L.D.* 782, aff'd and rev'd in part 128 *N.J. Super.* 149 (*App. Div.* 1974), *cert.* den. N.J. Supreme Court March 11, 1975, *cert.* den. 419 *U.S.* 1057 (1974); *In the Matter of the Tenure Hearing of Sally Williams, School District of Union Township,* 1973 *S.L.D.* 464, aff'd State Board of Education 1974 *S.L.D.* 1437, aff'd as *Sally Williams v. Board of Education of Union Township, Union County,* Docket No. A-1789-73, New Jersey Superior Court, Appellate Division (1975 *S.L.D.* 1162), *cert.* den. Docket No. 74-1534 Supreme Court of the United States, October 6, 1975

In *Bacon, supra,* the Commissioner found that even one incident of unprofessional conduct might be sufficient to warrant a judgment that a teacher had demonstrated unfitness for the position he held. Therein, the Commissioner quoted *Redcay v. State Board of Education,* 130 *N.J.L.* 369 (1943), aff'd 131 *N.J.L.* 326 (*E.&A.* 1944) to buttress this position. The Court in that decision said:

> "***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.***"
>
> *(Emphasis supplied.)* (130 *N.J.L.* at 371)

The proven charges herein, in the Commissioner's judgment, present "the series of incidents" referred to in *Redcay,* which are the best evidence that respondent should be dismissed.

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Accordingly, having found Charges Nos. 1, 2, 3, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16 and 17 to be true in fact, and having determined that they are sufficiently serious to warrant respondent's dismissal from his position as a teacher in the Ewing Township School System, the Commissioner hereby dismisses respondent as of the date of his suspension.

COMMISSIONER OF EDUCATION

May 16, 1978

**In the Matter of the Annual School Election Held in the School District of the Borough of Lawnside, Camden County.**

## COMMISSIONER OF EDUCATION

## DECISION

This matter comes before the Commissioner of Education pursuant to the receipt of a letter request dated February 15, 1978 from Earl Sherman Pierce, a defeated candidate for reelection on the Lawnside Board of Education, hereinafter "Board."

Candidate Pierce alleges that prior to the annual school election held in Lawnside on February 14, 1978, the Administrative Principal of the school district improperly and illegally caused election literature sponsored by the Lawnside Men's Association to be disseminated to the teachers at the Lawnside Middle School and thereby distributed to pupils to be taken home. It is further alleged that school supplies and equipment were used in the preparation of the controverted school election literature.

Candidate Pierce requests that by virtue of these improprieties the Commissioner declare said school election a nullity.

Pursuant to the above request an authorized representative appointed by the Commissioner was directed to conduct an inquiry into the matter. The inquiry was held at the Camden County Office of the Department of Education on March 10, 1978.

Testimony was taken from Candidate Pierce, Mr. Mears, another defeated candidate for reelection to the Board, and Geraldine Andrews, a sixth grade teacher employed by the Board, regarding the manner in which the school election literature was disseminated to the teachers and given to pupils to take home. Such testimony was not refuted by Dr. William Clark, Administrative Principal.

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Dr. Clark did deny, however, that either school supplies or equipment were used to prepare the school election literature herein controverted. In this regard, Dr. Clark testified that the literature was delivered to him at school by a representative of the Lawnside Men's Association on or before the day of the annual school election and, at the request of this person, he caused the election literature to be taken home by the pupils of the school system. It is Dr. Clark's position that, absent any Board policy prohibiting the distribution of such literature, he exercised his administrative discretion by having the literature distributed to his pupils to be taken home as he had previously done on other occasions when the Lawnside Parent Teachers Association or other community groups requested his assistance in distributing information to parents of pupils in the school system. Dr. Clark testified that his decision to allow the election literature to be delivered through the pupils to their parents was predicated on the fact that the contents of such literature did not promote or oppose any candidate or public question on the ballot.

At this juncture, the contents of the controverted notice are set forth as follows:

"*LAWNSIDE MEN'S ASSOCIATION*
POST OFFICE BOX 6231
LAWNSIDE, NEW JERSEY 08045

"On Tuesday, February 14, 1978, the borough will conduct the school board elections. Elections will be held in the library of the Lawnside Middle School from 7:00 a.m. until 9:00 p.m.

"The Lawnside Men's Association urges you to vote for the candidate(s) of your choice. Whether you vote or not and how you vote will effect (sic) our school system for years to come.

"Please take advantage of this opportunity and play an active role in our community's future. The children of Lawnside are depending on you.

"The Education Committee of the
Lawnside Men's Association" (C-1)

The Commissioner's representative finds that the terms of *N.J.S.A.* 18A:14-97 are broad enough to encompass the literature challenged in the present case. Therefore, the Lawnside Men's Association was required to comport with the provisions of *N.J.S.A.* 18A:14-97.1 and 97.2. In this regard had the administrative principal been aware of this statutory requirement, he should not have initially entertained a request to have such literature disseminated under any circumstance.

In contrast, *N.J.S.A.* 18A:42-4 prohibits the distribution of any literature which "***promotes, favors or opposes the candidacy of any candidate *** or the adoption of any bond issue *** or any public question***."

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A review of the literature challenged herein (C-1) reveals that it merely urged the voters to vote in the school election. It does not refer to any candidate or public question, therefore, it does not fall within the scope of *N.J.S.A.* 18A:42-4. It is noted, however, that this statute requires that "***[t]he board of education of each school district shall prescribe necessary rules to carry out the purposes of this section."

It is determined by the testimony of the Board Secretary that she was not aware that such policy had been adopted by the Board pursuant to the provisions of this statute.

The Commissioner's representative concludes that on the basis of the findings the actions of the Administrative Principal cannot be supported in law. There is no evidence, however, that he or the Board knowingly and willfully attempted to defy the law.

Accordingly, the Commissioner's representative recommends that, in view of the circumstances hereinbefore set forth, the results of the annual school election held in Lawnside on February 14, 1978 not be set aside but, rather, that the Board be directed to take the appropriate measures prescribed by law to remedy this matter to insure the integrity of the results of future school elections conducted in the Lawnside School District.

This concludes the report of the Commissioner's representative.

