NEW JERSEY SCHOOL LAW DECISIONS

Indexed

January 1, 1985 to December 31, 1985

Vol. I

SAUL COOPERMAN
Commissioner of Education

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SAUL COOPERMAN
Commissioner of Education

DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION
SUPERIOR COURT AND SUPREME COURT
1985

INITIAL DECISION
OAL DKT. NO. EDU 5752-84
AGENCY NO. 241-6/84

THOMAS CAMILLI,
Petitioner
v.
BOARD OF EDUCATION OF THE NORHTERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT,
Respondent

Kenneth I. Nowak, Esq., for petitioner
(Zazzali, Zazzali & Kroll, attorneys)

Albert O. Scafuro, Esq., for respondent

Record Closed: November 2, 1984 Decided: November 14, 1984

BEFORE **WARD R. YOUNG**, ALJ:

Petitioner, a tenured teaching staff member initially employed on September 1, 1971 with a physical science endorsement on his instructional certificate, alleged the Board violated his seniority rights when it assigned a non-tenured teacher to teach physics while reducing his employment from full to half-time.

The Board denies the allegation and asserts that, pursuant to N.J.A.C. 6:3-1.10(l)15, petitioner did not accrue seniority as a teacher of Physics because he had not served in that assignment.

The matter was transmitted to the Office of Administrative Law on August 1, 1984 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 9, 1984 at which the parties agreed to submit the matter for summary decision. The issue was briefed by the parties and the record closed on November 2, 1984, the date established for final submission.

The following facts were stipulated and incorporated in the Prehearing Order entered on October 9, 1984, and are adopted herein as FINDINGS OF FACT:

1. Petitioner has been employed in respondent's school district since September 1, 1971.

2. Petitioner possessed a certificate to teach with an endorsement as a teacher of physical science at the time of his employment.

3. Petitioner is a tenured teaching staff member.

4. Petitioner has been assigned to teach chemistry annually since his employment through June 1984.

5. On June 11, 1984, the Board acted on a reduction of force through the abolishment of a full-time chemistry position and establishment of a half-time chemistry position.

6. Petitioner was offered the half-time chemistry position for 1984-85 and accepted same, reserving his right to claim a full-time position within the scope of his certificate and seniority acquired.

7. A non-tenured teacher was assigned to teach physics for the 1984-85 school year.

8. The answers by the respondent to interrogatories propounded by petitioner are stipulated as facts by respondent, and shall be attached to petitioner's brief or memorandum of law.

Additionally, an admission in an answer to an interrogatory resulting from Stipulation #8 is also adopted as a FINDING OF FACT, which is that petitioner's performance as a teacher is not at issue.

Respondent is correct in stating that, pursuant to N.J.A.C. 6:3-1.10(l)15 and effective September 1, 1983, seniority only accrues in a category in an instructional endorsement under which a tenured teaching staff member has actually served. However, respondent fails to note that, pursuant to N.J.A.C. 6:3-1.10(m): "This action shall apply prospectively to all future seniority determinations as of the operative date of this rule, September 1, 1983."

It cannot be disputed that the physical science endorsement authorizes the teaching of "physics, chemistry, and earth and space sciences other than geography." Petitioner's accrual of seniority under the pre-amended regulation is vested, and tacking seniority accrual from September 1, 1983 is restricted to actual service under an endorsement. See In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Township Board of Education and the Edison Township Board of Education, Middlesex County, 1984 S.L.D. ____ (decided August 6, 1984).

I **FIND** that petitioner accrued 12 years of seniority as a teacher of Physics under the physical science endorsement possessed by him at the time of his employment. I **CONCLUDE**, therefore, that petitioner's seniority rights were violated when his employment for the 1984-85 school year was reduced to half-time while the Board employed a non-tenured teaching staff member as a teacher of Physics.

The Board is hereby **ORDERED** to make petitioner whole for the current school year by providing to him all the benefits of full-time employment from September 1, 1984.

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

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

14 November 1984
DATE

WARD R. YOUNG, ALJ

November 14 1984
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

NOV 21 1984
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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THOMAS CAMILLI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

The Board excepts to the determination that petitioner's seniority rights were violated when his employment as a chemistry teacher for the 1984-85 school year was reduced to half-time while the Board employed a nontenured teacher of physics. It contends that the initial decision fails to state petitioner never taught physics and that the teacher of physics has been teaching in the Board's employ since April 2, 1984 and therefore has seniority over petitioner.

The Board argues that the initial decision violates the spirit and intent of N.J.A.C. 6:3-1.10 (1) 15 adopted June 1, 1983, effective September 1, 1983. It avers that this regulation is to prevent the very situation the initial decision creates, namely, putting a teacher into a classroom situation teaching a course in physics which he has never before taught. According to the Board, such a decision would not take into consideration the best interests of the students.

Finally, the Board asserts that petitioner waived his right to claim seniority to the physics position because the position was advertised on March 21, 1984 yet he did not apply for it.

Petitioner affirms the judge's determination that he is entitled to the controverted physics position whether one were to apply the current seniority regulations effective September 1, 1983 or the prior ones. He claims entitlement under the current regulations, N.J.A.C. 6:3-1.10(1)(15), because these regulations state that seniority accrues in the subject area endorsement in which one has actually served. He cites N.J.A.C. 6:11-8.4(b)(14) as further support of his position. This regulation authorizes the holder of a physical science endorsement to teach physics, chemistry, and earth and space sciences other than geography. Thus, petitioner argues he has accrued seniority in the endorsement in which he has taught -- physical sciences -- and is, therefore, entitled to the physics position held by a nontenured teacher. Of this he states:

> "***To hold, as the Board urges, that the petitioner accrued seniority under the new rules only in chemistry not only contradicts the clear terms of the new seniority rules, it would create an unsupportable and harsh distinction in the scope of seniority accrual between different endorsements. For example, a holder of an English secondary certificate would accrue seniority in all English courses, even though the teacher may have only taught one or two courses. Yet the Board would have holders of a physical science endorsement treated differently, with seniority accruing only in the class taught despite the endorsement. There is no basis or support in the regulations for such a distinction in the manner in which seniority accrues under different endorsements. This is not a case in which the petitioner held physical science and business endorsements, never taught a business course, but now asks to exercise seniority in business. The petitioner has held a physical science endorsement and has accrued seniority in the authorizations under it - he now seeks to exercise his seniority in his physical science endorsement over a nontenured teacher who holds a general science endorsement.***"
>
> (Petitioner's Exceptions, at p. 3)

Petitioner further argues that, if he does not have seniority in physics under the new seniority rules, he did accrue seniority under the prior rules whereby seniority in the secondary category accrued in all fields covered even if never taught. Mulhearn v. Board of Education of Sterling Regional High School District, Docket No. A-5123-81T2 (N.J. Superior Court, Appellate Division, October 31, 1983. He contends that the question then becomes whether he lost all that seniority when the new rules were promulgated. Petitioner agrees with the judge that his seniority was not lost, because, inter alia, the new rules state that they are to be applied prospectively only. Further, the new regulations show "***no indicia of a desire to strip tenured teachers of seniority they had accrued under the prior law. Indeed, to do so would be unconstitutional." (Petitioner's Exceptions, at p. 4)

In addressing the issue of seniority, the Commissioner is constrained to emphasize that seniority is a right which only applies to tenured personnel, thus he finds no merit in the Board's argument that the nontenured teacher has greater "seniority" than petitioner because the nontenured teacher has taught physics since April 1984. Further, seniority is a right which only has meaning when a reduction in force is acted upon by a Board. The pertinent statutes read:

N.J.S.A. 18A:28-9

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

N.J.S.A. 18A:28-10

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

If the action to reduce force occurred prior to September 1, 1983, the prior seniority regulations are controlling. If the action occurred after that date, the current regulations are controlling when calculating seniority. In either circumstance, seniority determination is undertaken as a result of a reduction in force. In the instant matter, the Board's action to reduce petitioner's position occurred in June 1984, therefore, seniority is determined on the basis of the current regulations. The prior regulations have no applicability nor do they provide a vested right to seniority for any individual who was not subject to a reduction in force prior to September 1, 1983. There can be no issue of stripping petitioner of seniority rights accrued under the prior regulations since his seniority rights only took on meaning in June 1984 at the time he was subject to a reduction in force.

Petitioner is correct, however, in his argument that the current regulations entitle him to the physics position. The language of N.J.A.C. 6:3-1.10(1)(15) is clear and unambiguous that seniority accrues in the subject area endorsement(s) in which one actually serves. Petitioner has been a chemistry teacher for his entire service with the Board. Thus, his seniority attaches to the physical science endorsement, not merely chemistry. The physical science endorsement includes not only chemistry but physics and earth and space science other than geography; therefore, petitioner is unquestionably entitled to the physics position to which the non-tenured teacher was assigned.

The Board is in error when it argues petitioner waived his seniority rights to the physics position because he failed to apply for the position in March 1984. A tenured staff member who is subjected to a reduction in force is under no obligation to apply for a position to which he or she has entitlement by virtue of seniority. It is the responsibility of the Board to review its eligible staff to assure that no tenured employee has entitlement to a position prior to determining a vacancy exists that a nontenured individual may fill.

In addition to the above, the Commissioner is constrained to point out that the citation of the August 6, 1984 Old Bridge and Edison case in the initial decision is not applicable in the matter sub judice. That decision involves the seniority rights of (1) teachers assigned under elementary endorsement to grades 7 and 8 in either elementary schools or junior high schools or to teach common branch subjects in grades 9-12; (2) teachers assigned to teach simultaneously in two categories; and (3) persons serving under special subject endorsements or educational services certificates who are subject to a transfer to a grade level other than initially assigned.

Having determined that petitioner has accrued 13 years' seniority under the physical science endorsement pursuant to N.J.A.C. 6:3-1.10(1)(15), the Commissioner adopts the judge's recommended order for the reasons stated herein. The Board is to assign petitioner immediately to the position to which he is entitled and to provide him any salary, benefits, and emoluments that may have been lost as a result of the Board's improper actions in denying him the full-time physics position.

COMMISSIONER OF EDUCATION

JANUARY 3, 1985

THOMAS CAMILLI,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, January 3, 1985

For the Petitioner-Respondent, Zazzali, Zazzali and Kroll,
(Kenneth I. Nowak, Esq., of Counsel)

For the Respondent-Appellant, Scafuro and Gianni,
(Albert O. Scafuro, Esq., of Counsel)

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

May 1, 1985

INITIAL DECISION
OAL DKT. NO. EDU 7002-83
AGENCY DKT. NO. 217-4/80A

BERGENFIELD EDUCATION ASSOCIATION, CLAIRE M. KINGSLEY, ELAINE NICHOLAS, MARY McEWAN, BEVERLY KATZ, HELEN M. CASAZZA and JOAN MOORE,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,
Respondent.

APPEARANCES:

Gregory T. Syrek, Esq., for petitioners
(Bucceri & Pincus, attorneys)

Sidney A. Sayovitz, Esq., for respondent
(Greenwood & Sayovitz, attorneys)

Record Closed: October 12, 1984 Decided: November 21, 1984

BEFORE **ARNOLD SAMUELS,** ALJ:

This decision is the result of a remand to the Commissioner of Education from the Appellate Division of the Superior Court of New Jersey.

PROCEDURAL HISTORY

In April 1980, the petitioners (six teachers in the Bergenfield School District) and their employee representative organization filed petitions with the Commissioner of Education claiming rights to tenure, plus related compensation and benefits. The six teachers were categorized as Title I, Compensatory Education or Supplemental Instructors, and were among a larger group of teachers who were initially involved in the litigation, but subsequently withdrew. The respondent, Board of Education of the Borough of Bergenfield (Board), contested the petitioners' claims and, among various defenses, pleaded that the petitioners' actions were barred by the 90-day filing limitation in N.J.A.C. 6:24-1.2, and that the petitioners should be barred because of the equitable defense of laches.

The matter was heard and decided by the Office of Administrative Law (DKT. EDU 3298-80) in February 1981. It was held that 1) the 90-day filing limitation did not operate to bar the petitioners' claims; 2) the laches defense was eliminated from consideration because of lack of proof, and 3) based upon the case law then in effect, the petitioners were not entitled to tenure in their Title I, Compensatory Education or Supplemental Instructors positions.

In May 1981, the Commissioner of Education reversed the administrative law judge on the question of the 90-day filing limitation, holding that N.J.A.C. 6:24-1.2 should have barred consideration of the petitions. Nevertheless, the Commissioner also considered the findings and conclusions of the Initial Decision on the merits, and he affirmed the administrative law judge's determination that the petitioners were not tenure-eligible.

The Commissioner's decision was appealed to the N.J. State Board of Education. In January 1982, the State Board issued a decision that 1) reversed the Commissioner of Education and reinstated the administrative law judge's determination that the 90-day bar did not apply; 2) affirmed the Initial Decision and the Commissioner of Education as to the lack of tenure-eligibility of two of the six teachers, Casazza and Kingsley, and 3)

reversed the administrative law judge and the Commissioner of Education and found that petitioners, Moore, Nicholas, McEwan and Katz had attained tenure (holding that more recent cases decided by the Appellate Division mandated a different result).

The matter was then appealed to the Appellate Division of the Superior Court, which issued its decision (A-2615-81T2, unpublished) on May 19, 1983. At that time, the Appellate Division had the beneift of the New Jersey Supreme Court's definitive pronouncement on the subject, Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). That decision clarified and simplified the question of tenure eligibility for Title I, Compensatory Education teachers and Supplemental Instructors, all of whom would acquire tenure upon meeting the same statutory conditions as those teachers who are regularly employed.

In recognizing the application of the Spiewak holding to the Bergenfield teachers, the Appellate Division stated:

> The major issues on this appeal have been recently resolved by the decision in Spiewak v. Rutherford Bd. of Education. 90 N.J. 63 (1982), holding that Title I teachers and supplemental teachers who provide remedial and supplemental instruction to educationally handicapped children could acquire tenure if they otherwise meet the criteria of N.J.S.A. 18:28-5. Recognizing that Spiewak is controlling at least to some extent, we need only consider the appropriateness of a remedy to be afforded to the six teachers involved in this case. [Bergenfield Education Assn. et al. v. Board of Education of the Borough of Bergenfield, Bergen County].

After discussing the standards upon which remedies for the six teachers should be based, in accordance with Spiewak, the Appellate Division remanded the matter to the Commissioner of Education for further proceedings consistent with its opinion. The Commissioner, in turn, transmitted the remand to the Office of Administrative Law for hearing and determination pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on December 14, 1983 at the Office of Administrative Law in Newark, New Jersey. The Prehearing Order stated that the sole issue to be decided was "the definition

and calculation of benefits, if any, to which the petitioners are entitled pursuant to and in accordance with the foregoing decision of the Appellate Division."

TESTIMONY OF WITNESSES

Three days of hearing and argument were held on March 19, June 19 and September 12, 1984. Extensive briefs were filed both before and after hearing. Exhibits were marked in evidence; a list of which is attached hereto. A detailed stipulation of fact was filed, together with a voluminous quantity of supporting materials and documents, such as salary guides for the Bergenfield public schools during the years in question, salary and benefits information relating to each of the petitioners, copies of negotiated contracts for the years in question between the Bergenfield Board of Education and the teachers' representative, Bergenfield Education Association, and the prior decisions of the courts and administrative agencies.

Testimony was taken from each of the petitioner teachers, five of whom (Katz, Nicholas, Moore, Kingsley and Casazza) briefly stated the daily hours that they had taught during each of the years of their employment. That testimony from the five teachers was uncontradicted and is therefore accepted as **FACT.**

The sixth petitioner, Mary McEwan, also testified, primarily about details that precluded her continued employment as a teacher after December 1979. She left her position at the end of December 1979 until September 1980, in anticipation of the imminent birth of a child, when a maternity leave that she requested was denied (exhibit J-10 letters). Mrs. McEwan never returned to school. She became pregnant again in July 1980 (resulting in the birth of twins in January 1981), and she gave birth to another child in July 1983. She did not contact or communicate with the Board regarding the possibility of renewed employment after July 1980. The Board employed another teacher in her place, without regard to any tenure or seniority rights that McEwan might have had.

Mrs. McEwan filed a complaint with the Division on Civil Rights relating to the Board's refusal to grant the requested maternity leave beginning in December 1979 (exhibit R-1). That complaint was pending at the time the petition in this matter was filed with the Commissioner of Education, which resulted in the April 1981 Office of Administrative Law Initial Decision referred to above. She subsequently withdrew the portion of her petition in this matter that referred to the maternity leave denial. That withdrawal was offered on the record at the hearing, and it became part of the Initial Decision referred to above. The withdrawal was accepted by the Commissioner of Education and was not otherwise dealt with by the New Jersey State Board or the Appellate Division in the proceedings that followed. Mary McEwan never appealed or proceeded further on that issue after dismissal of her claim for lack of probable cause by the Division on Civil Rights, until she offered testimony at the remand hearing in this matter on September 12, 1984. The claim was also reasserted in the petitioner's briefs. The above facts, as to Mary McEwan, were also uncontradicted and are found to be **FACT.**

The supervisor of personnel for the Board, Donald Angelica, also testified. He indicated that, as hourly employees, the petitioners were paid upon submission of vouchers for each pay period. Beginning in the 1979-81 school year, different salary guides and schedules were negotiated for different categories of teachers; such as special education instructors, summer employees and part-time teachers. These separate schedules were negotiated with the teachers' union, and the agreements were reached as a result of good faith negotiations. Mr. Angelica said that the Board had recognized that the part-time or supplemental teachers were tenured or tenure-eligible, but the negotiations for hourly salary schedules were nevertheless guided by recognition that their duties and responsibilities were different from those of regular teachers. He acknowledged that there was no discussion in the negotiations of any rights the petitioners had (presumably to benefits other than salary) beyond the hourly wage. Since the date of the decision in Spiewak, all Title I, Compensatory Education and Supplemental Instructors have received contract salaries from the Board for a full day's work.