* * * *

The Commissioner has reviewed the record and the report and recommendations of his representative. The Commissioner observes that the circumstances giving rise to the matter controverted herein are indeed unfortunate, but not without future remedy. Accordingly, the Commissioner concurs with the findings and recommendations of his representative and determines that the annual school election in the School District of Lawnside on February 14, 1978 may not be set aside. In arriving at this determination the Commissioner also directs the Board to adhere to the applicable provisions of *N.J.S.A.* 18A:42-4 by enacting as a matter of policy the necessary procedural safeguards pertaining to the distribution of election literature by the pupils of its school. It is further directed that all employees of the Board be notified of such Board ruling as it pertains to all future school elections.

COMMISSIONER OF EDUCATION

May 16, 1978

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**Board of Education of the Borough of Keansburg,**

*Petitioner,*

*v.*

**Mayor and Council of the Borough of Keansburg, Monmouth County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Norton & Kalac (Peter P. Kalac, Esq., of Counsel)

For the Respondent, David Zolkin, Esq.

Petitioner, the Board of Education of the Borough of Keansburg, hereinafter "Board," appeals from an action of the Mayor and Council of the Borough of Keansburg, hereinafter "Council," taken pursuant to *N.J.S.A.* 18A:22-37 certifying to the Monmouth County Board of Taxation a lesser amount of appropriations for school purposes for the 1977-78 school year than the amount proposed by the Board in its budget which was rejected by the voters. The facts of the matter were adduced at a hearing conducted on December 19, 1977 at the State Department of Education, Trenton, before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner is as follows:

At the annual school election held March 29, 1977, the Board submitted to the electorate proposals to raise $1,209,022 by local taxation for current expense and $22,000 for capital outlay costs of the school district. These items were rejected by the voters and, subsequent to the rejection, the Board submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school system in Keansburg for the 1977-78 school year, pursuant to the mandatory obligation imposed on Council by *N.J.S.A.* 18A:22-37.

After consultation with the Board, Council made its determination and certified to the Monmouth County Board of Taxation an amount of $1,138,132 for current expense and $22,000 for capital outlay. The pertinent amount in dispute is shown as follows:

| | *CURRENT EXPENSE* |
|---|---|
| Board's Proposal | $1,209,022 |
| Council's Proposal | 1,138,132 |
| Amount Reduced | $ 70,890 |

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The Board contends that Council's action was arbitrary, unreasonable, and capricious and documents its need for restoration of the reductions recommended by Council with written testimony and a further oral exposition at the time of the hearing. Council maintains that it acted properly and after due deliberation and that the items reduced by its action are only those which are not necessary for a thorough and efficient educational system. Council also supports its position with written and oral testimony. As part of its determination, Council suggested specific line items of the budget in which it believed economies could be effected as follows:

CHART I

| Account Number | Item | Board's Proposal | Council's Proposal | Amount Reduced |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J213 | Sal., Tchrs. | $1,588,400 | $1,573,600 | $15,000 |
| J220 | Textbooks | 56,000 | 51,000 | 5,000 |
| J230B | Per. & Newsprs. | 2,000 | 1,000 | 1,000 |
| J230C | A-V Mats. | 5,000 | 4,700 | 300 |
| J250A | Misc. Supls., Instr. | 8,000 | 7,000 | 1,000 |
| J250B | Travel Exps. | 6,000 | 4,000 | 2,000 |
| J250C | Misc. Exps. | 4,000 | 3,500 | 500 |
| J320A | Supls., Attend. Servs. | 600 | 400 | 200 |
| J320B | Travel | 1,000 | 400 | 600 |
| J420A | Supls., Health Servs. | 4,000 | 3,600 | 400 |
| J520A | To/From Sch. Contr. | 59,400 | 58,700 | 700 |
| J520B | Trans., Contr. Servs. | 3,000 | 1,000 | 2,000 |
| J520C | Trans., Contr. Servs. | 16,000 | 13,000 | 3,000 |
| J540 | Ins., Pupil Trans. | 5,040 | 2,500 | 2,540 |
| J550B | Lub./Oil, Pupil Trans. | 500 | 100 | 400 |
| J550C | Tire & Tube Repl. | 1,000 | 250 | 750 |
| J550D | Repairs, Pupil Trans. | 1,720 | 720 | 1,000 |
| J550F | Maint. Private Garage | 500 | -0- | 500 |
| J620 | Contr. Servs., Plnt. Oper. | 2,100 | 1,800 | 300 |
| J640C | Gas | 2,700 | 1,000 | 1,700 |
| J640D | Telephone | 12,985 | 10,485 | 2,500 |
| J660B | Veh., Plnt. Oper. | 2,500 | 1,000 | 1,500 |
| J720A | Upkeep of Grnds. | 12,000 | 7,000 | 5,000 |
| J720B | Repair of Bldgs. | 29,000 | 23,000 | 6,000 |
| J720C | Repair of Equip. | 16,000 | 10,000 | 6,000 |
| J730A | Repl. Instr. Equip. | 16,000 | 10,000 | 6,000 |
| J730C | New Equip., Instr. | 13,000 | 8,000 | 5,000 |
| | TOTALS | $1,868,445 | $1,797,555 | $70,890 |

There appears no necessity to deal *seriatim* with each of the areas in which Council recommended reduced expenditures. As the Commissioner said in *Board*

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*of Education of the Township of Madison v. Mayor and Council of the Township of Madison*, 1968 *S.L.D.* 139:

> "***The problem is one of total revenues available to meet the demands of a school system***. The Commissioner will indicate, however, the areas where he believes all or part of Council's reductions should be reinstated. It must be emphasized, however, that the Board is not bound to effect its expenditures in the exercise of its discretion as needs develop and circumstances alter.***" (at 142)

The hearing examiner recommends that the Commissioner find that reinstatement of the following curtailments recommended by Council are necessary to insure an adequate school program in the school district. To assist the Commissioner in reaching his decision, the hearing examiner's findings and recommendations in regard to major line items of the proposed reductions are as follows:

*J213 Salaries of Teachers* *Reduction $15,000*

The record shows that the amount of $11,500 is necessary in this line item due to the lateral movement of instructors on the teachers' salary guide. (B-1)

The hearing examiner recommends that $11,500 of the proposed reduction of $15,000 be restored.