Evan Goldman, president of the local teachers' union and its chief negotiator, acknowledged that, on behalf of the petitioners, he had agreed to the different salary

schedules for certified hourly employees in negotiations for 1979-81 and 1981-83 contracts. He affirmed that the negotiations were held in good faith. He also testified that there was recognition during the negotiations that these hourly employees were tenured or tenure-eligible.

The foregoing testimony, also being uncontradicted, is accepted as **FACT.**

LEGAL DISCUSSION

A. **Tenure.** There is essentially no argument about the petitioners' tenure status. They all possess the required certification and have met the time-in-service requirements of N.J.S.A. 18A:28-5. They became tenured or were tenure-eligible during the years involved in their claims. See Spiewak at 81.

B. **Retroactive Relief.** The remand order of the Appellate Division in this case must be followed as the law of the case, despite an application of the law by the Appellate Division that appears to directly contradict the holding in Spiewak. The Supreme Court in Spiewak held that the parties before it were entitled to "retroactive payment of any benefits that they would have received if they had been awarded tenure properly." 90 N.J. at 83, n. 2. However, as to teachers not involved as plaintiffs in the Spiewak litigation, the Supreme Court held that "[t]eachers not before the court will therefore not be entitled to any back-pay award." Id. at 2. In another group of five consolidated post-Spiewak cases, Rutherford Education Association, et al v. Board of Education of the Borough of Rutherford, (N.J. App. Div. January 11, 1984, A-2014-82T3) (unreported) similar in some respects to the matter at hand, a different Appellate Division panel followed the Supreme Court opinion and denied retroactive relief to the teachers in Rutherford and other districts who were not before the court in Spiewak.

This forum is in no position to argue with the law of the case, and it must be followed, regardless of the seemingly clear language of Spiewak and the diametrically different applications of its ruling by different Appellate Division panels. The petitioners

here must be treated as if they were "before the court" in Spiewak, because the Appellate Division ordered it.

C. **The 90-day filing limitation, N.J.A.C. 6:24-1.2.** The question of the 90-day bar was fully litigated and decided in the Office of Administrative Law Initial Decision of February 1981 and affirmed by the State Board of Education in January 1982 (after an intermediate reversal by the Commissioner in May 1981). The Appellate Division did not address the subject and it was not part of the remand. Therefore, the 90-day filing limitation of N.J.A.C. 6:21-1.2 does not apply. It has been finally determined. It is the law of this case and should not be disturbed.

D. **Laches.** The above comments are also applicable to the respondent's attempt to bar the petitioners' claims by use of the equitable doctrine of laches. That subject was simarily dismissed by the administrative law judge in the Initial Decision of February 1981, due to lack of evidence, and that ruling was left untouched by the three appeals that followed. It also is not part of the remand and the prior ruling must remain, as the law of the case.

E. **Mary McEwan's claims.** Mrs. McEwan has conceded that, by virtue of her earlier withdrawal and lack of appeal of the Division on Civil Rights dismissal, she has waived any rights she may have had to contest denial of the maternity leave she requested. (See petitioner's reply brief at 19). As for any possibility of her reemployment thereafter, by calculation of seniority rights arising out of her tenure status, she admittedly was unable to engage in such employment because of the birth of three children during that time. In addition, she failed to contact or communicate with the Board to ask for reemployment. Any relief she might have been entitled to by virtue of her seniority rights during that period of time woiuld be purely speculative.

However, Mary McEwan did not waive any retroactive claims that she may have for tenure and benefits for periods of time prior to December 1979. In that respect she stands in the same position as the other petitioners.

F. **Prospective benefits (following the decision in Spiewak in June 1982) to which the petitioners are entitled.** The respondent has conceded that proper and full prospective adjustments have been, or should be, made in the salaries and benefits of those petitioners whose employment extended beyond the June 1982 date of the decision in Spiewak. Therefore it is unnecessary to deal further with the petitioners' entitlement to such prospective benefits. The principle stated in Rutherford applies here:

> The prospective application of the salary and benefits of the parties to the instant appeals are to be calculated from the date of the Spiewak decision, June 23, 1982 to the present. Moreover, the appellants are entitled to receive salary and employment benefits at the same rate as other teaching staff members with similar experience and qualifications employed by the various Boards. Rutherford Education Association v. Board of Ed. of the Borough of Rutherford, at 16.

G. **Retroactive Relief.** As stated above, the law of this case dictates that the petitioners are to be treated as if they were before the court in Spiewak, where the Supreme Court ruled that the petitioners, being tenured, were entitled to "all the emoluments and benefits afforded other teaching staff members." Id. at 69. It was also held that the parties were entitled to "retroactive payment of benefits that they would have received if they had been awarded tenure properly." Id. at 83, n. 2. The court in Spiewak then remanded the matter to the Commissioner of Education to determine when tenure had accrued and what retroactive benefits were owed to the teachers. The court also stated:

> We do not decide what, if any, additional benefits the teachers in these cases are entitled to, either retroactively or prospectively. That is primarily a matter of contract and the relevant collective bargaining agreements are not part of the record. Further, the parties for the most part did not brief this question and the Appellate Division did not address it. We therefore remand to the Commissioner of Education to make that determination in accord with the principles laid down in this opinion. Spiewak at 84 n. 3.

The same task is needed here. Since the petitioners' employment histories are stipulated, the dates on which each of them should have been awarded tenure are capable of ascertainment by the parties.

Calculation and payment of the retroactive dollars to be awarded them for deficiencies they may have suffered from the time of the attainment of tenure up to the date of the decision in Spiewak is also required. However, it is complicated by the fact that these teachers had entered into collective bargaining agreements with the Board beginning with the 1979-80 school year. Salary schedules were arrived at in those agreements that differed from the salary guide schedules in the regular teachers' contracts.

For periods of tenured or tenure-eligible employment prior to the 1979-80 collective bargaining agreement, each teacher should have received salary and benefits at the same rate as other teaching-staff members with similar experience and qualifications. For subsequent periods of time until June 23, 1982 (the date of the Spiewak decision), there is a question as to whether the negotiated agreement should control, if at lesser rates of compensation and benefits. Should they be nullified because they do not comport with the mandate of Spiewak?

That question was discussed in Hyman v. Board of Education of Teaneck, 1983 SLD ____ (Commissioner of Education, August 15, 1983), where the Commissioner held that the Spiewak mandate for equality in eligibility for benefits and salary guide placement does not necessarily preclude Boards from negotiating differences in salary schedules for supplemental or other special teachers as opposed to regular teachers, providing that there is a "clear recognition and acceptance on both sides in the negotiating process that the special teachers are by law teaching staff members eligible to obtain tenure." In this case, the testimony of both the supervisor of personnel for the Board and the chief negotiator for the union agreed that the 1979-81 and 1981-83 contracts were entered into after good faith negotiations and recognition that the hourly employees were tenured or tenure-eligible. However, there was no mention of whether or not the hourly rate salary schedules contained differentials for levels of preparation and

experience. There was also no mention of any provision for possible military service credit nor the withholding of benefits for unsatisfactory service. The stipulation of facts in this matter shows that no health or pension benefits, sick days and personal days were provided to hourly employees in 1979-80, but such benefits were given them thereafter. It is obvious that the Commissioner has strictly construed the Hyman acceptance of negotiated differentials between special and regular teachers. See West Orange Supplemental Instructors Association v. Board of Ed. of the Town of West Orange, 1984 SLD ____ (Commissioner of Education, February 23, 1984) and Office of Administrative Law DKT. EDU 6355-83; Margaret Wentworth v. Board of Ed. of Township of Parsippany - Troy Hills, 1984 SLD ____ (Commissioner of Education, April 13, 1984.)

Even though the petitioners here entered into good faith hourly wage agreements through union negotiations with the Board prior to and after Spiewak, those agreements must be negated, in the absence of recognition on the schedules for the petitioners' years of experience and levels of training. The Spiewak court's recognition of the existence of separate agreements does not invalidate the mandate for equality of salary and benefits at the same rate as other teaching staff members with similar experience and qualifications. Rutherford Education Association v. Board of Ed. of Rutherford, at pages 16-18.

The Rutherford, West Orange and Wentworth decisions are concerned with enforcing the statutory requirements for teachers' salaries and benefits in accordance with the Spiewak standards, but not with principles of the sanctity of contracts. If that situation causes later inhibitions or difficulties in the negotiating process for all teachers, it is nevertheless not relevant to this determination.

It is therefore **CONCLUDED** as follows:

A. Each of the petitioners was tenure-eligible and each of them attained tenure at the time they satisfied the certification and time in service statutory requirements of N.J.S.A. 18:28-5.

B. The petitioners are to be awarded retroactive benefits (for periods of time prior to the decision in Spiewak on June 23, 1982) as if they were before the court in Spiewak. See para. G, infra.

C. The petitioners' claims are not barred by the 90-day filing limitation of N.J.A.C. 6:24-1.2.

D. The petitioners' claims are not barred by the doctrine of laches.

E. Mary McEwan's claims for periods of time after the termination of her employment in December 1979 should be disallowed. She withdrew that portion of her petition from this action following dismissal of the allegations by the Division on Civil Rights, and she should not be permitted to reinstitute those claims.

As to benefits for periods of time prior to December 1979, Mary McEwan's claims are included with those of the other five petitioners.

F. The petitioners are entitled to the same salary and benefits as other teaching-staff members in the district, subject to contractual differences that satisfy the Hyman standard, prospectively and retroactively from the date of the Spiewak decision.

As for prospective benefits, it has been represented that suitable adjustments have been made in the petitioners' salaries and benefits (those who remained employed) since the date of Spiewak, and no relief need be ordered for such prospective benefits.

G. Retroactively, for the periods of time from each teacher's attainment of tenure, up to the 1979-80 school year (when collective bargaining agreements and separate salary schedules were begun) the full differentials between their prorated salary schedules and those of regular teachers

should be calculated and paid to them. Appropriate adjustments should also be made for each of them with the Teachers' Pension and Annuity Fund.

The same result obtains thereafter, because the Hyman standard has not been met. The hourly schedules for the petitioners' salaries in the 1979-81 and 1981-83 collective bargaining agreements are invalid to the extent that they provide less equivalent pay to the petitioners than that of regular teachers, and the petitioners should be awarded the same differentials for those years as for the pre-1979-80 years.

It is so **ORDERED.**

The parties are in factual agreement as to the hours, dates and rates of pay for each petitioner. Therefore, counsel are further **ORDERED** to perform the necessary calculations and computations to implement the foregoing, using the statistical data submitted in the exhibits.

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

OAL DKT. NO. EDU 7002-83

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

November 21, 1984
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

November 26, 1984
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 29 1984
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

dm/e

BERGENFIELD EDUCATION ASSOCIATION, CLAIRE M. KINGSLEY ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision on remand rendered by the Office of Administrative Law.

It is observed that exceptions to the initial decision and replies to those exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

In the Commissioner's judgment the exceptions raised by the parties to the initial decision are without merit essentially for those reasons expressed by the judge in his recommended findings and legal conclusions in the initial decision.

The Commissioner, however, is constrained to comment further upon the Board's strenuous objections to what it contends is a serious error by the judge in reaching the following conclusions with regard to the retroactive and prospective benefits to be accorded petitioners herein:

> "***B. The petitioners are to be awarded retroactive benefits (for periods of time prior to the decision in Spiewak on June 23, 1982) as if they were before the court in Spiewak. See para. G, infra.
>
> ***
>
> F. The petitioners are entitled to the same salary and benefits as other teachingstaff members in the district, subject to contractual differences that satisfy the Hyman standard, prospectively and retroactively from the date of the Spiewak decision.

As for prospective benefits, it has been represented that suitable adjustments have been made in the petitioners' salaries and benefits (those who remained employed) since the date of Spiewak, and no relief need be ordered for such prospective benefits.

G. Retroactively, for the periods of time from each teacher's attainment of tenure, up to the 1979-80 school year (when collective bargaining agreements and separate salary schedules were begun) the full differentials between their prorated salary schedules and those of regular teachers should be calculated and paid to them. Appropriate adjustments should also be made for each of them with the Teachers' Pension and Annuity Fund.

The same result obtains thereafter, because the Hyman standard has not been met. The hourly schedules for the petitioners' salaries in the 1979-81 and 1981-83 collective bargaining agreements are invalid to the extent that they provide less equivalent pay to the petitioners than that of regular teachers, and the petitioners should be awarded the same differentials for those years as for the pre-1979-80 years.***"

(Initial Decision, at pp. 11-12)

In this instance the scope of the remand of this matter by the Appellate Division is clear. (Bergenfield, A-2615-81T2, decided May 19, 1983) The purpose of these proceedings is to establish the retroactive and prospective benefits due petitioners pursuant to Spiewak. Thus, the remand of this matter effectively limits the scope of these proceedings and thereby precludes the Board from raising the defenses of timeliness and laches. Such defenses raised by the Board are hereby dismissed.

The Commissioner cannot ignore the fact that the Board failed to accord petitioners the same salary and benefits as other teaching staff members for the periods of time controverted herein. It is evident that, prior to the 1979-80 school year, petitioners were not recognized as tenure-eligible pursuant to N.J.S.A. 18A:28-5 nor were they included as part of a recognized bargaining unit for the purpose of negotiating their salary and benefits, as were all other regular teaching staff members. In accordance with the Hyman standard, petitioners are therefore entitled to the rights of salary and benefits accorded to all other regular teaching staff members who were tenure eligible prior to the 1979-80 school year.

Similarly, the Commissioner upon review of those negotiated agreements (J-12) in effect from 1979-81 through 1981-83 finds and determines that they do not comply with the statutory provisions of N.J.S.A. 18A:29-6 et seq. pertaining to the mandatory minimum salary schedules which establish the basis upon which clear recognition of petitioners' salaries and benefits were to be premised in order to conform to the Hyman standard at the time each of these negotiated agreements (J-12) became effective.

In this regard, these negotiated agreements which contain the separate salary schedules designating petitioners' hourly compensation are restricted to seven steps solely designating years of employment. The Commissioner finds and determines that the scope of these negotiated salary schedules is inadequate and contravenes the specific purpose and intent of N.J.S.A. 18A:29-6 et seq. Such schedules must thereby be declared without force and effect in accordance with the directives laid down in Spiewak and Hyman.

Finally, with respect to the representations made by the parties that suitable prospective adjustments have been made to petitioners' salaries and benefits as of the date of the Spiewak decision no further relief need be ordered provided they are not inconsistent with this decision and further that each of the negotiated agreements including the agreement in effect from 1983-85 (J-12) does not deprive those petitioners who are currently employed by the Board of any salary or benefits to which they were otherwise previously entitled.

Accordingly, the parties are hereby ordered to comply with those findings and conclusions set forth in paragraphs A through G, ante, in the initial decision as supplemented by the Commissioner herein. It is further ordered that the schedule of payments of those salaries and benefits accruing to petitioners be effected without unreasonable delay through mutual agreement between the parties.

COMMISSIONER OF EDUCATION

JANUARY 10, 1985

Pending State Board

INITIAL DECISION

OAL DKT. NO. EDU 8406-83

AGENCY DKT. NO. 266-7/83A

BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE,

Petitioner,

v.

BOARD OF EDUCATION OF MANASQUAN, BOARD OF EDUCATION OF THE BOROUGH OF BELMAR, BOARD OF EDUCATION OF THE BOROUGH OF SEA GIRT, BOARD OF EDUCATION OF THE BOROUGH OF SOUTH BELMAR, BOARD OF EDUCATION OF THE BOROUGH OF SPRING LAKE, BOARD OF EDUCATION OF THE BOROUGH OF SPRING LAKE HEIGHTS, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT BEACH, OCEAN COUNTY,

Respondents.

OAL DKT. NO. EDU 8406-83

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH BELMAR,

Third Party Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK,

Third Party Respondent.

Peter P. Kalac, Esq., for the petitioner, Brielle Board of Education (Kalac, Newman & Griffin, attorneys)

Seymour J. Kagan, Esq., for the respondent, Point Pleasant Beach Board of Education (Berry, Kagan, Privetera & Sahradnik, attorneys)

Malachi J. Kenney, Esq., for the respondent, Manasquan Board of Education (Kenney & McManus, attorneys)

Daniel P. Fahy, Esq., for the respondent, Spring Lake Board of Education

Jay C. Sendzik, Esq., for the respondent, Spring Lake Heights Board of Education (Anton & Sendzik, attorneys)

Kenneth B. Fitzsimmons, Esq., for the respondent, Belmar Board of Education (Sinn, Gunning, Fitzsimmons, Cantoli, West & Pardes, attorneys)

Dominick A. Cerrato, Esq., for the Sea Girt Board of Education (Cerrato, O'Connor, Mehr & Saker, attorneys) (No appearance)

Joseph N. Dempsey, Esq., for the respondent and third party petitioner, Board of Education of the Borough of South Belmar (No appearance)

J. Peter Sokol, Esq., for the third party respondent, Asbury Park Board of Education (McOmber & McOmber, attorneys)

Record Closed: October 2, 1984 Decided: November 16, 1984

BEFORE **AUGUST E. THOMAS,** ALJ:

The Board of Education of the Borough of Brielle filed this Petition of Appeal with the Commissioner of Education, which seeks to terminate its sending-receiving relationship with the Board of Education of Manasquan. The Commissioner transferred this matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted on December 21, 1983, in the

Office of Administrative Law, Trenton. South Belmar, which sends some of its pupils to Asbury Park High School and others to Manasquan High School, filed a third party petition enjoining the Asbury Park Board of Education. It was determined in the Prehearing Order to hold the third party petition in abeyance pending the determination of the Brielle Board's petition against the Manasquan School District.

Thirteen days of hearing were conducted in the Manasquan Borough Hall, Manasquan, beginning March 26, 1984, and ending June 25, 1984. Seventy-six documents were admitted in evidence and ten witnesses testified. The record closed on October 2, 1984, after receipt of the Brielle Board's reply brief. The Boards of Education of South Belmar, Sea Girt, and Asbury Park did not participate in the hearing. The Brielle Board filed a brief and a reply brief after the hearing. The Boards of Education of Spring Lake, Spring Lake Heights, and Belmar joined in the Manasquan brief; however, each elected not to submit a separate brief. The respondent Board of Education of Point Pleasant Beach filed a brief and a reply to the Manasquan Board of Education brief.

BACKGROUND INFORMATION

This is a sending-receiving termination case. The Brielle Board seeks to terminate its more than 50-year sending-receiving relationship with Manasquan (Monmouth County) and to send its pupils to Point Pleasant Beach High School (Ocean County). Brielle seeks a phased withdrawal over a four-year period so that its pupils now attending Manasquan High School can complete their education there.

Brielle is one of six districts sending pupils (grades 9-12) to Manasquan High School. The statute governing the termination of sending-receiving relationships is set forth at N.J.S.A. 18A:38-13 and it reads as follows:

> No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except for good and sufficient reason upon application made to and approved by the commissioner, who shall make equitable determinations upon any such applications.

The Commissioner will grant an application for change of designation or reallocation of pupils only when he is satisfied that benefits to the pupils thereby will outweigh the loss to the receiving district. In Bd. of Ed. of the Borough of Haworth v. Bd. of Ed. of the Borough of Dumont, 1950-51 S.L.D. 42, 43 the Commissioner set forth the rationale for the interpretation of R.S. 18:14-7 (now N.J.S.A. 18A:38-13) as follows:

> In considering an application for a change of designation or reallocation of pupils, the Commissioner must be mindful of the purpose of the high school designation law. In this State there are 165 school districts which maintain high schools for pupils of all high school grades. This means that 387 school districts must depend upon the 165 for the education of their high school pupils. This arrangement is mutually advantageous. The sending districts obtain high school facilities cheaper than such facilities can be provided by themselves and the additional pupils enable the receiving districts to expand their educational offerings and reduce their overhead.
>
> The success of the so-called "receiving-sending set-up" has given New Jersey an enviable position in the nation in secondary education. New Jersey has fewer small high schools than any other State in the United States. It was to give stability to the receiving-sending set-up that the first high school designation law was enacted. Before the enactment of this law, receiving districts hesitated to bond themselves to erect buildings and to expand their facilities to provide for tuition pupils for the fear that the tuition pupils might be withdrawn after the facilities have been provided. The high school designation law protects such districts from the withdrawal of tuition pupils without good cause. This statute benefits the sending district as well as the receiving district. If the law were not in effect, many sending districts, either individually or by uniting with other districts, would be burdened with the erection and maintenance of high schools.
>
> In order to provide for cases where good and sufficient reasons exist for the transfer of pupils to another high school, the Legislature charged the Commissioner with the duty of determining when there is good and sufficient reason for a change of designation. The Commissioner feels constrained to exercise his discretion under the statute with great caution. Otherwise, the law will not accomplish the salutary purposes intended by the Legislature. Accordingly, the Commissioner will grant an application for change of designation or reallocation of pupils only when he is satisfied that positive benefits will accrue thereby to the high school pupils sufficient to overcome the claims of the receiving district to these pupils.
>
> The burden of proof rests upon the petitioning board to establish the good and sufficient reason for change required by R. S. 18:14-7.

In my view this rationale has not changed over the years even though there may have been a change in the number of high school districts in the state.

In Bd. of Ed. of the Tp. of Washington, Mercer Cty. v. Bds. of Ed. of the Upper Freehold Reg. Sch. Dist., Monmouth Cty., Plumsted Tp., Ocean Cty. and Millstone Tp., Monmouth Cty., 1983 S.L.D. ____ (decided Dec. 7, 1983) the State Board of Education commented as follows:

> Under the statute, the Commissioner of Education must determine whether good and sufficient reason has been presented by the petitioning board and "weigh all the relevant factors in reaching his conclusion." Branchburg Bd. of Ed. v. Somerville Bd. of Ed., 173 N.J. Super. 268, 276 (App. Div. 1980). The relevant factors bear repeating here. They include the educational impact, financial impact, facility considerations and racial impact upon all pupils and districts involved. These are the principal factors to be studied and must be dealt with in every sending-receiving inquiry. Petitioning districts, traditionally, have been required to demonstrate by a definite presentation of facts, that it has satisfied the "good and sufficient reason" test. We continue to support these requirements.
>
> In addition, in the past, the Commissioner and this Board have required that petitioning districts prove that the receiving districts prove that the receiving districts are unable to offer a thorough and efficient education. See Bd. of Ed. of the Boro of Merchantville v. Bd. of Ed. of the Tp. of Pennsauken et al., 1982 S.L.D. (July 26, 1982) and In the Matter of the Application of the Bd. of Ed. of the Boro of Ogdensberg for the Termination of Its Sending-Receiving Relationship with the Bd. of Ed. of the Boro of Franklin, Sussex Cty., 1977 S.L.D. 610. We believe this requirement to be unrealistic and an almost impossible burden of proof. It is no longer acceptable. Furthermore, we do not read the statute, N.J.S.A. 18A:38-13, as imposing such a heavy burden. Consequently, the State Board relieves petitioning boards from this unrealistic task and eliminates this requirement as a condition precedent to the termination of sending-receiving relationships in the future.

Considering the above-cited statute and the aforementioned decisional law as a framework of reference, the facts bearing on the application to terminate the sending-receiving relationship between Brielle and Manasquan are set forth below.

In its third party petition, the Board of Education of the Borough of South Belmar asserts that it is under legislative obligation to send its secondary school pupils to be apportioned between Manasquan and Asbury Park High Schools as of the ratios that

existed in 1943-44. Believing that time has affected the basis for establishing those ratios, the South Belmar Board seeks to have all of its pupils transferred to the Manasquan High School if the Commissioner terminates the sending-receiving relationship between Brielle and Manasquan, stating that the withdrawal of Brielle would leave sufficient room in Manasquan High School for the South Belmar pupils. It is because of the nature of this South Belmar cross-petition against Asbury Park that that matter has been held in abeyance pending the outcome of the instant petition by Brielle.

FACILITY CONSIDERATIONS

Brielle contends that Manasquan High School is overcrowded and that it has been overcrowded for a long time. To support this contention, Brielle relies on the annual evaluation reports of Manasquan High School by the Monmouth County Superintendent of Schools. Specifically, Brielle states that the county superintendent made the following recommendations:

> The school building and site do not provide suitable accommodations to carry out the school educational program. It is recommended that all of the high school buildings require plans for renovations and/or possible additions. . . . [P-59, p. 3]
>
> . . . Continued efforts to maintain the physical plant at the high school in good condition despite overcrowding and inadequate facilities. [P-58, p. 2]
>
> Submit a plan and timeline to eliminate the use of substandard instructional space and to address the overcrowding situation at Manasquan High School. [P-57, p. 2]
>
> Address the overcrowding and poor storage space in the Home Economics and Child Care facility. . . . [P-56, p. 3]
>
> The district remains in Interim Approval (August 31, 1981 classification status), in the area of Other Law and Regulation regarding facilities. The district is cognizant of the fact that overcrowding and substandard facilities exist at the high school. A recent bond issue was defeated by the Manasquan voters but the district is investigating alternative ways to alleviate the situation. Submit an updated status report with district plans and timeline to alleviate the facility problem. [P-26, p. 2-3]
>
> With the declining enrollment projections, it is expected that the overcrowded situation will be alleviated within three years. It must be noted here that the district continues to maintain Interim Approval Classification status in the area of facilities. [P-27, p. 1]

School buildings have been declared overcrowded by the Commissioner when the number of pupils attending exceeds the functional capacity of the structure. The Commissioner addressed overcrowding and functional capacity in Morris Sch. Dist. v. Bds. of Ed. of Harding and Madison, 1974 S.L.D. 457, 467 through the testimony of a consultant to the Division of Facilities Services of the State Department of Education. At that time the Commissioner's consultant to the Division testified that "there is no uniform system throughout the nation . . . which may apply to an evaluation of school building capacities . . ."; however, the consultant stated that the State Department of Education has devised its own formula, in use since 1969, which attempts "to rate school buildings as to the number of pupils that the building can accommodate comfortably." The Commissioner's consultant further labeled the formula as a "bench mark" or a "guideline," and admitted that "extended schedules," "open campus policies," and "work experience programs" had an effect on the objective validity of the data he presented at that hearing.

At the request of the Brielle Board an expert from the State Department of Education toured the Manasquan High School, accompanied by its Superintendent and other members of the high school administration, and the expert developed a functional capacity study of the high school (P-20). At that time the functional capacity was determined to be 749, later revised to 663 because certain facilities allowed in the initial functional capacity study were discounted since they had been listed as substandard spaces by the Monmouth County Superintendent's office (P-21). The Commissioner's expert testified that no capacity can be assigned to a substandard facility and such a facility cannot be included in the functional capacity calculations if the space has not been approved for instruction by the Division of Facilities Planning Services. These designated substandard facilities were defined as an industrial arts building and the home economics building, which were described as being temporary facilities. However, the expert testified that the Division records indicated that these two facilities had been approved by the Division and that Manasquan was given the benefit of that approval by including these two buildings in another revised functional capacity calculation. The functional capacity was then established as 722 (P-23, P-24). The third area (room 213) did not qualify. It would have made the functional capacity 749.

The Commissioner's expert also toured the Point Pleasant Beach High School for the purpose of gathering information to compute its functional capacity and he later established a functional capacity of 567 for Point Pleasant Beach High School (P-25). The

pupil population at Point Pleasant Beach High School for 1984-85 is projected as 439 (P-15). (The total number of pupils involved from Brielle averages about 40 per year since the eighth graders are already in Manasquan High School, P-14.)

The Manasquan Board purchased a two-story residential home in 1950 and converted it into classrooms to accommodate the home economic pupils. Seeking additional space for its high school students, the Manasquan Board converted one of its elementary school buildings, which is located across the street from the high school to be used by the high school pupils in its high school program. A four classroom "POD" was attached to the elementary school building and has been utilized as high school classroom space since 1979. Additionally, since 1950, the industrial arts facilities at Manasquan High School are located in another structure on the high school grounds. This structure is a one-story building containing seven rooms used for wood shop, metal shop, mechanical drawing, art and a finishing room (P-3, p. 4-29). Brielle criticizes this facility incorporating language used by Uniplan in an educational facilities master plan, which states that the industrial art rooms for metals, wood and drafting are all inadequate (P-3, p. 4-23). These four structures make up the Manasquan "campus."

The record shows that Manasquan High School was on split sessions from the 1971 to about 1979 or 1980 and that from the 1979 or 1980 school year to the 1983-84 school year, the school was on a modified session of nine periods per day with staggered starting times. The record shows also that for the 1984-85 school year, the district will provide a traditional eight-period pupil day. Brielle argues that this traditional day will result in more pupils' utilizing the same facilities in a shortened school day causing even greater overcrowding in the high school.

The Point Pleasant Beach High School Board asserts that the functional capacity for its high school is 567 and that its pupil population for the 1983-84 school year was approximately 441. Point Pleasant Beach argues that its enrollment is declining and that without Brielle students its projected enrollment will be less than 350 pupils by 1991-92 (P-15). Point Pleasant argues that its availability as an underutilized school offers an attractive and viable resolution to the overcrowding problem in Manasquan as well as improving its own chances for survival.

Functional capacity is only one of the factors considered in determining whether or not pupils are being provided with a thorough and efficient educational

program. The expert from the State Department of Education who examined the facilities testified that he used a 75 percent utilization factor in those functional capacity studies and that a higher utilization factor could have been utilized. He testified further that in large high schools and in vocational schools in particular, it is not unusual to see utilization factors of nearly 100 percent (a 75 percent utilization factor means that 25 percent of the classroom space is unused at any one time). The record indicates that the higher utilization factor poses no strain on the facility or its ability to handle the pupil population; rather, the strain would be on the administration to make efficient and effective plans for the higher utilization factor. He testified also that virtually every older secondary school in the state has an enrollment in excess of its functional capacity.

The Manasquan Superintendent testified that Manasquan evidenced a utilization rate of instructional classrooms in excess of 90 percent for the 1983-84 school year and that a similar utilization rate would be used in the 1984-85 school year.

Brielle contends that Manasquan's Educational Facilities Master Plan labels some of its structures as inadequate and unsafe (P-3, p. 4-23). A monitor from the Monmouth County Monitoring Team and the Monmouth County Superintendent also testified that approval for the use of substandard facilities would not be granted if there was any question of safety. The Monmouth County Superintendent testified that there was no evidence that Manasquan's facilities were unsafe.

There is adequate testimony in the record to show that both Point Pleasant Beach and Manasquan are providing excellent educational programs. This statement was attested to by the County Superintendents of schools of both Ocean and Monmouth counties. The record shows that both districts are meeting or exceeding all thorough and efficient educational mandates.

ENROLLMENT PROJECTIONS

The Manasquan Superintendent testified that the school's enrollment has been declining annually since 1976. In September 1976, the high school enrollment was 1,475 and in September 1982 it was 1,095. The Uniplan study predicted a significantly higher number of pupils attending Manasquan High School through its use of a (Cohort) survival ratio method of calculating future enrollment (P-3, p. 3-16). The Superintendent testified that she used the straight line method of calculating projected enrollment because in her

experience it has been proven more reliable. The straight line enrollment projection utilizes grade-by-grade enrollment figures for each of the elementary schools which sends pupils to Manasquan High School. It is projected that each elementary student will enter the high school at the appropriate time. The Superintendent testified that she anticipates a continuing decline in enrollment for the foreseeable future and that document P-14 represents her enrollment projections through the straight line projection method. According to P-14, the Superintendent's enrollment projected for Manasquan High School is 1,009 pupils for the 1984-85 school year and that enrollment is projected to diminish to 808 for the 1988-89 school year. The Superintendent testified also that if Brielle were permitted to withdraw in the 1985-86 school year, Manasquan would be left with 970 pupils and subsequently, 880 in 1986-87; 788 in 1987-88; and 660 in 1988-89.

The record shows that the original petition of appeal requested a four-year phase out of the Brielle pupils beginning in the 1984-85 school year. However, Brielle indicated that because of the timing of the hearing in this matter that the phase-out could not begin to take place until the 1985-86 school year and that it would still require four years to complete. The Manasquan Superintendent testified that based upon P-14 in evidence, the enrollment at Manasquan High School for the 1988-89 school year would be 803 pupils including the Brielle pupils and 660 without the Brielle pupils. The Monmouth County Superintendent examined this document and gave his opinion that the Brielle pupils should remain in the Manasquan School District. He testified also that although some of Manasquan's facilities had been labeled substandard, they were not inadequate, but they needed upgrading. He testified that one of the reasons for the interim approval given Manasquan was to keep pressure on the district to upgrade and modernize its facilities.

It may be stated generally that Brielle has characterized the Manasquan campus as overcrowded because it is operating above its listed functional capacity. Brielle has also alleged that the campus style setting with the out-buildings, some of which were not designed for use by high school pupils, are inadequate and in some instances unsafe. Specifically, Brielle identifies the problems of increased passing time between classes and the fact that some pupils have to go outside during inclement weather to change classes.

The Manasquan Superintendent denied that any of these factors are significant in terms of operating a sound educational program in the Manasquan School District. She

testified that the passing time between classes was not significantly longer and that there was no disadvantage to pupils' having to walk outside between classes to another building.

CURRICULUM

There is ample evidence in the record to show that both Manasquan and Point Pleasant Beach High Schools offer a broad curriculum. In fact, the Monmouth County monitoring expert testified that she has done an on-site inspection of the Manasquan facility since 1979 and that she is familiar with Manasquan's educational program. The expert testified specifically that Manasquan has come into the 20th century with its program and that it is comprehensive and excellent. She testified further that Manasquan's curriculum is one of the finest in the county if not in the state. This expert testified also that Manasquan's curriculum meets the educational needs of all of its pupils including their talents. Her testimony further indicates that the comprehensive nature of the Manasquan curriculum particularly in journalism, art, and music, may lead to some overcrowding but that she would not give up a program because of the overcrowding. Her testimony included the statement that there is a need for large pool of pupils in order to offer a comprehensive program; however, with declining enrollment the program will suffer and the advanced placement courses will be the first to go. With regard to the 1988-89 projection of 660 pupils in the Manasquan High School if Brielle was permitted to withdraw, she testified that without Brielle it would not be possible to maintain the scope of the current curriculum with such a limited enrollment.

With regard to its overcrowded facility and curriculum offerings, the monitoring expert testified that "substandard" is the designation given to any space not originally designed as a classroom. As far as the overcrowding is concerned, the Monmouth County Superintendent decided that the overcrowding would correct itself. She testified also that she was surprised that Manasquan was moving from a nine-period day to an eight-period day and that it was her belief that this would be going in the opposite direction to relieve overcrowding. Nevertheless, the expert testified that she was concerned more with room utilization and that she was absolutely convinced that Manasquan has an excellent program. Her testimony included the statement that although it is better to have the library in the central building, it really doesn't matter whether the school district has one or four buildings making up its high school complex. She testified that she did not decide that Manasquan was overcrowded because it exceeded its functional capacity; rather, she reached that determination based on several large classes

she witnessed and that the Manasquan Superintendent mentioned overcrowding to her. She testified also that the Shore Regional High School is on staggered session because of a transportation problem; however, it receives full approval from the State Department of Education rather than interim approval because there is nothing that Shore Regional can do about its transportation problem.