*J220 Textbooks* *Reduction $5,000*

The testimony of the Superintendent (Tr. 52) and the document (B-1) show the Board's proposed expenditure for the school year 1977-78 to be less than the actual expenditure for the previous year.

It is recommended by the hearing examiner that the $5,000 reduction proposed by Council be restored.

*J250A Miscellaneous Supplies, Instruction* *Reduction $1,000*

The restoration of the proposed reduction of $1,000 is recommended because the amount budgeted by the Board for the 1977-78 school year was less than the actual expenditure for this item in the previous year.

*J250B Travel Expenses* *Reduction $2,000*

The Board alleges that the restoration of the entire reduction of $2,000 is necessary to this account.

The hearing examiner does not recommend the restoration of this amount as the remaining $4,000 is substantially in excess of the expenditures for this line item in either of the two preceding school years.

*J520B Transportation Contracts* *Reduction $2,000*

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*J520C Transportation Contracts* *Reduction $3,000*

The record is absent any evidence that the restoration of the proposed reductions by Council is necessary to the thorough and efficient education of the pupils in the regular program of the school system.

The hearing examiner does not recommend their restoration.

*J540 Pupil Transportation, Insurance* *Reduction $2,540*

The hearing examiner recommends the restoration of $500 of the proposed reduction by Council to afford the Board the requisite funds in this item necessary over the actual expenditures of the previous year due to the indicated increase in insurance rates.

*J550D Transportation Repairs* *Reduction $1,000*

The hearing examiner does not recommend the restoration of the proposed $1,000 reduction by Council as the remaining $720 in this line item represents a one hundred percent increase over the actual expenditure in the previous year.

*J640C Utilities, Gas* *Reduction $1,700*

The Board alleges the placement in this line item of the expenditures necessary to the use of propane gas in trailer operations but gives no resulting estimate due to this item.

The hearing examiner does not recommend the restoration of $1,700 reduced by Council.

*J640D Telephone* *Reduction $2,500*

The restoration of the entire amount of $2,500 is recommended. The reduction proposed by Council places the revised amount available in this line item for 1977-78 to be over $2,000 less than the actual expenditure for the previous school year.

*J660B Plant Operation, Vehicles* *Reduction $1,500*

The Board indicates that previously owned vehicles were traded in and replacements were acquired from naval surplus. The Board gives no estimate of needed repairs.

The hearing examiner does not recommend the restoration of $1,500 reduced by Council in this line item.

*J720A Grounds Maintenance, Contracted* *Reduction $5,000*

The Board states that Council's proposed reduction of $5,000 from a total budgetary allocation is excessive and unreasonable in view of the fact that such

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reduction places the available funds below the amount expended two years ago in the 1975-76 budget.

The hearing examiner recommends that the sum of $5,000 be restored to this line item so that a major portion of repairs and maintenance of grounds can be undertaken immediately.

*J720B Building Maintenance, Contracted* *Reduction $6,000*

The Board states that it has not been able to do necessary repairs over the years and asserts the need for a new roof on the elementary school.

The hearing examiner recommends the restoration of $3,000 to this line item to place the expenditure at a higher level than for the two prior school years and assist the Board to maintain the district's schoolhouse in a decent semblance of repair.

*J720C Repair of Equipment, Contracted* *Reduction $6,000*

The Board states that Council's proposed reduction of $6,000 is excessive and unreasonable in view of the fact that it is only performing emergency repairs in the current school year.

The hearing examiner recommends that the sum of $3,000 be restored to better enable the Board to make the needed repairs.

*J730A Instructional Equipment Replacement* *Reduction $6,000*

The Board seeks within this item to replace desks and chairs for pupils much of which was transferred from the old school and, additionally, purchase needed business machines and audiovisual equipment.

The hearing examiner in consideration of the individual initial requests of staff and the needs expressed therein does not find the amount budgeted to be unreasonable and recommends the restoration of the entire $6,000.

*J730C Instructional Equipment, New* *Reduction $5,000*

The Board seeks within this line item to purchase new instructional equipment. The hearing examiner does not question the desirable educational outcomes which could be effected through the wise use of such media but he finds no listings of programs and their resulting goals for which new equipment is intended.

The hearing examiner believes, in view of the defeat of the budget at the polls, that such advances be limited and he does not recommend the restoration of the proposed reduction.

The hearing examiner now calls to the attention of the Commissioner certain unrealistic practices evidenced by the Board in the process of the compilation

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of its budget figures. The Superintendent testified that in line items J110B, J110C, J110F (and others) that, although he notified the Board that these items would be overexpended based on the monies budgeted by the Board, it refused to acknowledge the actual expenditures indicated and did not revise the figures accordingly. (Tr. 66-68)

Further, the hearing examiner calls to the attention of the Commissioner the impropriety of the expenditure of $13,000 as a W reserve account item from the 1976-77 school budget for the uncontracted construction of new tennis courts as adduced from the testimony of the Superintendent. (Tr. 70-72)

In summary, the recommendations of the hearing examiner with respect to the total budget reductions are listed as follows:

CHART II

| Account Number | Item | Amount of Reduction | Amount Restored | Amount not Restored |
|---|---|---|---|---|
| CURRENT EXPENSE: | | | | |
| J213 | Sal., Tchrs. | $15,000 | $11,500 | $ 3,500 |
| J220 | Textbooks | 5,000 | 5,000 | -0- |
| J230B | Per. & Newsprs. | 1,000 | 500 | 500 |
| J230C | A-V Mats. | 300 | 300 | -0- |
| J250A | Misc. Supls., Instr. | 1,000 | 1,000 | -0- |
| J250B | Travel Exps. | 2,000 | -0- | 2,000 |
| J250C | Misc. Exps. | 500 | -0- | 500 |
| J320A | Supls., Attend. Servs. | 200 | -0- | 200 |
| J320B | Travel | 600 | -0- | 600 |
| J420A | Supls., Health Servs. | 400 | -0- | 400 |
| J520A | To/From Sch. Contr. | 700 | 700 | -0- |
| J520B | Trans., Contr. Servs. | 2,000 | -0- | 2,000 |
| J520C | Trans., Contr. Servs. | 3,000 | -0- | 3,000 |
| J540 | Ins., Pupil Trans. | 2,540 | 500 | 2,040 |
| J550B | Lub./Oil, Pupil Trans. | 400 | -0- | 400 |
| J550C | Tire & Tube Repl. | 750 | -0- | 750 |
| J550D | Repairs, Pupil Trans. | 1,000 | -0- | 1,000 |
| J550F | Maint. Private Garage | 500 | -0- | 500 |
| J620 | Contr. Servs., Plnt. Oper. | 300 | -0- | 300 |
| J640C | Gas | 1,700 | -0- | 1,700 |
| J640D | Telephone | 2,500 | 2,500 | -0- |
| J660B | Veh., Plnt. Oper. | 1,500 | -0- | 1,500 |
| J720A | Upkeep of Grnds. | 5,000 | 5,000 | -0- |
| J720B | Repair of Bldgs. | 6,000 | 3,000 | 3,000 |
| J720C | Repair of Equip. | 6,000 | 3,000 | 3,000 |
| J730A | Repl. Instr. Equip. | 6,000 | 6,000 | -0- |
| J730C | New Equip., Instr. | 5,000 | -0- | 5,000 |
| | TOTALS | $70,890 | $39,000 | $31,890 |

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This concludes the report of the hearing examiner.

* * * *

The Commissioner has reviewed the record of the controverted matter and notes that no exceptions were filed by the parties to the hearing examiner report, pursuant to the provisions of *N.J.A.C.* 6:24-1.17(b). The evidence in the record is supportive of the recommendations of the hearing examiner which the Commissioner henceforth accepts as his own.

A review of the Commissioner's own records, however, reveals that the $22,000 for capital outlay as proposed in the Board's budget, *ante,* was an item to be funded from the existing unappropriated balance in its capital outlay account, rather than an amount to be raised by public taxation. To this extent the hearing examiner report is found to be technically in error and is hereby corrected.

The Commissioner determines that besides the amount of $1,138,132 already certified by Council for the Board's current expense needs for the 1977-78 school year the additional amount of $39,000 is necessary for the Board to conduct a thorough and efficient program of education for the 1977-78 school year. Accordingly, the additional amount of $39,000 for the Board's current expenses in the 1977-78 school year is hereby certified to the Monmouth County Board of Taxation to be raised by public taxation in the Borough of Keansburg.

The Commissioner is constrained to observe that the Board failed to submit a revised 1977-78 budget subsequent to Council's original reduction. Consequently, the amount it has since been advised it could anticipate as State equalization aid for 1978-79 school purposes and the maximum permitted 1978-79 net current expense budget is based on its total current expense proposal originally submitted to the voters. Thus, the calculations are overstated. The restoration herein shall also have an effect on the amount of State equalization aid and the maximum permitted net current expense budget it may anticipate for 1978-79.

The Commissioner hereby directs the Board Secretary of the Board of Education of the Borough of Keansburg to forthwith consult with the County Superintendent of Schools to arrange a meeting with the Assistant Commissioner in charge of the Division of Administration and Finance, Department of Education, to reconcile any disparity which may exist in regard to the Board's anticipated 1978-79 State equalization aid and the Board's maximum permitted 1978-79 net current expense budget.

In conclusion, the Commissioner directs the Board to comply precisely with those applicable legal requirements of bidding procedures and budget compilation wherein the hearing examiner has noted imperfections in the Board's procedural actions, *ante*.

COMMISSIONER OF EDUCATION

May 16, 1978

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**Board of Education of the Township of Cranbury, Middlesex County, and Board of Education of the Borough of Roosevelt, Monmouth County,**

*Petitioners,*

*v.*

**Board of Education of the East Windsor Regional School District, Mercer County,**

*Respondent.*

## COMMISSIONER OF EDUCATION

## DECISION ON MOTION

For the Petitioner Cranbury Board of Education, Golden, Shore & Paley (Philip H. Shore, Esq., of Counsel)

For the Petitioner Roosevelt Board of Education, Joyce M. Usiskin, Attorney at Law

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

The Board of Education of the School District of the Township of Cranbury, hereinafter "Cranbury Board," and the Board of Education of the School District of the Borough of Roosevelt, hereinafter "Roosevelt Board," have appealed from an action of the Board of Education of the East Windsor Regional School District, hereinafter "East Windsor Board," wherein the East Windsor Board has served notice to terminate a sending-receiving relationship with Cranbury Township and the Borough of Roosevelt, has refused to accept Cranbury Board's and Roosevelt Board's ninth grade pupils for the 1978-79 school year, and has failed to provide an orientation program for the present eighth grade pupils and to make available the guidance counselors, course information, program information, course selection forms and the necessary assistance to enable the Cranbury and Roosevelt pupils to complete such necessary course selection forms preparatory to enrollment at East Windsor Board's high school.

This matter comes directly before the Commissioner of Education on an Order to Show Cause filed by the Cranbury Board and, subsequently, a Notice of Motion for Consolidation and for Interim Restraints filed by the Roosevelt Board. On his own Motion, the Commissioner consolidated the two Petitions of Appeal filed by the East Windsor Board and the within matter is now *Board of Education of the East Windsor Regional School District, Mercer County v. Board of Education of the Borough of Roosevelt, Monmouth County, and Board of Education of the Township of Cranbury, Middlesex County.*

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Oral argument on the Motion for Interim Relief pursuant to *N.J.A.C.* 6:24-1.5 was heard on February 17, 1978 at the State Department of Education, by a representative of the Commissioner. The matter is now before the Commissioner for adjudication.

The Cranbury Board and Roosevelt Board allege that the East Windsor Board has failed to provide an orientation program for their eighth grade pupils in preparation for their enrollment in the East Windsor Board's high school for the 1978-79 school year. The Cranbury and Roosevelt Boards contend that such an orientation program has been a long-standing practice and included, *inter alia,* eighth grade pupils' visitation to the high school, the high school house leaders and guidance counselors meeting with all parents and pupils for course program information and assistance with course selection in preparation to their entrance into the East Windsor Board's high school in September of each school year. The Boards argue that the East Windsor Board's failure to provide such an orientation program is prejudicial to their pupils and request that the Commissioner order the East Windsor Board to provide an orientation similar to that provided their pupils in the past.