Concerning the length of classes and the passing time between classes, the monitoring expert testified that the state minimum time for a class is forty minutes and that Manasquan classes run 45 minutes plus additional time for passing between classes; therefore, Manasquan more than meets the minimum standard even with the extra two minutes allowed for passing to the out-buildings. She testified also that the size of a class is not a factor in the excellent offerings and programs of the school and that the best way to evaluate the school's program is to observe how the school is being utilized. She testified that not only would the quick solution of removing Brielle not be the best solution, it would be a mistake. Her testimony included the statement that most districts are experiencing declining enrollment; however, the educational program has a greater weight than overcrowding and the solution to Manasquan's problem will be resolved by the attrition it will experience in the next several years. This testimony was also supported by the Monmouth County Superintendent of Schools, who testified that in his experience significant declines in enrollment always resulted in reductions in the scope of the curriculum despite the theoretical possibilities that a school district could choose to spend more money in order to maintain the curriculum.

The Manasquan Superintendent testified that several courses would have to be dropped if the enrollment declined 35 percent and she identified those courses on the record. Additionally she testified that some of the language offerings such as French III and IV and Spanish III and IV would have to be consolidated in the event of a 35 percent enrollment decline, and she identified further borderline courses and possible problems with a similar reduction in enrollment. The Superintendent also testified that the withdrawal of Brielle pupils would have a substantial impact on the school's extra-curricular activity programs because of the heavy involvement of Brielle pupils.

RACIAL IMPACT

It is conceded by all litigants that the racial impact of removing the Brielle pupils will have little if any significance in the racial balance of either Manasquan or

Point Pleasant Beach High Schools. The data published in the New Jersey Public School Racial Ethnic Data, 1982-83, shows that Point Pleasant Beach had a white pupil population of 97.2 percent. It is anticipated that with the addition of the Brielle pupils, that percentage will decline to 92.6 percent (P-2). Manasquan, 95.4 percent white (P-2), states that the transfer of its Brielle pupils to Point Pleasant Beach would involve approximately 20 minority pupils and that its consequence would reduce the proportion of minority students in Manasquan approximately 2 percent (to 93.4 percent) while it would increase the proportion of minority pupils at Point Pleasant Beach High School to approximately 3 to 4 percent.

EDUCATIONAL IMPACT

Brielle argues that the State Board decision in Washington requires that the Commissioner consider the educational impact on all of the pupils involved and that means that Point Pleasant Beach High School must be considered.

Brielle argues that overcrowded school facilities produce adverse educational results. This assumption is grounded on the assertion that split and modified school sessions caused by overcrowding have been universally frowned upon by the educational community. Further, thorough and efficient monitors traditionally score each district's facilities as well as its education program and require that any district which is experiencing overcrowding take steps to alleviate that problem. Additionally, the State Board of Education in Washington requires that the facility impact considerations be addressed when deciding whether or not sufficient reasons exist for the termination of a sending-receiving relationship.

The record shows that Manasquan was able to show through the testimony of its Superintendent and the state's monitor expert that its educational program is above average with its present enrollment. Brielle argues that the removal of its pupils should in no way affect the quality or quantity of the offerings in the Manasquan School District and that the Manasquan Superintendent's testimony that courses would have to be eliminated when the transition is completed in the school year 1988-89 is too speculative and of no value in this litigation. Brielle argues that it does not necessarily mean that any programs have to be eliminated if its pupils leave and that Manasquan has the ultimate choice to make its offerings.

Brielle asserts that the Commissioner of Education has previously determined that where overcrowding exists, the fact that there also exists an excellent educational program is not sufficient grounds for refusing the requested sending-receiving termination. In Morris at 481, the Commissioner ordered the termination of a sending-receiving relationship despite a finding that:

> There can be no doubt that Morristown High School is an excellent school and that . . . administrators have developed a fine administrative plan. . .
>
> . . . .
>
> There is ample evidence to support the judgment . . . that Morristown High School is overcrowded.

The Commissioner concluded that Morristown High School was overcrowded and he ordered the termination of the sending-receiving relationship.

The record shows that Point Pleasant Beach offers a breadth of programs (P-16) and that the state's thorough and efficient monitors scored its educational program as excellent on June 1, 1983 (P-19). Brielle concludes that the termination of the sending-receiving relationship must take into account the impact on the Point Pleasant Beach pupils as well as those in Brielle and Manasquan.

FINANCIAL IMPACT

Two witnesses testified concerning the financial impact on Manasquan and its sending districts if Brielle should withdraw. Brielle presented as its expert a public accountant who specializes in municipal and school board accounting and who is also an attorney with a background in municipal taxation. Manasquan produced the testimony of its Superintendent whose experience in budget and accounting is limited to her knowledge of those disciplines as the Board's Superintendent.

Brielle contends that in accordance with the documents and the testimony presented by its expert that there would be an inconsequential financial impact on all of the districts.

Brielle's expert based his conclusions on the number of pupils to be withdrawn and the number to remain after full withdrawal in 1984-85 and also with the phased withdrawal. He used the Cohort Survival Method (as set forth in P-3 at 3-10) of calculating the numbers of pupils for all of the districts. This expert projected the loss of tuition revenue by also utilizing the Cohort Survival Method and the certified tuition rates factored to reflect increased costs. He also projected the loss of tuition revenue, which has been adjusted to reflect the savings caused by reduced staffing and estimated educational cost savings. Reduced staff savings was factored to reflect a seven and one-half percent increase in compensation over the phased withdrawal. Allocation of the net loss to be shared by the remaining districts was computed on the basis of percentages developed from the Cohort Survival worksheets. Finally, the estimated tax rates were computed utilizing factored amounts to be raised by taxation and net valuations taxable to reflect the average increases over the past seven years (P-54). Brielle concludes from the opinion of its expert that the financial impact of either a complete withdrawal or a phased withdrawal by the Brielle Board is not of such a significant nature as to affect adversely the tax rate of Manasquan or the remaining sending districts.

The Manasquan Superintendent utilized a different procedure in determining the financial impact on the Manasquan district. She used a per teacher savings figure of $20,000, which is $5,500 lower than the figure used by the Brielle expert. The Superintendent testified that the lower figure was more reasonable because when reductions in force are necessary, the staff cuts fall with greatest weight on the lower paid staff members. The Superintendent also testified that a substantial portion of the teachers currently employed at Manasquan High School are junior, lower paid staff members and that this staff is spread over all instructional areas. The Superintendent testified further that it is cost per pupil rather than tax rates which reflect the actual atmosphere in which school district financial decisions have to be made since cost per pupil governs the tuition rate charged to sending districts. The Superintendent's testimony shows that the cost increases she projected would place the Manasquan cost per pupil at a substantially higher level than the cost per pupil in surrounding districts. She testified that the maintenance of small, specialized classes for advanced students or students with special interests would require an excessive cost per pupil and the classes would probably have to be eliminated. She also testified that these higher costs, together with the probable elimination of advanced and specialized courses, would create strong motives in the sending districts to seek alternatives for their pupils rather than to send them to Manasquan High School.

The State Board of Education in Washington directed that the financial impact must be considered in deciding whether or not good and sufficient reasons exist to terminate any sending-receiving realtionship. Brielle argues that the State Board did not intend that any increase at all would preclude such determination; rather, the projected increase in a tax rate or per pupil cost to the several districts must be of such a significant proportion as to make the termination economically unfeasible. Brielle supports this conclusion with documents P-51 and P-52, submitted by its expert.

The record shows through the testimony of the Monmouth County Superintendent of Schools and that of his monitoring expert that there will be a continuing enrollment decline in Manasquan whether or not Brielle leaves. Manasquan argues that because of this factor, it must calculate the impact of a Brielle withdrawal in the context of a larger overall decline. Brielle attacked the credibility of the Manasquan Superintendent's testimony asserting that she had given three different answers regarding the financial impact to Manasquan considering a Brielle withdrawal. Manasquan asserts that its Superintendent did not give three separate answers; rather, she gave the same answer to three different questions which required modification because of the time sequence in which the questions were posed. Manasquan asserts that the question was first posed to its Superintendent considering a phased withdrawal of Brielle beginning in September 1984, which was the last year in which Brielle would send a large freshman class to Manasquan High School (P-14). That document shows that the 1983 eighth grade enrollment of 71 pupils is the last class of that size from Brielle and that the 1985-86 class will be 42 pupils (P-14). Manasquan asserts that the third question posed to its superintendent addressed the impact of a Brielle withdrawal in the context of an already contemplated significant decline in enrollment.

Manasquan concludes from these projections that the financial impact will be extremely adverse in the event of a Brielle withdrawal.

Finally, Manasquan asserts that the transportation cost to Brielle would be increased. The Brielle Superintendent testified that he would recommend that all Brielle pupils be bused to Point Pleasant Beach High School because of the hazardous crossing of the Rt. 35 bridge across the Manasquan River. The Brielle Superintendent testified that most of the Brielle pupils would not qualify for State aided transportation; consequently, Brielle would have to absorb the entire cost of this bus transportation. Accordingly,

Manasquan argues that this financial impact must also be considered in the context of a Brielle withdrawal.

THE FUTURE OF POINT PLEASANT BEACH HIGH SCHOOL

Point Pleasant Beach emphasizes the impact on its school district with regard to the proposed withdrawal of Brielle pupils from Manasquan High School in light of the four standards set forth in Bd. of Ed. of the Tp. of Washington. Point Pleasant Beach cites N.J.S.A. 18A:78-5, which demands that a thorough and efficient system of free public schools be provided in each school district. Specifically, it cites sub-paragraphs (d) and (f) as follows:

> (d) A breadth of program offerings designed to develop the individual talents and abilities of pupils. . .
>
> . . . .
>
> (f) Adequately equipped, sanitary and secure physical facilities and adequate materials and supplies.

Point Pleasant argues that its facility is superior because it is housed in one building as opposed to the multi-building Manasquan High School and that it utilizes a traditional eight-period day plus after school, extra-help periods. Point Pleasant Beach cites the Department of Education functional capacity expert who testified that Point Pleasant Beach High School facility is capable of handling the Brielle pupils. The highest figure, including Brielle pupils if they should attend Point Pleasant Beach, would be 504 in 1992 (P-15).

Point Pleasant Beach argues that its enrollment has been declining over the past several years and that a Middle States evaluation report addressed this problem of declining enrollment and recommended the exploration of sending or receiving with other school districts. Point Pleasant Beach argues that the availability of its under-utilized school as an alternative to the Manasquan High School distinguishes the matter being considered here from other Commissioner's decisions. In the Matter of the Application of the Upper Freehold Regional Bd. of Ed. for the Termination of the Sending-Receiving Relationship With the Bd. of Ed. of the Tp. of Washington, Mercer County, 1972 S.L.D. 627; Bd. of Ed. of the Southern Regional High School District v. Bds. of Ed. of the Tp. Bass River, et al., 1974 S.L.D. 1012; and In The Matter of the Application of the

Phillipsburg Bd. of Ed. for the Termination of Its Sending-Receiving Relationship With the Bd. of Ed. of the Borough of Alfa, et al., 1976 S.L.D. 176. Point Pleasant Beach asserts that the Commissioner determined in the above-cited cases that although there was evidence of overcrowding, the evidence was not sufficient to warrant the termination of the sending-receiving relationship in question because there was no viable alternative placement for the pupils to be withdrawn. In In the Matter of the Application of the Bd. of Ed. of the Borough of Ogdensburg for the Termination of Its Sending-Receiving Relationship With the Bd. of Ed. of the Borough of Franklin, Sussex County, 1977 S.L.D. 610, Ogdensburg sought a gradual withdrawal and transfer of its pupils to Sparta, whose board had agreed to accept them. Point Pleasant argues that the testimony in that matter as to functional capacity and deficient facilities was similar to the testimony in the case being considered here and that a viable alternative was present in that Ogdensburg matter.

The Ocean County Superintendent of Schools testified that the phase-in of Brielle pupils would be educationally significant because it would help Point Pleasant Beach to more closely approximate its best functional utility and capacity.

Point Pleasant Beach cites In the Matter of the Closing of the Jamesburg High School District of the Borough of Jamesburg, Middlesex County, 1979 S.L.D. 35; aff'd, State Board of Education, 1979 S.L.D. 52. Jamesburg High School, which had an enrollment of 275 pupils in September 1978, was the smallest high school in New Jersey. Jamesburg had experienced continuing declining enrollments and was unable to regionalize with another school district or to establish a sending-receiving relationship. The Middlesex County Superintendent reported on December 31, 1977 that ". . . it has become increasingly difficult for the Board to justify such operation as economically or educationally viable. . . . The need to retain a skeletal program of essential offerings requires an ever-increasing per pupil cost."

The hearing examiner in the Jamesburg matter, who is now the Ocean County Superintendent of Schools, recommended to the Commissioner that Jamesburg be closed because it did not meet the test of providing a thorough and efficient system of education under N.J.S.A. 18A:7a-1 et seq., subsequently, Jamesburg High School was closed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Manasquan High School has a functional capacity of 722 pupils.

2. Manasquan pupil enrollment for the 1984-85 school year is projected to be 1,009.

3. Manasquan High School is technically overcrowded.

4. Manasquan High School is on interim approval by the State Department of Education through the Monmouth County Superintendent's office.

5. Point Pleasant Beach High School has a functional capacity of 567 pupils.

6. Point Pleasant Beach pupil enrollment for the 1984-85 school year is projected to be 439.

7. Point Pleasant Beach High School is under-utilized.

8. If the termination of the sending-receiving relationship occurs, the pupil population at Point Pleasant Beach High School with the additional Brielle pupils will not exceed its functional capacity.

9. Point Pleasant Beach High School houses all of its high school pupils in one structure.

10. There will be no racial impact if the sending-receiving termination is granted. Point Pleasant Beach will be 92.6 percent white and Manasquan will be 93.4 percent white.

11. The financial impact on all of the districts in the event of termination will not be so significant as to make the withdrawal economically unfeasible.

12. The educational program now being offered at Point Pleasant Beach High School equals and exceeds all thorough and efficient standards.

13. The educational program now being offered at Manasquan High School equals and exceeds all thorough and efficient standards excepting its facility.

14. Point Pleasant Beach High School facilities are fully approved by the State Department of Education.

Nothing in the record above suggests that Manasquan High School is overcrowded to the degree that it is unable to provide a thorough and efficient educational opportunity to all of its pupils. In fact, the record clearly shows that Manasquan meets or exceeds the State criteria for a thorough and efficient education and is recognized as one of the better high schools in the state. Although petitioner makes much of the fact that some buildings and spaces not originally designed as classrooms for high school classes are now being used for such, there is no evidence in the record to show that this use is improper or not in conformance with state standards. The reason for the lowered (722) functional capacity designation is occasioned by the fact that one of these substandard classroom spaces could not be counted in that study.

Manasquan's facilities have not measured up to the state standard for several years; nevertheless, the record shows that the State has continually offered suggestions for improvement and correction of deficient facilities where they existed and that Manasquan has met each one of the state's suggestions to improve its facilities. Nothing in the record suggests that the campus-type setting is inferior to a single building setting as exists at Point Pleasant Beach High School. In fact, the record shows that the length of Manasquan High School's classes exceeds the minimum time established by the State Department of Education and that it has more than adequate time for its pupils to pass between its buildings even in inclement weather.

I am not convinced by the financial data submitted by Manasquan that there would be a significant financial impact on its district if Brielle withdraws. Consequently, there is insufficient evidence in the record to show that phased withdrawal of Brielle would cause a change in the financial circumstances in Manasquan that would be significant. On the other hand, there would be a substantial transportation cost which would have to be absorbed by Brielle to bus most, if not all, of its pupils to Point Pleasant Beach High School.

The record also shows that the racial impact on both districts would be inconsequential and should not be a reason for granting or denying the withdrawal.

Finally, and most importantly, the earlier cited decisions clearly show the seriousness and practical permanence of any sending-receiving relationship and that the sending-receiving relationships are not terminated except for good and sufficient reason and only after a hearing. As stated earlier, this relationship between Brielle and Manasquan has persisted for more than 50 years. The record shows that the Monmouth County Superintendent of Schools testified that he expects that Manasquan will be near its functional capacity by 1988-89 if there is no change whatever. The documentation and the testimony of the Manasquan superintendent supports that conclusion (R-7).

Although the State Board of Education in Washington, states that the decision must consider the impact on all of the districts involved, I cannot read from that decision an intent by the State Board to dissolve a sending-receiving relationship where there is overcrowding for the purpose of shoring up the enrollment in another high school that is operating below its functional capacity and is experiencing declining enrollment. But even though enrollment is declining in Point Pleasant Beach High School, it is also declining in the Manasquan High School and in a short time Manasquan may experience an erosion in the breadth of its program offerings according to the testimony of the Manasquan Superintendent and the Monmouth County Superintendent of Schools. The record shows that by 1988-89 with a phased withdrawal of Brielle pupils, Manasquan will be well under its functional capacity (R-7).

In Morris School District at 486, the Commissioner approved the termination of a sending-receiving relationship after accepting the report of the hearing examiner who determined that there was "serious overcrowding" in the Morristown High School and that the withdrawal of Harding Township pupils would offer moderate relief from such crowded conditions. However, in examining the enrollment being considered in that decision, the Commissioner's decision shows that the Morris School District had a functional capacity of 1,361 and its enrollment for September 1983 would have been 2,385. Further, the addition of the Harding pupils would have raised the number of enrolled pupils to 2,473. Thus, well over 1,000 additional pupils were to be divided between the two high schools in the Morris School District, and it was this enrollment which the Commissioner found to constitute severe overcrowding.

In the instant matter there is no severe overcrowding of the Manasquan High School.

Based on these findings of facts and conclusions, I **CONCLUDE** further that there has been no showing that the educational impact, the financial impact or the racial impact upon all pupils and districts involved would be significantly affected over the short-term by a withdrawal of the Brielle pupils. Neither does the record show that these three areas show good and sufficient reason for granting a phased withdrawal. However, there will be an adverse educational impact upon Manasquan if there is a phased withdrawal combined with its already declining enrollment. Similarly, if Point Pleasant Beach High School's declining enrollment continues, it will experience an adverse educational impact by losing its ability to maintain its breadth of program. What is left is the facility considerations of the Manasquan High School campus and whether or not its facilities are so inadequate as to demand the removal of the Brielle pupils. Brielle has attempted to show that this facility is so inadequate that it has a negative educational impact on the offerings and on the quality of the Manasquan program. The testimony of the State's experts together with that of the Manasquan Superintendent of Schools leads to the conclusion that the Manasquan curriculum and educational program is not affected by its facility.