The East Windsor Board answers that no authority has been cited in Title 18A, Education, or Title 6 of the Administrative Code which compels it to provide an orientation program to pupils of a sending district in a sending-receiving relationship. It asserts that it would continue to provide such a program only in the event that the Cranbury Board and Roosevelt Board would agree to pay for the service. It admits, however, that no such request for the payment of an orientation program has been requested by it from the Cranbury and Roosevelt Boards since the program began in 1974.

The Cranbury Board and Roosevelt Board now move, by application for interim relief, that, pending a final determination by the Commissioner of the merits of their petition seeking to prevent the termination of the sending-receiving relationship for the 1978-79 school year, the Commissioner order the East Windsor Board to provide an orientation program and accept the ninth grade pupils from Cranbury and Roosevelt for the school term commencing September 1978.

The Commissioner is aware of the criteria set forth by the courts for the exercise of discretion in the issuance of a *pendente lite* restraint, *U.S. v. Pavenick,* 197 *F. Supp.* 257, 259-60 (*D.N.J.* 1961); *Communist Party of the United States of America v. McGrath,* 96 *F.Supp.* 47, 48 (*D.D.C.* 1951). The Commissioner also takes notice that the pertinent statutes relative to the termination of sending-receiving relationships are embodied in *N.J.S.A.* 18A:38-13, 22 and 23.

It is clear that the statutes provide for continual stability in sending-receiving relationships, and also make provisions for changes in and/or termination of such relationships between school districts if there is "good ground" for the severance of an existing pattern.

In the instant matter the three school districts have had a relationship of

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long standing, and the refusal by the East Windsor Board to receive the ninth grade pupils in September 1978 from the School District of Cranbury Township and the Borough of Roosevelt is *prima facie* evidence of an intention to sever this relationship. The statute, *N.J.S.A.* 18A:38-13, requires that the severance of a sending-receiving relationship must be for "good and sufficient reason," upon application made to and approved by the Commissioner. The action of the East Windsor Board in refusing to accept the aforementioned pupils was taken before any application for severance of the existing sending-receiving relationship was filed before the Commissioner. Notwithstanding any provisions of a contractual agreement to the contrary, the sending-receiving relationship continues in full force and effect unless and until an application for severance is approved by the Commissioner.

Accordingly, the Commissioner finds and determines that the action of the East Windsor Regional Board of Education refusing to accept the ninth grade pupils from the Cranbury Township School District and the School District of the Borough of Roosevelt for the school term commencing September 1978 is *ultra vires*. The Commissioner therefore directs the East Windsor Board to accommodate the aforementioned pupils without delay and to provide these pupils with the necessary orientation which it has provided in the past for an orderly transition into its schools and to continue to accommodate these pupils, and any other ninth grade pupil, who shall be similarly situated by virtue of establishing a domicile within the Township of Cranbury and/or the Borough of Roosevelt School Districts until the matter herein controverted before the Commissioner is finally determined and resolved. The Commissioner further directs that a final determination of the merits of this appeal be made with all deliberate speed.

COMMISSIONER OF EDUCATION

March 6, 1978

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**In the Matter of the Application of the Board of Education of the East Windsor Regional School District, Mercer County, for the Termination of the Sending-Receiving Relationship with the School District of the Township of Cranbury, Middlesex County, and the Application of the Board of Education of the Township of Cranbury to Establish a Sending-Receiving Relationship with the Board of Education of the Township of Lawrence, Mercer County.**

## COMMISSIONER OF EDUCATION

## DECISION

For the East Windsor Regional Board of Education, Turp, Coates, Essl & Driggers (Henry G. P. Coates, Esq., of Counsel)

For the Cranbury Board of Education, Golden, Shore & Paley (Philip H. Shore, Esq., of Counsel)

For the Lawrence Board of Education, Peter Knipe, Esq.

In 1973 the East Windsor Regional Board of Education, hereinafter "East Windsor Board," filed an application with the Commissioner of Education for a severance of the sending-receiving relationships between it and the Boards of Education of the Borough of Roosevelt, hereinafter "Roosevelt Board," and the Township of Cranbury, hereinafter "Cranbury Board." Thereafter, in a decision of April 29, 1976, the Commissioner determined that the Cranbury Board should be "free to pursue possible alternatives" in a sending-receiving relationship which should be submitted for review and consideration and he retained jurisdiction to the date of January 1, 1977 to expedite such study. *In the Matter of the Application of the Board of Education of the East Windsor Regional School District for the Termination of the Sending-Receiving Relationship with the School Districts of the Borough of Roosevelt, Monmouth County, and the Township of Cranbury, Middlesex County,* 1976 *S.L.D.* 479 Subsequently, the East Windsor Board submitted enrollment data to the Commissioner which was less than originally projected. The Commissioner found that East Windsor Board's projected enrollment "***clearly poses no necessity for immediate action by the Commissioner***" and dismissed East Windsor Board's application without prejudice. *In the Matter of the Application of the Board of Education of the East Windsor Regional School District for the Termination of the Sending-Receiving Relationship with the School District of the Borough of Roosevelt, Monmouth County, and the Township of Cranbury, Middlesex County,* 1977 *S.L.D.* 304. On January 19, 1978, the East Windsor Board renewed its application to sever its sending-receiving relationship with the Roosevelt Board and the Cranbury Board. The instant matter is limited to a review and consideration of the termination of the sending-receiving relationship between the East Windsor Board and the Cranbury Board, and the application to

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establish a sending-receiving relationship between the Cranbury Board and the Board of Education of the Township of Lawrence, hereinafter "Lawrence Board."