As stated earlier, N.J.S.A. 18A:38-13 states that there will be no termination of a sending-receiving relationship except for good and sufficient reason upon application to and approved by the Commissioner who shall make equitable determinations upon any such applications. As the Commissioner stated in Bd. of Ed. of the Borough of Haworth, one of the reasons for establishing the mutually advantageous sending-receiving relationship was to provide districts with an opportunity to expand their educational offerings and to reduce their overhead while giving stability to the sending-receiving relationship. Another reason was to protect districts from the withdrawal of tuition pupils without good cause. The burden of proof then, as now, rests upon the petitioning board to establish the good and sufficient reason for change required by the statute.

In my view, Brielle has been unable to establish good and sufficient reason for terminating its sending-receiving relationship with Manasquan. What Brielle was able to show is that Manasquan is overcrowded because of some substandard facilities which have received interim approval by the State Department of Education and what it believes to be an inferior type campus arrangement which Manasquan now utilizes; whereas the Point

Pleasant Beach High School is a single building unit. The Commissioner of Education also commented in Bd. of Ed. of the Borough of Haworth at 43 as follows:

> The Commissioner feels constrained to exercise his discretion under the statute with great caution. Otherwise, the law will not accomplish the salutary purposes intended by the Legislature.

Based on the foregoing testimony and evidence, I **CONCLUDE** that Brielle has been unable to establish that good and sufficient reasons exist for terminating its sending-receiving relationship with Manasquan.

Accordingly, the Petition of Appeal is **DISMISSED WITH PREJUDICE.**

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

OAL DKT. NO. EDU 8406-83

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

November 16, 1984
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

November 21, 1984
DATE

Ronald J. Parks, Jr.
OFFICE OF ADMINISTRATIVE LAW

ml/E

BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MANASQUAN ET AL., MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a and b. Respondent Manasquan's reply exceptions were untimely in accordance with subsection c of this regulation.

Petitioner contends that the judge's recommendation to dismiss the Petition of Appeal is incongruous in light of the fact that he determined (1) Manasquan High School is overcrowded for 1984-85; (2) the high school has only interim approval of its physical facilities; (3) dissolution of the sending-receiving relationship sub judice would not cause any significant adverse racial or financial impact; and (4) the high school to which petitioner desires to send its students has under-utilized facilities which are fully approved by the State Department of Education and it equals and exceeds all standards for a thorough and efficient education.

Petitioner argues that the equities in this matter lie heavily on its side given that Manasquan High School's enrollment is substantially beyond its functional capacity, being overcrowded and over-utilized, while Point Pleasant's is not. Petitioner believes that this constitutes good and sufficient reason to terminate the sending-receiving relationship with Manasquan.

Petitioner contends that the only basis for frustrating its desire to terminate the sending-receiving relationship must be grounded in a negative educational impact. With respect to educational impact, petitioner points out that there is no finding of fact provided by the judge relative to this issue and yet he concludes that there will be an adverse educational impact upon Manasquan if there is a phased withdrawal. However, petitioner argues that it should not go unnoted that the judge also concluded "***that there has been no showing that the educational impact *** would be significantly affected over the short-term by a withdrawal of the Brielle pupils." (Initial Decision, ante) Further, it contends, inter alia, that dismissal of the Petition cannot be predicated on any rationally supportable adverse educational impact

particularly given the speculative nature of the Manasquan Superintendent's testimony as to what programs may be eliminated five years in the future.

Petitioner also takes exception to the judge's reliance on Haworth, supra, in arriving at his conclusion that the appeal should be dismissed, contending that he misinterpreted and incorrectly applied that decision. Specifically, petitioner argues that Haworth is inapplicable because in that decision the intent of the Legislature in adopting R.S. 18:14-7 (now N.J.S.A. 18A:38-13) is described as a protection to school districts which expanded their facilities to accommodate other districts which did not have their own high school. In the instant matter there is no issue of bonding and, further, the judge has found that there would be no significant financial impact on any of the districts involved (Finding No. 11). In addition, petitioner challenges any implication that continuing its students in a facility which has for six years been overcrowded could help accomplish the "salutary purposes intended by the Legislature" in enacting R.S. 18:14-7 when its students can attend Point Pleasant Beach High School.

Petitioner argues that the State Board in deciding Washington Twp. Bd. of Ed. v. Upper Freehold Regional Bd. of Ed., (decided September 2, 1981) did not rely on Haworth and held the following with respect to overcrowding, almost identical to what in the instant matter is being deemed merely "technical overcrowding":

> "The substantial overcrowding may suffice alone to warrant withdrawal where the sending district has found another and uncrowded school to receive its high school students and there is no proof that the change will adversely affect the present receiving district to any important degree."
> (at p. 3)

Petitioner argues on the basis of the above that Manasquan is "substantially overcrowded." Further, there is another uncrowded high school to which its students may be sent and it contends that the record does not support that the change to Point Pleasant Beach will adversely affect the present receiving district to any important degree. In addition, it contends that Kopera v. Bd. of Ed. of West Orange, 60 N.J. Super. 288 (App. Div. 1960) dictates that the Commissioner not substitute his judgment for that of a local board of education because the motivation to terminate the sending-receiving relationship is not arbitrary, capricious or unreasonable.

Upon a thorough and comprehensive review of the record of this matter, it is the determination of the Commissioner that petitioner has not borne the burden of proof that good and sufficient reason exists to terminate the more than fifty-year-old sending-receiving relationship between the Brielle School District and Manasquan for the following reasons.

Contrary to petitioner's argument, Haworth, supra, remains appropriate applicable case law setting one of the standards of review which the Commissioner must consider when rendering a decision with respect to sending-receiving relationships. As articulated in the Haworth decision, the Commissioner is obliged to exercise his discretion in such matters with great caution; therefore, the judge's reliance on that case was appropriate. It is true that Kopera, supra, dictates that the Commissioner not substitute his judgment for that of a local board of education absent evidence of arbitrary, capricious or unreasonable action or motivation. However, the standard of review for sending-receiving relationships has been clearly and definitively stated in Haworth, supra, and Washington Township, supra. (State Board, December 7, 1983 decision) These standards, as well as statutory constraints imposed upon the Commissioner, N.J.S.A. 18A:38-13, require far more of the Commissioner than application of the Kopera standard when a case involves a sending-receiving relationship.

It is the Commissioner's belief that the judge's comprehensive and thorough analysis of the voluminous information presented in the instant matter carefully adheres to the required standards of review for determining sending-receiving relationship matters.

The Commissioner is not persuaded by petitioner's argument that the September 2, 1981 State Board decision in Washington Township determined that substantial overcrowding existed. The decision does indicate that the evidence that had already been adduced made a prima facie case of good and sufficient reason for the requested termination in that matter and that substantial overcrowding may suffice alone to warrant withdrawal. However, a final decision was not rendered on the prima facie evidence. Rather, extensive hearings continued in that matter which ultimately led to the recent Commissioner's decision (November 29, 1984) denying termination of the sending-receiving relationship. It is the opinion of the Commissioner that, had the State Board believed a prima facie case based on enrollment figures in excess of functional capacity constituted good and sufficient reason for termination of a sending-receiving relationship, it would not have required that matter to be heard on remand.

The Commissioner has relied heavily on the testimony of the Department of Education staff responsible for determining functional capacity and the monitoring of Manasquan's educational programs that, while overcrowding exists in Manasquan, this overcrowding has not detracted from the excellence of the program provided to the students. Likewise, he has placed heavy reliance upon the testimony of the county superintendent and educational planner that withdrawal of the Brielle students would ultimately, after the phased withdrawal period, adversely impact upon the breadth and scope of Manasquan's educational program.

In the September 2, 1981 Washington Township decision the State Board characterized sending-receiving cases as a "search for the whole truth" wherein it is essential that all relevant facts be considered. (at p. 2). Therefore, it is necessary to go beyond the short-term impact of terminating a sending-receiving relationship and consider what impact will result beyond any phasing out of students.

Having determined that (1) the overcrowding that exists in this matter is not so severe as to warrant a termination of the long established sending-receiving relationship between Brielle and Manasquan; (2) the use of substandard facilities does not pose any danger to students; (3) the quality of education offered by Manasquan is deemed superior; (4) overcrowding will not exist in a relatively reasonable period of time; and (5) adverse educational impact will occur ultimately if a withdrawal of Brielle's students is allowed, the Commissioner concurs with the Office of Administrative Law's recommendation to dismiss the Petition of Appeal with prejudice. Further, he concurs with the judge that insufficient evidence came to the record to make a final determination as to any possible adverse financial impact. Notwithstanding this factor, the Commissioner believes that ample information exists in the record to support that petitioner has failed to demonstrate good and sufficient cause to terminate the relationship and adopts as his own the order of dismissal of the Petition of Appeal in this matter.

COMMISSIONER OF EDUCATION

JANUARY 18, 1985

BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF MANASQUAN, ET AL., MONMOUTH COUNTY,	:	
RESPONDENTS-RESPONDENTS.	:	
	:	

Decided by the Commissioner of Education, January 18, 1985

For the Petitioner-Appellant, Brielle Board of Education, Kalac, Newman and Griffin (Peter J. Kalac, Esq., of Counsel)

For the Respondent-Cross-Appellant, Point Pleasant Beach Board of Education, Berry, Kagan, Privetera and Sahradnik (Seymour J. Kagan, Esq., of Counsel)

For the Respondent-Respondent, Manasquan Board of Education, Kenny and McManus (Malachi J. Kenny, Esq., of Counsel)

For the Respondent-Respondent, Spring Lake Board of Education, Daniel P. Fahey, Esq.

For the Respondent-Respondent, Spring Lake Heights Board of Education, Anton and Sendzik (Jay C. Sendzik, Esq., of Counsel)

For the Respondent-Respondent, Belmar Board of Education, Sinn, Gunning, Fitzsimmons, Cantoli, West and Pardes (Kenneth B. Fitzsimmons, Esq., of Counsel)

For the Respondent-Respondent, Sea Girt Board of Education, Cerrato, O'Connor, Mehr and Saker (Dominick A. Cerrato, Esq., of Counsel)

For the Respondent/Third Party Petitioner-Respondent, Board of Education of the Borough of South Belmar, Joseph N. Dempsey, Esq.

For the Third Party Respondent-Respondent, Asbury Park Board of Education, McOmber and McOmber (J. Peter Sokol, Esq., of Counsel)

By this appeal, the Board of Education of the Borough of Brielle seeks to terminate, on a four year phase-out basis, its sending-receiving relationship with the Board of Education of Manasquan, a relationship of more than fifty years' duration. Although Brielle maintains its own K-8 elementary school program, its ninth through twelfth grade students attend Manasquan High School. Manasquan is also the receiving district for the Sea Girt, Spring Lake, Spring Lake Heights, Belmar and South Belmar school districts, all of whom are parties in this case, as is Point Pleasant Beach, with whom Brielle seeks to establish a new sending-receiving relationship.

In petitioning the Commissioner for termination pursuant to N.J.S.A. 18A:38-13,[1] Brielle stated that it desired termination because Manasquan High School allegedly was badly overcrowded. Petition, at #6. Brielle asserted that its withdrawal would have no significant impact on racial balance and would not seriously affect the Manasquan Board educationally or financially. Petition, at #12 & #13. It further asserted that it had succeeded in finding a suitable alternative to its present relationship and that this alternative, offered by Point Pleasant Beach, was one that would meet the constitutional standards for the provision of a thorough and efficient education and one that would provide safe and adequate facilities. Petition, at #10. Brielle therefore asked that termination of its sending-receiving relationship with Manasquan be approved and that permission be granted to establish a new relationship with Point Pleasant Beach.

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[1] N.J.S.A. 18A:38-13 provides that where a board has designated a high school outside of the district for its high school students to attend, see N.J.S.A. 18A:38-11,

> [n]o such designation of a high school or high schools and no such allocation or apportionment of pupils thereto or hereafter made pursuant to law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except for good and sufficient reason upon application made to and approved by the commissioner, who shall make equitable determinations upon any such applications.

N.J.S.A. 18A:38-14 provides that "the determination of the commissioner upon any such application may be appealed by the applying board of education or by the board of education of any school district affected thereby to the state board, which may in its discretion affirm, reverse, revise or modify the determination appealed from."

At the conclusion of the initial proceedings, which involved thirteen days of hearing, the Administrative Law Judge (ALJ) found that Manasquan High School was technically overcrowded and functioning on interim approval from the State Department of Education, Findings of Fact, #3 & 4. He further found that there would be no racial impact if termination was granted, Findings of Fact, #10, and that the financial impact on all districts would not be so significant as to make withdrawal economically unfeasible. Id., at #11. The ALJ also determined that Point Pleasant Beach High School was under-utilized, Id., at #6, that it housed all of its students in one structure,[2] Id. at #9, that its facilities are fully approved by the State Department of Education, Id. at #14, and that its educational program equals and exceeds all thorough and efficient standards. Id., at #12. He found that Manasquan also met and exceeded all thorough and efficient standards, except in the area of facilities. Id., at #14.

However, despite his conclusions that pupil enrollment exceeded functional capacity and that Manasquan High School was overcrowded,[3] and his determination that there had been no showing of significant short-term educational, financial or racial impact, Initial Decision, at 22, the ALJ found that Brielle had been unable to establish good and sufficient reason for terminating its sending-receiving relationship with Manasquan. He reasoned that although Manasquan High School was overcrowded, nothing in the record suggested that it was unable to provide a thorough and efficient education. Id., at 20. He concluded that even though Manasquan's facilities have not measured up to state standards for several years, Manasquan had consistently met the State's suggestions for improvement and he determined that nothing suggested that the "campus-type" setting at Manasquan was inferior to the single building setting offered by Point Pleasant Beach. See supra n. 2. Finally, the ALJ found it most important that earlier Commissioner's decisions "clearly show the seriousness and practical permanence of any sending-receiving relationship." Id., at 21. Thus, although he acknowledged the State Board's decision in Washington Township, decided by the State Board, December 7, 1983,

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[2] In contrast, Manasquan students attend classes in four separate locations: the main building, a separate structure to the rear of the main building that houses the shop classes, a converted residential home on the same side of the street that accommodates home economics classes and a POD on the opposite side of the street that has been converted for use by the high school. See P-3.

[3] We note that the ALJ attributed the overcrowding to the use of substandard facilities. Initial Decision, at 22. See supra n. 2. We do not agree. Rather, the use of substandard facilities appears to be the result of the overcrowding. See Initial Decision, at 8.

he concluded that it was not the State Board's intent to dissolve such relationships where there is overcrowding "for the purpose of shoring up enrollment at another high school." Initial Decision, at 21. Accordingly, the ALJ dismissed the Petition.

The Commissioner agreed that Brielle had failed to demonstrate good and sufficient reason for termination. He first determined that Board of Education of Hawthorne v. Board of Education of the Borough of Dumont, 1950-51 S.L.D. 42, along with Washington Township, supra, provided the standard of review for sending-receiving relationships. Commissioner's Decision, at 32. Noting that a final decision in Washington Township had not been rendered by the State Board as of the date of his decision in the case before him, the Commissioner concluded that the State Board would not have remanded Washington Township if it had believed that a prima facie case based on enrollment figures in excess of functional capacity constituted good and sufficient reason for terminating a sending-receiving relationship. Id., at 33. As to Brielle, the Commissioner, like the ALJ, emphasized that the overcrowding at Manasquan had not detracted from the educational program provided to the students.

In assessing the impact of withdrawal, he found that Washington Township dictated that he go beyond the short-term impact of termination and consider the impact beyond the phasing out period. Id., at 34. He determined that 1) the overcrowding at Manasquan was not so severe as to warrant termination, 2) the use of substandard facilities did not pose any danger to students, 3) the quality of education offered by Manasquan was superior, 4) overcrowding would not exist in a "relatively reasonable" period of time and 5) adverse educational impact would ultimately occur if termination were permitted. Finally, the Commissioner stated that he concurred with the ALJ that insufficient evidence came to the record to make a final determination as to possible financial impact.[4] Id., at 34-5. The Commissioner, concluding that Brielle

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[4] We note that the ALJ did find that financial impact on all districts would not be so significant as to make withdrawal economically unfeasible. Findings of Fact, #11. The statement to which the Commissioner apparently is referring is the ALJ's determination that he was "not convinced by the financial data submitted by Manasquan that there would be significant financial impact on its district if Brielle withdraws. Consequently, there is insufficient evidence in the record to show that phased withdrawal of Brielle would cause financial circumstances in Manasquan that would be significant." Initial Decision, at 20. By this statement and his Findings of Fact, the ALJ did make a determination concerning financial impact and that determination, as set forth above, was that withdrawal would not result in significant financial impact.

had failed to show good and sufficient cause to terminate, adopted the ALJ's order dismissing the Petition as his own. Id., at 35.

After careful review of the record and the relevant case law, the State Board concludes that the Commissioner has failed in this case to properly apply the appropriate standard established by the State Board for evaluating requested withdrawals from sending-receiving relationships. In its decision remanding Washington Township, the State Board, while affirming that good and sufficient reason for termination must be demonstrated by a definite presentation of facts, eliminated the requirement that the petitioning district must prove that the receiving district is unable to offer a thorough and efficient education. Washington Township, supra, at 3-4. Rather, the State Board held that N.J.S.A. 18A:38-13 requires only that the Commissioner determine whether good and sufficient reason has been presented and that he weigh all the relevant factors in reaching his conclusion. Id., at 3. Those factors include the educational impact, facility considerations, financial impact and racial impact upon all pupils and districts involved. Id.