A hearing in this matter was conducted on May 12, 1978 by a hearing examiner appointed by the Commissioner at the State Department of Education, Trenton. The report of the hearing examiner is as follows:

Subsequent to the filing of East Windsor Board's renewed application to terminate the sending-receiving relationship between it and the Cranbury Board on January 19, 1978 and prior to the hearing, the Cranbury Board agreed with the Commissioner's determination of April 29, 1976 and did indeed "***pursue possible alternatives***." Subject to the approval of the Commissioner to establish a sending-receiving relationship between it and the Lawrence Board, the Cranbury Board joined East Windsor Board in its application to sever the sending-receiving relationship between the East Windsor Board and the Cranbury Board. (Tr. 12)

The East Windsor and Cranbury Boards have engaged in a sending-receiving relationship for approximately seventy-five years whereby Cranbury pupils in grades nine through twelve attended East Windsor Board's Hightstown High School. The Boards last entered into an Agreement on September 17, 1966 for a period of ten years. The continuation of this Agreement beyond the 1975-76 school year has been determined by the Commissioner as noted above.

The East Windsor Board asserts the functional capacity of its high school to be 1332 pupils without use of the auditorium. (Petition of Appeal, at p. 2) The hearing examiner observes that the Chief Educational Consultant of the Bureau of Facility Planning Services, New Jersey Department of Education, computed the pupil capacity at 1394 pupils. (C-1) In any event, the East Windsor Board introduced into evidence its "Facilities Master Plan Study," which included, *inter alia,* enrollment projections for the school years 1978-79 through 1987-88. (P-1) The enrollment projections were determined through the use of a method based upon the trend in class survival for the periods between 1971-77 and the following enrollments for grades nine through twelve are shown:

| *Year* | *Total* |
|---|---|
| 1978 | 1396 |
| 1979 | 1453 |
| 1980 | 1474 |
| 1981 | 1521 |
| 1982 | 1588 |
| 1983 | 1687 |
| 1984 | 1799 |
| 1985 | 1833 |
| 1986 | 1779 |
| 1987 | 1772 |

(P-1, at p. 14)

It is evident that the projected enrollments commence to exceed the rated

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functional capacity of Hightstown High School with the 1978-79 school year.

The East Windsor Board avers that the severance of the sending-receiving relationship will not adversely affect either it or the Cranbury Board financially or educationally. It further asserts that the withdrawal of Cranbury pupils will not materially alter the existing racial composition within the two districts. (Petition of Appeal, Exhibit A, East Windsor Board Resolution, December 12, 1977)

The East Windsor Board stipulated its consent, in its entirety, to the application to establish a sending-receiving relationship between the Cranbury Board and the Lawrence Board. (Tr. 8-9)

The Lawrence Board and the Cranbury Board on May 8 and 10, 1978, respectively, adopted similar Resolutions to enter into a sending-receiving relationship, subject to approval by the Commissioner, which provide, *inter alia,* as follows:

1. *Classes Involved: Phased Transfer*

The Cranbury Board shall send its high school pupils in grades nine through twelve to the Lawrence Board's high school which shall receive and provide high school facilities for such pupils. The sending-receiving relationship shall begin in September 1978, at which time the ninth and tenth grade pupils for the 1978-79 school year from Cranbury will attend Lawrence Board's high school. Cranbury pupils who will be assigned to the eleventh and twelfth grades for the 1978-79 school year shall have the option to continue to attend the East Windsor Board's high school or to transfer to the Lawrence Board's high school. It is agreed that the option for these classes must be exercised by all pupils on or before June 1, 1978. For members of the eleventh grade, the choice made for the 1978-79 school year shall govern their attendance for the 1979-80 school year.

2. *Term of Agreement*

The Agreement shall be in effect for a term of five years from July 1, 1978 through and including June 30, 1983. At the end of the third year of this Agreement, which shall be June 30, 1981, the parties will conduct a detailed analysis and review of the facilities, pupil population, and projected increase or decrease of pupils in each community. If, after the completion of this in-depth analysis, the Lawrence Board shall determine that it will not be in a position to continue the sending-receiving relationship at the end of the five year period, it shall so notify the Cranbury Board in writing of its desire to terminate the relationship at the end of the five year term and the Cranbury Board shall begin efforts to find an alternate school district to receive its pupils, subject to the approval of the Commissioner. If, at the end of the third year, the Cranbury Board shall determine that it will not be in a position to continue the sending-receiving relationship at the end of the five year period, it shall so notify the

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Lawrence Board in writing of its desire to terminate the relationship at the end of the five year term, also subject to the approval of the Commissioner.

3. *Termination*

At the conclusion of the Agreement, the termination shall be carried out on a phased withdrawal wherein ninth and tenth grade pupils for the subsequent school year will attend the high school of the new school district and the eleventh and twelfth grade pupils will be provided the option to remain in Lawrence Board's high school for the completion of their school career or, in the alternative, to attend the new receiving district, subject to the approval of the Commissioner.

4. *Tuition*

Tuition and related charges, as well as payment of same, shall be made in accordance with the applicable laws, rules and regulations of the New Jersey Department of Education. The Cranbury Board will directly bear the full cost for any classified special education pupils who cannot be accommodated by the Lawrence Board.

5. *Transportation and Related Costs*

The Cranbury Board shall be responsible for all transportation costs for transporting its pupils between Cranbury and Lawrence High School. The Cranbury Board will pay the reasonable cost incurred by the Lawrence Board for supervisors who may be appointed as the result of a possible need for late buses. The Cranbury Board will pay for and provide insurance coverage, and will have the Lawrence Board designated as an additional named insured under the policy covering the bus carrier and all other appropriate policies. The Cranbury Board will provide copies of all such documents and a certificate of insurance reflecting a minimum of one million dollars ($1,000,000) of insurance coverage per occurrence.

6. *Preliminary Costs*

The Cranbury Board shall be responsible for the payment of twenty-five hundred dollars ($2,500) toward the legal fees and directly related expenses and disbursements incurred by the Lawrence Board in connection with the establishment of this relationship.

Additionally, the Agreement provides for:

7. liaison procedure for parent concerns;

8. equality of treatment of the sending pupils with a thorough and efficient education including extracurricular activities;

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9. non-voting liaison board representatives of each Board to attend meetings and conferences of the other Board of Education;

11. Cranbury pupils to be subject to and governed by all rules and regulations of the Lawrence Board;

12. 1978 summer school not available to Cranbury pupils;

13. expeditious resolution of any and all disputes arising out of the Agreement; and

10. all necessary approvals of the Agreement to be obtained by June 1, 1978 in order that the relationship can become effective September 1978, otherwise the Agreement is null and void. (C-2-3)

The hearing examiner has carefully reviewed the record and documents in evidence and finds the following to be true in fact:

1. The East Windsor Board has, since 1973, attempted to sever the sending-receiving relationship between it and the Cranbury Board.

2. The East Windsor Board's Hightstown High School has a functional pupil capacity of 1394 pupils. (C-1)

3. The projected pupil enrollments in grades nine through twelve will exceed the functional pupil capacity of the Hightstown High School commencing with the 1978-79 school year and thereafter through the 1987-88 school year. (P-1)

4. The severance of the sending-receiving relationship between the East Windsor Board and the Cranbury Board will not adversely affect either party financially or educationally.

Having thoroughly reviewed the applicable statutes in the instant matter (*N.J.S.A.* 18A:38-8 *et seq.*) and the criteria as set forth in previous decisions of the Commissioner (*In the Matter of the Termination of the Sending-Receiving Relationship Between the Boards of Education of the Township of Lakewood and the Township of Manchester,* 1966 *S.L.D.* 12; *In the Matter of the Application of the Board of Education of Caldwell-West Caldwell to Terminate Sending-Receiving Relationship with the Board of Education of the Township of Montville Beginning with the Ninth Grade for the School Year 1958-59,* 1957-58 *S.L.D.* 43), the hearing examiner, therefore, recommends that the Commissioner approve the termination of the sending-receiving relationship between the East Windsor Board and the Cranbury Board effective June 30, 1978.

For the reasons set forth, *ante,* and pursuant to the Agreement between the Boards of Cranbury and Lawrence, the hearing examiner further recommends that the Commissioner establish the sending-receiving relationship between the Cranbury Board and the Lawrence Board effective July 1, 1978.

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This concludes the report of the hearing examiner.

* * * *

The Commissioner has considered the record and observes that the parties have waived receipt of the hearing examiner's report pursuant to *N.J.A.C.* 6:24-1.17(b). (Tr. 4-5)

The Commissioner has reviewed the entire record in this lengthy dispute and determines that equity has been served by the Cranbury Board joining the East Windsor Board in its Application to terminate the now existing sending-receiving relationship. The Commissioner agrees with the findings of the hearing examiner and accepts them as his own. Accordingly, the Commissioner hereby approves the termination of the sending-receiving relationship between the East Windsor Regional Board of Education and the Board of Education of the Township of Cranbury effective June 30, 1978.

The Commissioner has reviewed the joint resolutions executed by the Boards of Cranbury and Lawrence and hereby approves the establishment of the new sending-receiving relationship for a five year term. He cautions both Boards, however, to carefully consider the consequences of article 3, the Termination clause of the Agreement. The Commissioner is required to strictly adhere to the provisions of the statutes in such matters and may not terminate such sending-receiving relationships "***except for good and sufficient reason.***" *N.J.S.A.* 18A:38-13

Accordingly, for the reasons hereinbefore set forth the sending-receiving relationship between the Cranbury Board and the Lawrence Board is hereby approved effective July 1, 1978 for the 1978-79 school year and continuing to the date of June 30, 1983. The plans to effectuate such relationship may now go forward and it is directed that they be implemented with expedition.

COMMISSIONER OF EDUCATION

May 31, 1978

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**In the Matter of the Application of the Board of Education of the East Windsor Regional School District for the Termination of the Sending-Receiving Relationship with the School District of the Borough of Roosevelt, Monmouth County.**

**COMMISSIONER OF EDUCATION**

**ORDER**

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

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

This matter having been opened before the Commissioner of Education on January 17, 1978 by the filing of a Petition of Appeal by the Board of Education of the East Windsor Regional School District, hereinafter "East Windsor Board," wherein the East Windsor Board has served notice to terminate a sending-receiving relationship with the Board of Education of the School District of the Borough of Roosevelt, hereinafter "Roosevelt Board"; and

A timely Answer having been filed with the Commissioner on February 14, 1978 wherein the Roosevelt Board opposes the termination of the existing sending-receiving relationship; and

The Roosevelt Board having filed an affidavit with the Commissioner which alleges that the East Windsor Board has refused to accept and enroll Roosevelt tuition pupils in its approved 1978 summer school program; and

The Roosevelt Board having filed a Notice of Motion to Restrain the East Windsor Board from a denial to accept and enroll Roosevelt tuition pupils in the East Windsor Board's approved 1978 summer school program; and

The Commissioner having considered the resolution adopted by the East Windsor Board on December 12, 1977 contending, *inter alia,* that the Roosevelt Board must withdraw its pupils from the sending-receiving relationship not later than June 30, 1978; and

The Commissioner having determined that the East Windsor Board's resolution is *ultra vires (Board of Education of the Township of Cranbury, Middlesex County, and Board of Education of the Borough of Roosevelt, Monmouth County v. Board of Education of the East Windsor Regional School District, Mercer County,* Decision on Motion March 6, 1978); and

The Commissioner having similarly considered arguments of the parties *In re Cranbury, supra,* and determined, *inter alia,* that "*** [n]ot withstanding any provisions of a contractual agreement to the contrary, *the sending-receiving*

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*relationship continues in full force and effect* unless and until an application for severance is approved by the Commissioner.***'' *(emphasis supplied);* and

The Commissioner having determined that there is sufficient showing that irreparable harm will result to those Roosevelt pupils denied the opportunity to enroll and participate in the East Windsor Board's approved 1978 summer school program; now therefore

IT IS ORDERED that the Roosevelt Board's application to enjoin and restrain the East Windsor Board from the acceptance and enrollment of Roosevelt pupils in the East Windsor Board's approved 1978 summer school is hereby granted; and

IT IS ORDERED that the East Windsor Board accept and enroll in its approved 1978 summer school program all pupils similarly situated in the Roosevelt School District; and

IT IS FURTHER ORDERED that this matter move forward to a final determination in an expeditious manner.