In Washington Township, the reason asserted for withdrawal was overcrowding at Allentown High School. Subsequent to issuance of the Legal Committee Report in the matter, Upper Freehold asserted that there had been a change in the record and that the high school was no longer overcrowded. Id., at 2-3. The State Board concluded that the issue of whether Allentown High School was overcrowded could not be resolved without remanding the matter for the "express purpose of supplementing the record and resolving the overcrowding issue." Id., at 3. Thus, contrary to the Commissioner's view, the State Board, in remanding that case, was not rejecting the conclusion that overcrowding alone may provide good and sufficient reason to permit withdrawal. Rather, the State Board was concerned with the factual question of whether overcrowding was present in the case before it.

On remand, it was determined that functional capacity at Allentown High School was not exceeded. Since overcrowding was the sole reason presented for withdrawal, the State Board affirmed the Commissioner's denial of termination in its final decision in the matter. Washington Township, decided by the State Board, June 5, 1985. In its decision, however, the State Board made it clear that withdrawal would have been permitted if there had been overcrowding if there would be no substantial negative impact on the other districts involved. Id.

We reiterate that a receiving district does not have a statutory right to continue as the receiving district for a particular sending district indefinitely or to perpetuity. Board of Education of the Borough of Kinnelon v. Board of Education of the Borough of Riverdale, App. Div., Docket No. A-3587-83T2, Slip. Op., at 2 (February 8, 1985). Under the standard established by Washington Township, once good and sufficient reason has been demonstrated by a definite presentation of facts and negative impact

is not shown, a petitioning district will be permitted to withdraw from a sending-receiving relationship. The reason asserted for withdrawal must be examined in each case to insure that it is supported by the facts and that it is a reason based upon the educational interests of the students in the petitioning district. See Washington Township, decided by the State Board, June 5, 1985.

We emphasize that the existence of overcrowding alone may result in a failure to provide a thorough and efficient education regardless of whether a district meets constitutional standards in other areas. See N.J.S.A. 18A:7A-5(f). Because of the importance of adequate facilities to the educational process, we find that even where overcrowding does not rise to the level of a failure to provide a thorough and efficient education, when a petitioning district seeks to avoid such overcrowding, it is acting in the educational interests of its students. See Washington Township, decided by the State Board, June 5, 1985. Thus, we reiterate that good and sufficient reason is present where it is established that overcrowding exists and no significant negative impact will result from withdrawal. Id.

We further emphasize that the current standard for reviewing sending-receiving relationships represents a departure from the Commissioner's decision in Hawthorne, supra. Although the current standard recognizes the need for stability in sending-receiving relationships and protects receiving districts who have expanded their facilities or erected buildings to provide for tuition students by its requirement that negative impact be assessed, the current standard does not require that "positive benefits...accrue to the high school students sufficient to overcome the claims of the receiving district to these pupils." Hawthorne, supra, at 43. Rather, as stated, if the petitioning district demonstrates a good and sufficient reason for withdrawal, one that is in the educational interests of its students, withdrawal will be permitted if no significant negative impact is shown. Under this standard, the receiving district has no "claim" to the sending district's pupils other than that their withdrawal must not result in significant negative impact on the other districts involved.

Under the current standard, we find that Brielle should be permitted to withdraw from its present relationship with Manasquan and to establish a new relationship with Point Pleasant Beach. As set forth above, Brielle desires to terminate its relationship with Manasquan because Manasquan High School is overcrowded and substandard facilities are in use. By definite presentation of facts, such overcrowding was established, and both the ALJ and the Commissioner concluded that the high school in fact was overcrowded. The ALJ determined that the overcrowding was not of such degree as to preclude the provision of a thorough and efficient education, Initial Decision, at 20, and the Commissioner "relied heavily" in reaching his decision on testimony that the overcrowding "has not detracted from the excellence of the program provided to the students," Commissioner's Decision, at 34. We do not decide in

this case whether the overcrowding constitutes a violation of the provision of a thorough and efficient education. It is not required that overcrowding, once established to exist, be shown to impact the quality of the educational program offered since facilities considerations are a separate factor in evaluating termination of sending-receiving relationships. As stated, overcrowding, such as that present in the instant case, independently may provide good and sufficient reason for termination.

Additionally, we find it significant that the overcrowding here is not a new or temporary occurrence. Rather, students attending Manasquan High School have been on either split or staggered sessions since 1971. See Initial Decision, at 8; T3/30/84, at 59 & T 3/28/84, at 164-65. Although the record indicates that Manasquan would return to the traditional eight period day for the 1984-85 school year, this scheduling change was to occur without the elimination of the overcrowding. Moreover, although the Commissioner concluded that because, based on enrollment projections, the "overcrowding will not exist in a relatively reasonable period of time ", Commissioner's Decision, at 34, evidently because overcrowding may be alleviated in three years, P-27, P-14, we conclude that under these circumstances, elimination of overcrowding in a minimum of three more years is not elimination within a reasonable period of time such as to warrant denying withdrawal. Nor do we believe that, even though the substandard facilities in use may not constitute a "danger" to the students, see Commissioner's Decision, at 34, the absence of actual "danger" should defeat withdrawal. Under the circumstances present here, we conclude that Brielle's desire that its students be permitted to attend a school that is not overcrowded and is housed in fully approved facilities provides good and sufficient reason for termination if no negative impact is shown.

As set forth above, it was established below that withdrawal would have no racial impact on the districts involved, Findings of Fact, #10, and that the financial impact on all districts would not be so significant as to make withdrawal economically unfeasible. Findings of Fact, #11. Further, there has been no showing that withdrawal would have any significant short term educational impact. Initial Decision, at 22. Although the Commissioner concluded that adverse educational impact will occur ultimately if withdrawal is allowed, we do not find that the record supports this conclusion.

The record shows that if Brielle is permitted to withdraw, and assuming enrollment projections are borne out, by 1989, Manasquan High School's population will have declined a total of 35%. Of this, 15% would be attributable to Brielle's withdrawal. P-4. This, Manasquan argues, would force it to eliminate a significant number of courses and that students remaining at Manasquan High School would be provided with an education that is substantially inferior to that which is currently available to them. See Respondent's Brief, at 52-3.

We find that decisions as to which courses to offer are decisions within the control of Manasquan, that it is speculative to predict which courses may or may not be offered four years hence and that even if the total decrease in enrollment dictates curriculum changes in four years, such changes will be necessitated by the total decline in student population, as well as other factors, and not solely or even mainly by the withdrawal of the Brielle students. For example, as the Manasquan Superintendent testified, some cuts in courses offered for the 1984-85 school year had already occurred because of lack of student interest in some specialized courses. T 5/1/84, at 109 et seq. Moreover, although she testified that certain courses would probably be dropped or the number of sections reduced if enrollment declined 35% and that some of these courses might be kept if the decline was limited to 20%, it was not established which, if any, courses would be reduced or cut in four years even if enrollment did decline 35%. See Id. Given that any changes in Manasquan's curriculum would not be caused solely by Brielle's withdrawal, but would be contingent on student course choices, the actual total decrease in enrollment and, ultimately, the Manasquan Board's decisions as to which courses, if any, to eliminate, we find that it has not been demonstrated that Brielle's withdrawal will result in long term negative educational impact. Accordingly, we conclude that it is unreasonable to force Brielle's students to continue to attend a facility that is now overcrowded based on the possibility that their continued attendance might prevent possible curriculum cut backs.

Finally, although Washington Township requires that we assess the impact on "all the districts involved," we do not read this requirement to necessitate balancing the relative academic merits of a proposed receiving district against those of the current receiving district where, as here, both have been found to provide quality education programs. Nor would we approve withdrawal in order to bolster the declining enrollment of a potential receiving district.[5] However, we find that it is necessary that the existence of an acceptable alternative, one that meets constitutional standards, be established in order that we may fulfill our responsibility to insure the provision of a thorough and efficient education to the students of this state. We conclude that the existence of such alternative has been demonstrated in this case

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[5]Although the ALJ suggested that this would be the purpose of permitting withdrawal, as set forth above, we are approving withdrawal because Manasquan is overcrowded and not because Pt. Pleasant Beach is underutilized.

since it has been established that Point Pleasant Beach meets all such standards and is willing to establish a sending-receiving relationship with Brielle.

In sum, we conclude that Brielle has demonstrated good and sufficient reason for withdrawal, that there has been no showing of significant negative impact that would be caused by withdrawal and that an acceptable alternative has been shown to Brielle's present relationship. We therefore reverse the decision of the Commissioner and approve termination of the sending-receiving relationship between Brielle and Manasquan on the basis of a four year phase-out plan, as proposed by Brielle.

Mateo DeCardenas and James Jones opposed in the matter.
Attorney exceptions are noted.

August 7, 1985

Limited remand by N.J. Superior Court September 23, 1985

BOARD OF EDUCATION OF THE BOROUGH OF BRIELLE, MONMOUTH COUNTY,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION ON REMAND
BOARD OF EDUCATION OF THE BOROUGH OF MANASQUAN, ET AL., MONMOUTH COUNTY,	:	
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, January 18, 1985

Decided by the State Board, August 7, 1985

Limited Remand by the Appellate Division, September 20, 1985

For the Petitioner-Appellant, Brielle Board of Education, Wayne J. Oppito, Esq.

For the Respondent-Cross-Appellant, Point Pleasant Beach Board of Education, Berry, Kagan, Privetera and Sahradnik (Seymour J. Kagan, Esq., of Counsel)

For the Respondent-Respondent, Manasquan Board of Education, Kenny and McManus (Malachi J. Kenny, Esq., of Counsel)

For the Respondent-Respondent, Spring Lake Board of Education, Daniel P. Fahey, Esq.

For the Respondent-Respondent Spring Lake Heights Board of Education, Anton and Sendzik (Jay C. Sendzik, Esq., of Counsel)

For the Respondent-Respondent, Belmar Board of Education, Sinn, Gunning, Fitzsimmons, Cantoli, West and Pardes (Kenneth B. Fitzsimmmons, Esq., of Counsel)

For the Respondent-Respondent, Sea Girt Board of Education, Cerrato, O'Connor, Mehr and Saker (Dominick A. Cerrato, Esq., of Counsel)

For the Respondent/Third Party Petitioner-Respondent, Board of Education of the Borough of South Belmar, Joseph N. Dempsey, Esq.

For the Third Party Respondent-Respondent, Asbury Park Board of Education, McOmber and McOmber (J. Peter Sokol, Esq., of Counsel)

This matter is before us pursuant to a limited remand by the Appellate Division in order that the State Board of Education may consider whether the circumstances of this case warrant ordering the Board of Education of the Borough of Brielle to terminate its sending-receiving relationship with the Board of Education of the Borough of Manasquan and to establish a new sending-receiving relationship with the Point Pleasant Beach Board of Education. See Order, Superior Court of New Jersey, Appellate Division, September 20, 1985. We emphasize that this issue was not raised by the parties when we originally considered the matter and that we did not address it in arriving at our decision of August 7, 1985. See Board of Education of the Borough of Brielle v. Board of Education of the Borough of Manasquan, et al., decided by the State Board, August 7, 1985. Rather, at the time the State Board approved termination of the sending-receiving relationship between Brielle and Manasquan, we had before us Brielle's Petition to terminate the relationship on a four year phase-out plan. See Petition of Appeal, at (e). We were under the impression that the Brielle Board supported its Petition for withdrawal, and we anticipated that once the State Board approved its request, the Brielle Board would immediately commence implementation of the plan. We therefore did not consider the issue of whether the circumstances warranted ordering the Brielle Board to terminate the relationship. In considering this issue, we conclude that oral argument is not necessary in order to arrive at a fair determination of this issue and, therefore, we deny the Respondent Manasquan Board's request for oral argument.

As set forth above, the litigation in this case resulted from a Petition of Appeal to the Commissioner filed by the Board of Education of the Borough of Brielle. In its Petition, Brielle asserted that it desired termination of its relationship with Manasquan because Manasquan High School was overcrowded. See Petition of Appeal, at #6, #7, #8 and #9. It further asserted that it had succeeded in finding a suitable alternative to its present relationship, id. at #10, and, therefore, requested authorization and permission to terminate its present relationship, and to establish a new relationship with Point Pleasant Beach. Id. at (d) and (e).

As a result of Brielle's Petition, 13 days of hearings were held, during which Brielle attempted to establish that Manasquan High School was overcrowded and that, therefore, good and sufficient reason existed to terminate the relationship. Following the hearing, the Administrative Law Judge issued an Initial Decision recommending the denial of Brielle's application. The Commissioner accepted the Initial Decision, concluding that Brielle had failed to demonstrate good and sufficient reason for termination. Board of Education of the Borough of Brielle v. Board of Education of the Borough of Manasquan, decided by the Commissioner, January 18, 1985.

The Brielle Board then appealed to the State Board of Education, continuing to seek termination of its relationship with Manasquan and restating its desire to establish a new relationship with Point Pleasant Beach. It renewed its argument that there was substantial overcrowding at Manasquan High School. It further argued that because Manasquan High School was overcrowded and no negative impact would result if its students instead were to attend Point Pleasant Beach, the equities favored granting its request.

After reviewing the case, the State Board found that Brielle had established, by a definite presentation of facts, that Manasquan High School was overcrowded and that no negative impact resulting from the proposed withdrawal had been shown. Because under the current standard, "good and sufficient reason" does not require that continuation of a sending-receiving relationship preclude the provision of a thorough and efficient education, we did not find it necessary to determine whether the overcrowding at Manasquan constituted such violation. State Board Decision, at 10. Thus, although we found that Brielle had established good and sufficient reason for termination, since the State Board assumed that the Brielle Board supported its Petition and since we therefore anticipated that it would commence implementation of the four year phase-out plan, we did not consider whether the circumstances warranted ordering termination. Rather, we concluded that "[u]nder the circumstances ... Brielle's desire that its students be permitted to attend a school that is not overcrowded and is housed in fully approved facilities provides good and sufficient reason for termination if no negative impact is shown". Id. at 11. Thus, in approving termination on the basis of a four year phase-out program as proposed by Brielle, id. at 14, we presumed that we were granting to the Brielle Board the relief that it had sought through the litigation.

We are now presented with a different scenario, marked by two significant changes in circumstances. First, the Board of Education of the Borough of Brielle no longer seeks to terminate its relationship with Manasquan, but rather desires to continue it. Second, Manasquan now has completed the monitoring process, which included assessment of its facilities, and, on September 4, 1985, the State Board of Education certified the District. We find that under the present circumstances, Brielle should not be ordered to terminate its sending-receiving relationship with Manasquan and to establish a new relationship with Point Pleasant Beach.

We emphasize that where a district seeks to terminate a sending-receiving relationship, community preference does not outweigh racial, financial or educational objections to severing the relationship. Branchburg Tp. Bd. of Ed. v. Somerville Bd. of Ed., 173 N.J. Super. 268, 276 (1980). See Jenkins, et al. v. Tp. of Morris School Dist. and Bd. of Ed., 58 N.J. 483 (1971). Moreover, even where community input properly may be sought through a non-binding referendum, members of a local board of education may not pledge themselves in advance to abandon their individual views

in favor of the results of such referendum. Jenkins, supra, at 507-08.

However, N.J.S.A. 18A:38-13 provides that no designation of a high school shall be changed or withdrawn "except for good and sufficient reason upon application made to and approved by the Commissioner, who shall make equitable determinations upon any such applications." We find that where the sending district has made such application, the statute contemplates that the withdrawal or change requested is one that is desired by the local board in the sending district. We therefore conclude that in the narrow circumstances present here, where the sending district made application to withdraw and later determined that it did not wish to terminate its present relationship and the receiving district likewise desires to continue the relationship, we properly may consider the local board's preference so long as continuation of the relationship does not violate the requirements for the provision of a thorough and efficient education or contravene the policies of this state. We emphasize that none of the parties have asserted that continuation of the relationship in this case would violate either the requirements for the provision of a thorough and efficient education or contravene state policy. Nor does the record indicate that these concerns are present.

In our decision of August 7, 1985, although we did not find that overcrowding at Manasquan precluded the provision of a thorough and efficient education, we were concerned that the overcrowding had resulted in the use of substandard facilities and split or staggered sessions over a period of years. See State Board Decision, at 10-11. However, as previously stated, on September 4, 1985, the State Board accepted the recommendation of the Commissioner and certified the District of Manasquan. Thus, Manasquan High School is no longer operating on interim approval, as was the case when we rendered our decision in August.

We find that the concerns we had at that time have been addressed by Manasquan's successful completion of the monitoring process. We note that the Monitoring Report, which was the basis for the Commissioner's positive recommendation to the State Board, indicates that, as required for certification, the District's facilities are acceptable for indicators 5.1 and 5.3.[1] In conformity with 5.1, a multiyear comprehensive maintenance plan exists and has been implemented. In assessing the District's use of substandard classrooms under 5.3, the monitoring team reported that the District has a master plan to eliminate all substandard facilities and has made budget allocations that target specific construction and capital expenditures. The monitoring team reported

[1]Under the current monitoring system, one out of three of indicators 5.1, 5.2 and 5.3 must be rated acceptable in order for a district to be certified. See MANUAL FOR THE EVALUATION OF LOCAL SCHOOL DISTRICTS PURSUANT TO THE PUBLIC SCHOOL EDUCATION ACT OF 1975 (1984).

that this is the last year that the facilities which caused us concern would be used and that the District had made substantial progress in eliminating substandard facilities. Specifically, the monitoring team noted that this is the last year that the home economics and agricultural buildings would be used for instructional purposes. Additionally, pursuant to the team's strong suggestion, quarterly reports will be submitted to the County Office regarding the facilities in question and periodic on-site inspections will be conducted to review the District's progress toward its goals.

In the area of adherence to health and safety laws, under indicator 5.2 in which the District was rated not acceptable, the team reported that prior to the completion of monitoring, the District had already addressed many of its suggestions and recommendations. A memo from the Assistant Superintendent, included with the Report, indicates that the recommendations made by the team in the Report also have been followed. In addition, correspondence from the Division of Finance, dated December 13, 1985, states that architectural plans for alterations of the Industrial Arts Annex, the facility that most concerned the team in this area, have been submitted to the State Department of Education for approval.