ORDERED this 27th day of June 1978.

COMMISSIONER OF EDUCATION

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**Blanche Connolly,**

*Petitioner,*

*v.*

**Board of Education of the Township of Montville *et al.*, Morris County,**

*Respondents.*

## COMMISSIONER OF EDUCATION

## DECISION

For the Petitioner, Ruhlman and Butrym (Paul T. Koenig, Jr., Esq., of Counsel)

For the Respondents, Schneider, Cohen & Solomon (Martin List, Esq., of Counsel)

Petitioner is a teaching staff member employed by the Board of Education of the Township of Montville, hereinafter "Board," who enjoys a tenure status. For a period of five years she performed additional duties as chairman of the business department of the Montville Township High School. Petitioner received additional compensation for these duties and served until she was not reappointed as a department chairman for the 1974-75 academic year. Petitioner alleges that her termination as a department chairman was illegal because it was retaliatory and discriminatory of her and grounded on the reason that she was elected to the position of president of the Montville Township Education Association (Association).

The Board denies that its action was illegal, retaliatory, or discriminatory; rather, it contends that holding positions as department chairman and Association president simultaneously poses a potential irreconcilable conflict of interest.

A hearing was held in the office of the Somerset County Superintendent of Schools on February 18, 1975 before a hearing examiner appointed by the Commissioner of Education. The report of the hearing examiner follows:

At the conclusion of the hearing, the hearing examiner learned that a similar matter involving petitioner had been presented earlier before the Public Employment Relations Commission (PERC) and he alerted the litigants that any report of the hearing may have to be withheld pending a decision by PERC. The hearing examiner thereafter discussed this matter with the PERC representative assigned to petitioner's case and was informed that the Commissioner's office would be notified by letter concerning the status of petitioner's matter before that administrative agency. No notification by PERC has been received to date although confirmation of the discussion, *ante,* was mailed to the litigants

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and to PERC. (Letter, April 24, 1975) When additional requests were made for an update of this matter before PERC, the litigants did not know, nor could they ascertain, the status of the Connolly matter.

On May 5, 1977, more than two years after the hearing, the hearing examiner determined that this matter should no longer be delayed pending a decision by PERC and that the matter was ripe for determination by the Commissioner. Briefs were then filed by the litigants.

The facts in the matter are stipulated insofar as they relate to petitioner's tenure status: that she has no tenure as a department chairman; that she received additional compensation for department chairman duties; that she was an active member of the Association; and that she was elected as Association president. She was not reappointed to the position of department chairman. (Petitioner's Brief, at p. 1)

Petitioner contends that the Board's action discloses an anti-union animus and is thus violative of her rights guaranteed by the laws of this State. (Petitioner's Brief, at pp. 1, 4-5) The Board denies petitioner's contention and states that it was concerned about a dual status problem of the two offices before petitioner became president of the Association. (Tr. 114-119)

The record discloses that petitioner, as department chairman, was in a position to recommend as to employment or termination of an employee. The high school principal testified on cross-examination why he believed the dual roles were incompatible as follows:

> "***I think that one is a role that mandates that you are in a position to hire. You are in a position to fire. You are in a position to evaluate. You are in a position to develop budgets. You are in a position to reprimand people. The other is a situation that you are supportive of teachers. You are going to support them in grievances. You are going to support them in every aspect, legally, as [petitioner] stated, legally.***" (Tr. 131)

The record discloses further that the Board was concerned about the potential for a conflict of interest. The Board did not prove there was actually a conflict of interest, nor was it required to do so in the hearing examiner's judgment. In *Board of Education of West Orange v. Wilton*, 57 *N.J.* 404 (1971), the Court noted that:

> "***If performance of the obligations or powers delegated by the employer to the supervisory employee whose membership in the unit is sought creates an actual *or potential* substantial conflict between the interests of a particular supervisor and the other included employees, the community of interest required for inclusion of such supervisor is not present.***"
>
> (*Emphasis added.*) (at 425)

In the hearing examiner's judgment, petitioner was unable to prove an anti-union animus as she claimed or that the Board acted illegally or violated any

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of her rights by not reappointing her to a position as a department chairman. Further, the Board's determination was made pursuant to its statutory and discretionary authority found in *N.J.S.A.* 18A:11-1 which reads as follows:

"The board shall—

a. Adopt an official seal;

b. Enforce the rules of the state board;

c. Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes ***; and

d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district."

The hearing examiner finds that the testimony and the record do not support petitioner's contention; therefore, he recommends that the Petition of Appeal be dismissed.

This concludes the report of the hearing examiner.

* * * *

The Commissioner has read the report of the hearing examiner and notices that no exceptions have been filed thereto by the litigants. *N.J.A.C.* 6:24-1.17(b)

It is clear that a local board of education has the right to assign and transfer teaching staff members whom it employs. *N.J.S.A.* 18A:27-4 states the following:

"Each board of education may make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district, and may from time to time change, amend or repeal the same, and the employment of any person in any such capacity and his rights and duties with respect to such employment shall be dependent upon and governed by the rules in force with reference thereto."

In the instant matter the Commissioner determines that the Board merely exercised its authority to decline to reassign petitioner to a position for which she held no tenure rights. In exercising this discretion the Board had no further

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obligation to petitioner. *Henry R. Boney v. Board of Education of the City of Pleasantville et al.*, 1971 *S.L.D.* 579, 585

Petitioner did not sustain her burden of proof to show that the Board exhibited any anti-union animus, or that it acted improperly or illegally in deciding not to reappoint her to a position as a department chairman.

The Board has the statutory authority to assign teachers as it sees fit, subject to the limitations of certification and reasonableness. *Boney, supra* As the Commissioner stated in *Boult and Harris v. Board of Education of Passaic,* 1939-49 *S.L.D.* 7 (1946), aff'd State Board of Education 15, 135 *N.J.L.* 329 (*Sup. Ct.* 1947), 136 *N.J.L.* 521 (*E.&A.* 1948):

> "***[B]oards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions.***" (at 13)

There has been no showing that the Board's determination was in any way arbitrary, capricious or unreasonable. The aforementioned allegations are not supported by the facts. Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

May 31, 1978

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