Moreover, the District was rated acceptable for indicator 5.4, which is necessary for certification. This rating demonstrates that the Manasquan High School is no longer on a split session schedule. Further, this indicator required submission by the District of a Board approved long range facilities plan. Pursuant to its long range plan, Manasquan is committed to the elimination of the substandard facilities that were of major concern to the monitoring team by 1987 and to the total elimination of all substandard facilities by 1990. We note that pursuant to the monitoring team's recommendations, the progress of the District towards its goals will be monitored. Finally, as shown by the enrollment figures and projections included in its long range plan, enrollment has already declined by over 100 - from the total of 1049 enrolled during the 1983-84 school year to 938 for the 1985-86 school year - and it is expected that enrollment will not exceed total school capacity by 1987-88. See LONG RANGE FACILITY PLAN, MANASQUAN BOROUGH SCHOOL DISTRICT, July 1, 1985.

In sum, the circumstances now are such that the concerns that led us to conclude that termination of the sending-receiving relationship between Brielle and Manasquan was proper are no longer present. The Brielle Board no longer desires to terminate the relationship. See State Board Decision, at 9, 10 and 11. Manasquan High School has now completed the monitoring process and has been certified. See State Board Decision, at 11. It is no longer on split or staggered sessions. Id. at 10-11. Most of the substandard facilities, including the home economics facility, will not be used for instructional purposes after June, 1986, and progress toward elimination of the use of all substandard facilities will be monitored by submission of quarterly reports to the County Office and periodic on-site inspections. Id. at 10. In light of our responsibility to provide stability in sending-receiving

relationships, e.g. Board of Education of the Borough of Merchantville v. Board of Education of the Township of Pennsauken and the Board of Education of the Township of Haddon, Docket #A-1655-82T3 (App. Div. September 30, 1985), we conclude that under the circumstances present here, we should not order termination of Brielle's relationship with Manasquan. Rather, based on the circumstance with which we now are presented, we find that good and sufficient reason for termination no longer exists.

In its brief, Point Pleasant Beach indicates that it entered into contracts and incurred additional duties in expectation that following our decision in August, some students from Brielle would be attending school in Point Pleasant Beach. We note that the nature and the extent of such obligations have not been specified. We further note that pursuant to the four year phase-out plan proposed by Brielle during the litigation in this case, the total number of Brielle students who would have attended Point Pleasant Beach in 1985-86 was 42. P-14. Nonetheless, we recognize that Point Pleasant Beach may have incurred some obligations because of its expectations. However, in light of the facts that our decision of August 7, 1985, was appealed by Manasquan on August 28, 1985, that a motion for a limited remand to the State Board for clarification by the Manasquan Board of Education was filed with the Appellate Division on September 3, 1985, and that the Appellate Division granted a limited stay of our decision on that date, we do not believe that such expectations for this school year were justified. Moreover, in balancing Point Pleasant Beach's expectancies against the need for stability in sending-receiving relationships and the circumstances set forth above, we conclude that such expectancies can not outweigh the instability that would be created if, as would be the case now, based solely on obligations incurred by Point Pleasant Beach, we were to order termination of the sending-receiving relationship between Brielle and Manasquan.

For the reasons stated, under the narrow circumstances with which we now are presented, we do not find good and sufficient reason to order termination of the relationship between Brielle and Manasquan.

S. David Brandt, Maud Dahme, Betty Dean, Anne Dillman, James Jones, Robert Marik and Deborah Wolfe join in the opinion of the State Board.

Attorney Exceptions are noted.
March 5, 1986

John Klagholz, Alice Holzapfel, Nancy Schaenen and James Seabrook dissenting.

In looking at this case, we believe that we have two cases before us. The first concerns the exact Appellate Division remand which is for the "limited purpose of clarifying whether our decision of August 7th is permissive or mandatory." The second is the majority's interpretation, which states that the remand is for the limited purpose of considering whether, "under the circumstances of this case," should the State Board of Education order Brielle to terminate its sending-receiving relationship with Manasquan -- with the emphasis on the circumstances.

The remand seems clear that it was for the purpose of determining whether our August 7th decision was permissive or mandatory, and we do not believe that the majority's opinion addresses that issue. Also, if this limited remand was for the purpose of clarifying a decision made on August 7th, we would agree with Point Pleasant Beach that information which became available after that date is not relevant. However, what the majority has done is to use that information to re-evaluate a decision made seven months ago. That is a completely different issue, and one which was not requested by the Appellate remand.

The majority apparently has looked at the remand differently and responded by choosing to address "the circumstances in this case" and how those circumstances have changed since August 7th. This has nothing to do with whether our decision of August 7th was mandatory or permissive.

If Brielle had appealed our decision to the Appellate Court because the circumstances had changed, we would think the remand would have been for us to re-examine our decision in light of new facts. That was not the remand. Also, that kind of remand would involve the submission of briefs specifically addressing the question of change in circumstances, an issue which the parties were not required to address in the briefing on remand.

The majority re-assesses the State Board's August 7th decision by looking at facts and circumstances as they exist today and, thereby, reaches a new decision. In dissenting, we refrain from commenting on the merits of this decision because that is not the issue we have been asked to address by the Court. However, since the majority does not respond to the specific question posed by the limited remand to clarify the State Board's decision of August 7th, i.e., whether that decision was mandatory or permissive, we would refer the matter back to the Legal Committee for consideration of the legal issue we believe we are required to address in our decision on remand.

March 5, 1986

Pending N.J. Superior Court

INITIAL DECISION
OAL DKT. NO. EDU 4090-84
AGENCY DKT. NO. 205-6/84

DANIEL W. GIBSON, JR.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Nathanya G. Simon, Esq., for petitioner (Schwartz, Pisano & Simon, attorneys)

Robert L. Podvey, Esq., for respondent (Podvey, Sachs & Catenacci, attorneys)

Record Closed: October 23, 1984 Decided: December 4, 1984

BEFORE **STEPHEN G. WEISS**, ALJ:

The petitioner in this case is a former member of the respondent Board of Education of the City of Newark who has challenged the Board's determination in May 1984 to dismiss its previous general counsel and to hire new general counsel. The basis for the challenge stems from the petitioner's allegation that, by law, the Board is without authority to take such action absent a recommendation from the Executive Superintendent of Schools concerning the same. A prehearing conference was conducted in July 1984 and the following four issues were identified:

(1) Does the Board have the authority to hire or dismiss general counsel without first obtaining a recommendation from the Executive Superintendent respecting such action?

(2) Does the attorney-client relationship supersede the language of N.J.S.A. 18A:17A-5?

(3) Was that portion of the Board's resolution giving its new general counsel the right to determine how long former counsel would be employed within the maximum period of 45 days an improper delegation of authority by the Board?

(4) If petitioner should prevail, to what relief is he entitled, including counsel fees?

Previously, in June 1984, this court had entered an Order denying petitioner's application for temporary restraints which had been brought with respect to a certain resolution adopted by the Board on May 29, 1984. The Order determined that the question of whether the Board had the authority to hire or terminate the employment of general counsel without a recommendation from the Executive Superintendent was an issue which required further attention and should not be disposed of at that time. On review of that Order the Commissioner agreed and remanded the matter for a hearing to determine: ". . . the outstanding issue pertaining to the Board's authority to employ or dismiss general counsel without the recommendation of the Executive Superintendent. . . ." See, Daniel W. Gibson, Jr. v. Bd. of Ed. of the City of Newark, OAL DKT. EDU 4090-84, Order of the Commissioner of Education, June 28, 1984.*

*The Commissioner's review also resulted in his rejection of certain other portions of this court's Order which are not pertinent to this Initial Decision.

Following the Commissioner's remand, the matter proceeded to hearing in September 1984. At that time, the parties stipulated in evidence a variety of documents. No oral testimony was offered. Thereafter, in accordance with an established schedule, post-hearing memoranda were filed.

DISCUSSION

In Daniel W. Gibson, Jr. v. Bd. of Ed. of the City of Newark, OAL DKT. EDU 6160-83, Decision of the Commissioner, March 30, 1984 (hereinafter "Gibson I"), the Commissioner comprehensively reviewed the statute under which the Newark Board of Education operates and, in reversing an Initial Decision of an administrative law judge, found and determined that with respect to a variety of certain activities undertaken by the Board, it ignored the Legislature's intent with respect to the legal relationship that is supposed to exist in the school district between it and the Executive Superintendent. Specifically, in Gibson I, the Commissioner determined that the Board's extending a certain consultancy/lobbyist contract without a recommendation from the Executive Superintendent was "clearly in error." The Commissioner further determined that the administrative law judge erred in finding that the Office of Board Affairs and the Office of General Counsel were independent of the Executive Superintendent vis a vis his supervisory authority and their reporting procedures. In reaching his decision, the Commissioner rejected the administrative law judge's substantial reliance upon the weight to be given to the trial testimony of Mr. Walter Wechsler pertaining to the circumstances surrounding the enactment of N.J.S.A. 18A:17A-1 et seq. The decision in Gibson I was appealed to the State Board of Education which, on June 8, 1984, dismissed it on procedural grounds. That dismissal is presently the subject of a pending appeal to the Superior Court, Appellate Division.

Without doubt, subject to such modification as might ultimately eventuate as the result of the pending appeal in Gibson I, the relationship between the chief school officer in Newark, known as the Executive Superintendent, and the Board is a unique one. That the Executive Superintendent enjoys powers which transcend those which other chief school officers in this State have is obvious. The limited issue here, however, is the extent of that power, insofar as it reaches the question of employment and termination of legal counsel.

The organizational structure of Newark's school system was totally recast by P.L. 1975, c. 169; N.J.S.A. 18A:17A-1 et seq. After referring to the authority of the Executive Superintendent to appoint and remove clerks in his immediate office, the statute provided that the Executive Superintendent, ". . . shall propose to the board of education all other officers and employees, professional and nonprofessional, for employment, transfer and removal." N.J.S.A. 18A:17A-5(c) (emphasis added). However, N.J.S.A. 18A:17A-7 reserved to the Board, except as otherwise provided in the statute, the power to perform all acts and do all things consistent with law and State Board rules that were necessary for the proper conduct and maintenance of the schools in the district and to exercise all other powers and responsibilities vested in it under the education law of the State, including but not limited to the appointment, transfer or dismissal of employees. Given these statutory provisions, can the Board hire and/or fire its general counsel without first having received a recommendation from the Executive Superintendent pertaining to such personnel decisions? I believe it can and must have that authority.

In April 1984, a school board election was held in the City of Newark. As a result, some members of the Board failed of reelection and new members ultimately took their place. Thereafter, on May 29, 1984, by a vote of five in favor, three opposed and one absent, the Board adopted a resolution which resolved as follows:

> NOW, THERFORE, BE IT RESOLVED, that the Board of Education of the City of Newark appoints Vickie Donaldson, Esq., to the position of Board General Counsel; and
>
> BE IT FURTHER RESOLVED, that the former General Counsel, Louis C. Rosen, Esq., will remain employed by the Newark Board of Education at his present salary for a maximum period of 45 days, such time to be determined by the new General Counsel, to aid in the transition of the General Counsel (Exhibit J-3).

A few days later, on June 1, 1984, a memorandum was sent from Ms. Donaldson to the Executive Director of the Office of Human Resources advising that effective on that date, Mr. Rosen will, "... cease to be employed pursuant to the attached resolution" (Exhibit J-2). On that same date, both a mailgram and a letter were dispatched from Ms. Donaldson to Mr. Rosen advising him that the transition period referred to in the May 29, 1984, resolution was terminated and that he should "act accordingly" (Exhibits J-1, J-4). There would not appear to be any dispute that both the appointment of Ms. Donaldson and the events which culminated in the "termination" of Mr. Rosen took place without a "proposal" from the Executive Superintendent recommending the same. Why the Board majority determined to replace Rosen with Donaldson is not pertinent to the present proceedings and need not be the subject of any discussion here . Suffice it to say that the majority presumably felt that such a change was in order.

At the hearing before me, each side introduced a variety of excerpts from the transcripts of Gibson I. Much of that testimony consists of Mr. Wechsler's views and the Board insists that such testimony is

> ...an important aid in interpreting the statutory framework governing the Newark School System. The statute does not explain the relationship of counsel with the Board and Executive Superintendent and does not set forth whether counsel should report to the Board or the Executive Superintendent (Brief of Respondent, p. 4).

Thus, according to the Board, Wechsler's testimony is vital with regard to an understanding of the Board-counsel relationship contemplated by the legislature and ". . . clarifies what was not set forth explicitly in the statute" (Brief of Respondent, p. 6). Several references are made in the brief to Wechsler's testimony and the respondent insists that consideration of this testimony, in light of various provisions of the statute, leads inexorably to the conclusion that the Board clearly was intended by the Legislature to retain unto itself the power to hire and terminate general counsel.

On the other hand, Gibson maintains that Wechsler's testimony must be disregarded, as essentially occurred when the Commissioner reviewed the Initial Decision in Gibson I. According to petitioner, the obvious thrust of the legislative scheme embodied in N.J.S.A. 18A:17A-1 et seq. was to create a powerful Executive Superintendent, and the Legislature's omission specifically to address the position of general counsel must be considered in that light. Consequently, with respect to the hiring and dismissal of personnel, this is a matter which plainly falls within the purview of the Executive Superintendent's "proposal" authority under N.J.S.A. 18A:17A-5 and no manner or method of interpretation can change that notion.

In Gibson I, although the Commissioner took official notice of the valuable services rendered and the contributions made by Mr. Wechsler with respect to the revamping of the Newark public school system, he nevertheless rejected his views insofar as they appeared not to comport with what the Commissioner believed to be the "clear and unambiguous" provisions of the statute. Whether or not the main issue in this case, insofar as statutory interpretation is concerned, is as "clear and unambiguous" as those found by the Commissioner in Gibson I, is a matter which is very much the subject of dispute. As noted, several transcript excerpts from Gibson I were introduced without objection by both sides in the truncated hearing which I conducted. Dr. Salley, for example, testified during the hearings in Gibson I with respect, generally, to his role vis a vis the Board under the statute. During his direct examination he stated that he is

responsible for the supervision of all Board employees, whether professional or nonprofessional, and believes he has a responsibility to recommend to the Board for its approval or disapproval any personnel action which would include appointment, transfer, promotion, etc. While Dr. Salley agreed that ultimately it is the Board that does the actual hiring, the initiation of a personnel action, as he put it, ". . . is the purview of the Executive Superintendent" (Exhibit P-1). According to Dr. Salley, the legislation deliberately established a system of "checks and balances" and just as he could not hire anybody without final approval by the Board, the Board could not "go out and create its own kingdom and domain" without some sort of oversight by the chief executive officer (Exhibit P-4).

In excerpts from Wechsler's testimony, submitted by the Board, he identified his background, particularly his involvement with the total restructuring of the Newark Board (Exhibits R-5, R-6). According to Wechsler, the Legislature, based upon the spade work done by the committee which he headed, obviously did not intend to enact a scheme in which all personnel had to be proposed to the Board by the Executive Superintendent. As Wechsler put it, that would be the

> . . . equivalent of sending a fox to the henhouse. You can't have an independent judgment made in one branch, if the other branch is the one that is going to decide who is going to hire the people or going to be hired. On that basis, they would owe their allegiance to the person who proposed the hire (Exhibit P-8).

Thus, to the extent that policymaking was involved, it was Wechsler's opinion that the Board itself would employ its own personnel to carry out those functions without recommendation from the Executive Superintendent. As Wechsler put it, one could not serve the Board to the fullest extent if he or she was "beholden" to the Executive Superintendent for his nomination or for his proposal to be hired (Exhibit R-10).

I have read and considered all of the transcript excerpts and other documents which were admitted into evidence. While the exhibits shed some light upon the overall context of this case, they do not directly answer the basic question of whether general counsel to the Board was meant to be included within the category of professional employees under N.J.S.A. 18A:17A-5. On the other hand, despite the Commissioner's determination in Gibson I to reject much of Mr. Wechsler's testimony because the statute was clear and unambiguous with regard to the matters before him, I consider that testimony to be quite apt insofar as the matter sub judice is concerned.

It seems to me that enjoyment of the right to have counsel necessarily includes the notion that the counsel must be one of the client's own choice. The relationship between attorney and client is surrounded by all sorts of protections, including constitutional, statutory, regulatory and ethical. It simply is not conceivable to me that the Legislature in adopting the unique plan for Newark ever intended that the Board would be subject to the Executive Superintendent's "veto" insofar as its selection or dismissal of counsel is concerned. As the New Jersey Supreme Court observed in Battaglia v. Union County Welfare Board, 88 N.J. 48, 64 (1981):

> Trust and confidence are the essence of the attorney-client relationship. Assuredly, a public body should not be compelled, at least in the absence of some legislative directive, to retain an attorney when those elements do not exist.

In the instant case, the Board majority presumably determined that it no longer could continue to repose the sort of trust and confidence in its former general counsel that was required. Rightly or wrongly, it certainly was vested with the discretion to make such a judgment. To continue to require that it retain the attorney simply because it did not receive a recommendation from the Executive Superintendent vis a vis termination runs contrary to common sense, if not the case law and the rules of ethics.

While the Supreme Court in Battaglia made reference to a possible exception where there was some "legislative directive," no such directive can be found here. I simply am not willing to reach the conclusion, absent express language in the statute, that the Legislature intended to include general counsel within the scope of N.J.S.A. 18A:17A-5.

Another instructive case is Taylor v. Hoboken Bd. of Ed., 187 N.J. Super. 546 (App. Div. 1983), certif. denied, 95 N.J. 228 (1983). In that case, the Appellate Division held that a school board attorney had a duty to withdraw from his employment when he was discharged by his client and that this obligation, which arose under D.R. 2-110(B)(4),* was made absolute to members of the Bar of this State under R. 1:14. In fact, the Appellate Division believed that the court rule even superseded any statutory tenure rights which the attorney might otherwise have to the position. Indeed, the court held that although under N.J.S.A. 38:16-1, Taylor was within the class of veterans who were entitled to tenure, the statute could not constitutionally be held to apply to an attorney under the principles of Winberry v. Salisbury, 5 N.J. 240 (1950), cert. denied, 340 U.S. 877, (1950).

In reaching the result that I do in this case, it should be understood that I am not determining the constitutionality of any statute. In my view, the provisions of N.J.S.A. 18A:17A-1 et seq. do not, as a matter of statutory interpretation, vest in the Executive Superintendent the right to prevent a board from hiring and/or discharging its attorney. Rather, the statute is silent on that point and thus no such implied authority exists in the Executive Superintendent to so act. If the statute did expressly so provide, or was potentially to be construed in that way, the Taylor decision then would appear to me to point to a determination of unconstitutionality. However, since no such conflict exists, I need not decide this issue.

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*Now contained in R.P.C. 1.16a(3) (1984).

The petitioner also argues that the term "client" includes the Executive Superintendent. I disagree. The client is the governmental entity made up of the elected, voting members of the Newark Board of Education, although counsel's duties certainly include the rendering, upon request, in appropriate situations, of legal advice to all of the employees of the governmental entity.

In essence, I am convinced that there is simply no support, either in the statute or in any case law, for the proposition put forth by the petitioner that the Board's hiring of Ms. Donaldson and the discharge of Mr. Rosen were improper because the Executive Superintendent, Dr. Salley, did not recommend such action to the Board under N.J.S.A. 18A:17A-5.

The third issue raised in the Prehearing Order has to do with the propriety of the delegation to Donaldson of the right to determine how long Rosen would continue to be employed, up to a maximum of 45 days. With respect to this issue, I must agree with petitioner that such a delegation exceeded the scope of the Board's statutory authority. In effect, the Board discharged Rosen, such discharge to be effective 45 days after the enactment of its resolution. To give to Donaldson the right to shorten that period resulted in nothing less than an improper delegation to her to amend that resolution. She was not the Board and could not be given any such power. Rather, if she believed that reasons existed to make the termination effective sooner than 45 days, she should have been asked immediately to bring such matters to the attention of the Board for its consideration and decision. Accordingly, that portion of the resolution which gave Donaldson such improper authority must be considered null and void.

The final issue had to do with the question of counsel fees should petitioner prevail. Except for my discussion of the delegation question, the petitioner has not prevailed. Under all of the circumstances, I therefore must reject any claim by him to be awarded counsel fees.

In reaching the conclusions that I have in this Initial Decision, I am not unmindful of the petitioner's reliance upon the previous decision of the Commissioner in the case of Ross v. Bd. of Ed. of the City of Jersey City, 1981 S.L.D. _____ (March 10, 1981), aff'd State Bd. 1981 S.L.D. _____ (Oct. 7, 1981). The statutory provision at issue in that case is distinguishable from the provisions involved here. Moreover, that case had to do with the appointment of assistant superintendents who, with all due respect to the importance of their activities, cannot be equated with the school board's attorney.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The foregoing discussion contains my views of the applicable case law and the appropriate result that ought to be reached with respect to the issues raised in the Prehearing Order. Accordingly, I herewith make the following findings of fact and reach the following conclusions of law:

1. The activities of the Board of Education of the City of Newark are governed by the provisions of N.J.S.A. 18A:17A-1 et seq.

2. The chief executive officer and administrator of the school district is the Executive Superintendent who, pursuant to rules and regulations established by the Board, is vested with the responsibility and general supervision over the organization and the educational, managerial and fiscal operations of the district. The Executive Superintendent has supervisory authority over all officers and employees, professional and nonprofessional, of the district, all of whom shall report to him, and he shall be responsible for prescribing their duties.

3. The Executive Superintendent enjoys a seat on the Board of Education and the right to speak on all educational, managerial and fiscal matters at Board meetings but shall have no vote.

4. The Executive Superintendent has the independent authority to appoint, transfer and, pursuant to certain statutory provisions, remove clerks in his immediate office.

5. The Executive Superintendent, subject to the approval of the Board, has the authority to appoint and fix the compensation of such assistant executive superintendents as he shall deem necessary, subject to certain restrictions as to number and the length of the term of the appointment.

6. The Executive Superintendent has the authority to propose to the Board of Education for employment, transfer and removal all other officers and employees, professional and nonprofessional, except that such authority does not extend to the position of general counsel.

7. The attorney-client relationship requires that absent express legislative directive to the contrary, the determination of whom shall be appointed as general counsel and/or discharged from that position with the Board of Education of the City of Newark is a matter which rests wholly within the discretion of the elected members of the Board of Education.

8. The Executive Superintendent has supervisory authority over general counsel who is required to report to the Board through the Executive Superintendent.

9. At a special meeting held on May 29, 1984, the Board of Education of the City of Newark adopted a resolution as follows:

> WHEREAS, the Board of Education of the City of Newark is a municipal corporation subject to laws, regulations and rules on the federal, state and local level; and
>
> WHEREAS, the Board of Education must provide for the legal defense of the Board and its employees; and
>
> WHEREAS, there is presently a need for an attorney to be appointed to the position of General Counsel to advise, counsel and represent the Board and its employees; and
>
> WHEREAS, at the annual reorganization meeting, the Board must select its General Counsel, pursuant to By-Law 9126; and
>
> WHEREAS, the Board has made careful and reasonable search to select its General Counsel.
>
> NOW, THERFORE, BE IT RESOLVED, that the Board of Education of the City of Newark appoints Vickie Donaldson, Esq., to the position of Board General Counsel; and
>
> BE IT FURTHER RESOLVED, that the former General Counsel, Louis C. Rosen, Esq., will remain employed by the Newark Board of Education at his present salary for a maximum period of 45 days, such time to be determined by the new General Counsel, to aid in the transition of the General Counsel.

The Board voted to adopt the resolution with five yeas, three nays and one member absent.

10. On June 1, 1984, the new general counsel, Vickie Donaldson, Esq., dispatched a mailgram to Louis C. Rosen, Esq. advising him that pursuant to the Board resolution of May 29, 1984, the "transition" set forth therein is terminated. In addition, Donaldson dispatched a memorandum to the Executive Director of the Human Resources Services Office advising that, effective June 1, 1984, Rosen "shall cease to employed."

11. Walter Wechsler, the Director of the Division of Budget and Accounting, State of New Jersey, for 35 years, was recruited in early 1975 by then Governor Brendan T. Byrne to head a task force of persons to examine Newark's school system and to make recommendations with regard to the overhaul of its systems and procedures in order to enable it more effectively to operate on a sound fiscal and administrative basis.

12. In that capacity, Wechsler was intimately involved with the development of the legislation which ultimately was enacted as P.L. 1975, c. 169 (N.J.S.A. 18A:17A-1 et seq.).

13. During the course of his testimony in the case of Gibson I, Wechsler was asked whether or not the report which his task force developed and the legislation which ultimately was adopted contemplated that every employee of the school district, including those who engaged in the policymaking functions of the Board, had to be proposed to the Board by the Executive Superintendent. Wechsler's reply was as follows:

> The answer is definitely no. To do otherwise or to permit otherwise would be equivalent to sending a fox into the henhouse. You can't have an independent judgment made in one branch, if the other branch is the one that is going to decide who is going to hire the people or going to be hired. On that basis, they would owe their allegiance to the person who proposed the hire.

14. Wechsler also testified that personnel who were carrying out the policymaking functions of the Board ought to be employed by the Board without the recommendation of the Executive Superintendent.

15. During the course of his cross-examination, Wechsler testified that he believed that the Board should not have to go through the Executive Superintendent to obtain an opinion from its legal counsel, nor should counsel have to report directly to the Executive Superintendent rather than to the Board. As Wechsler put it, "we are again dealing with the separation of powers. And if the Board needs to have information from counsel, it should have direct access to him."

16. In his decision modifying and reversing in part the Initial Decision of the administrative law judge in Gibson I, the Commissioner determined that the testimony of Wechsler was of no weight insofar as certain provisions of N.J.S.A. 18A:17A-1 et seq. were concerned in that said provisions were clear and unambiguous and needed no interpretation or extrinsic aid toward that end. An appeal of that decision was dismissed by the State Board of Education on procedural grounds, but that dismissal is itself the subject of a pending appeal to the Superior Court, Appellate Division.

17. In his decision on appeal from my interlocutory order, dated June 28, 1984, the Commissioner determined that the decision in Gibson I did not address the question of whether the Board could hire or discharge its general counsel without a recommendation from the Executive Superintendent.

Based upon my discussion and the above findings of fact, I **CONCLUDE** that pursuant to the provisions of N.J.S.A. 18A:17A-1 et seq., the determination to hire and/or dismiss its general counsel may be made by the Board of Education of the City of Newark whether or not the Executive Superintendent recommends the same to it. The provisions of N.J.S.A. 18A:17A-5 do not compel a different result. I therefore further **CONCLUDE** that there is no need in this case to determine whether or not a conflict exists between any of the provisions of N.J.S.A. 18A:17A-1 et seq. and the Rules of Professional Conduct which vest in the client the absolute authority to discharge counsel. I further **CONCLUDE** that so much of the Board's resolution of May 29, 1984 that delegated to its new general counsel the right to determine how long the transition period would last with regard to the continued employment of the former general counsel is null, void and of no effect. Finally, I **CONCLUDE** that given all of the circumstances of this case, no counsel fees should be awarded to the petitioner. Accordingly, except for the portion of the May 29, 1984 resolution which improperly delegated certain authority to the new general counsel, the petition in this case should be **DISMISSED**.

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

OAL DKT. NO. EDU 4090-84

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

December 4, 1984
DATE

STEPHEN G. WEISS, ALJ

12/5/84
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

December 6, 1984
DATE

Ronnell L. Parker/mm
FOR OFFICE OF ADMINISTRATIVE LAW

md/e

DANIEL W. GIBSON, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

It is noted that petitioner's exceptions to the initial decision and the Board's reply were filed pursuant to N.J.A.C. 1:1-16.4a, b and c.

In the Commissioner's judgment the final determination to be rendered herein turns upon the pivotal issue regarding whether or not the Board has the authority, pursuant to the provisions of N.J.S.A. 18A:17A-1 et seq., to hire or dismiss General Counsel without a recommendation to that effect from its Executive Superintendent.

It has been concluded in part in the initial decision that the provisions of N.J.S.A. 18A:17A-1 et seq. could not be properly interpreted by the judge with respect to the issue being adjudicated herein without relying upon the prior testimony of Mr. Wechsler in Gibson I, supra, pertaining to his interpretation regarding the legislative intent of the above-cited statutory provisions.

The Commissioner does not agree. It is found and determined from a review of the statutory provisions of N.J.S.A. 18A:17A-1 et seq. that they are "clear and unambiguous" and are therefore not susceptible to the interpretation given to Mr. Wechsler's testimony by the ALJ.

Accordingly, the conclusions which rely on Mr. Wechsler's testimony are hereby rejected insofar as they are premised upon the intent of the Legislature as viewed by Mr. Wechsler, rather than the clear prescriptive language set forth in the applicable sections of N.J.S.A. 18A:17A-1 et seq.

It is further observed that the judge has concluded that in the absence of express statutory language, the Legislature did not intend for the employment of General Counsel to fall within the scope of N.J.S.A. 18A:17A-5. More specifically, the rationale adopted by the judge in support of this conclusion reads in pertinent part as follows:

"***It seems to me that enjoyment of the right to have counsel necessarily includes the notion that the counsel must be one of the client's own choice. The relationship between attorney and client is surrounded by all sorts of protections, including constitutional, statutory, regulatory and ethical. It simply is not conceivable to me that the Legislature in adopting the unique plan for Newark ever intended that the Board would be subject to the Executive Superintendent's 'veto' insofar as its selection or dismissal of counsel is concerned. As the New Jersey Supreme Court observed in Battaglia v. Union County Welfare Board, 88 N.J. 48, 64 (1981):

> 'Trust and confidence are the essence of the attorney-client relationship. Assuredly, a public body should not be compelled, at least in the absence of some legislative directive, to retain an attorney when those elements do not exist.'***"

(Initial Decision, at p. 8) (Emphasis supplied.)

In the Commissioner's view the case law in Battaglia upon which the judge's conclusional language is grounded is clearly distinguishable from the issue to be decided herein. In Battaglia, the Court clearly identified the issue wherein its ruling relied upon the attorney-client relationship in upholding the action of the Union County Welfare Board:

"***The principal question presented in this case is whether the plaintiff, an attorney for a county welfare board, who was not continued in employment because of his political beliefs, was deprived of his First Amendment rights.***"

(88 N.J. at 53)

It is evident in Battaglia that the Court invoked the attorney-client privilege in considering the propriety and constitutionality of the Union County Welfare Board's reasons for dismissing Battaglia. The Welfare Board's authority to hire or dismiss its employees was not at issue.

The Commissioner finds and determines that the judge's application of the attorney-client privilege in Battaglia to the primary issue controverted herein is misplaced since the Board's reasons for dismissing its General Counsel are not under review. What is in contention, however, are the statutory provisions of N.J.S.A. 18A:17A-5 which read as follows:

"All officers and employees, professional and nonprofessional, shall be employed, transferred and removed as provided below.

a. The executive superintendent may appoint, transfer, pursuant to the provisions of Title 11 of the Revised Statutes, and, pursuant to Article 1 of chapter 17 of Title 18A of the New Jersey Statutes, [Section 18A:17-1 et seq.] remove clerks in his immediate office, but the number and salaries of the clerks shall be determined by the board.

b. The executive superintendent, subject to the approval of the board, shall appoint and fix the compensation of such assistant executive superintendents as he shall deem necessary; provided, however, the number of assistant executive superintendents shall not exceed the number of persons serving immediately prior to the effective date of this act in the position of assistant superintendent of schools, school business administrator, school business manager, secretary to the board of education and assistant secretary to the board of education. An assistant executive superintendent shall not be appointed for a term exceeding the remainder of the term of the executive superintendent. Notwithstanding any other provision of law, no assistant executive superintendent shall acquire tenure.

c. The executive superintendent shall propose to the board of education all other officers and employees, professional and nonprofessional, for employment, transfer and removal."

(Emphasis supplied.)

The prescriptive language of the above-cited section is clear and unambiguous in mandating the procedural steps which are to be complied with for the employment or dismissal of "[a]ll officers and employees, professional and nonprofessional***" by the Board. Namely, any prerequisite to Board action must be initiated to the Board by a recommendation to that effect from the Executive Superintendent. The Board, of course, uses its discretionary authority to accept or reject such recommendations from its Executive Superintendent. Therefore, the ultimate authority vested in the Board to employ or dismiss "[a]ll officers and employees, professional and nonprofessional***" is not compromised or diminished by the provisions of N.J.S.A. 18A:17A-5(c). Nor can the Executive Superintendent hold the Board hostage by exercising his "veto" over such persons the Board determines to employ or dismiss in the City of Newark Public School District as concluded herein by the judge in

the initial decision. There is no veto power in such matters accorded by the provisions of N.J.S.A. 18A:17A-5(c) to the Executive Superintendent.

It is undisputed that the Office of General Counsel is contained within the Board's table of organization. Gibson I, supra All of the persons employed in that office are under the direct supervision of General Counsel, the chief legal officer of the City of Newark Public School District who is employed in a full-time capacity. In the Commissioner's judgment the Office of General Counsel has been established and organized by the Board to facilitate compliance with the lawful proper conduct and maintenance of the school district. In this capacity General Counsel provides legal advice to the Board as well as to the Executive Superintendent in order to effectuate the legislative directive prescribed in N.J.S.A. 18A:17A-1 which reads in part:

> "Districts in cities of the first class with a population over 325,000 shall have a unit control organizational structure.***" (Emphasis supplied.)

It is significant that, at the present time, pursuant to the above-cited statute the City of Newark Public School District is the only one statutorily subject to the unit control organizational structure. Consequently, the legal services provided by General Counsel are to be afforded directly to the Board, as well as the Executive Superintendent who is a non-voting member of such Board, without compromising their respective statutorily prescribed duties and responsibilities including, but not necessarily limited to, the provisions of N.J.S.A. 18A:17A-1 et seq.

The Commissioner does not concur with those findings and conclusions in the initial decision which exempt the Board from complying with the provisions of N.J.S.A. 18A:17A-5(c) insofar as the employment or dismissal of its General Counsel would not require a recommendation to that effect from the Executive Superintendent. The provisions of N.J.S.A. 18A:17A-3 as well as 17A-5(c) clearly establish that the following authority is vested in the Executive Superintendent:

1. "***[S]upervisory authority over all officers and employees, professional and nonprofessional of the district, all of whom shall report to him, and he shall prescribe their duties.***"
   (N.J.S.A. 18A:17A-3) (Emphasis supplied.)

2. "The executive superintendent shall propose to the board of education all other officers and employees, professional and nonprofessional, for employment, transfer and removal."
   (N.J.S.A. 18A:17A-5(c)) (Emphasis supplied.)

The Commissioner finds and determines that the employment of General Counsel does not create an exception to the provisions of N.J.S.A. 18A:17A-5(c). Such position is deemed to be a professional position and the person who is employed therein is a legal officer employed by the Board upon recommendation of its Executive Superintendent. Moreover, the duties and responsibilities of General Counsel relate to the statutory authority vested in the Executive Superintendent and the Board in effectuating a unit control organizational structure as mandated by N.J.S.A. 18A:17A-1.

The Board's contention that the above construction of the provisions of N.J.S.A. 18A:17A-5(c) would produce an anomalous result is unfounded and without merit.

In the Commissioner's judgment the Board has the authority to promulgate the necessary rules and regulations establishing the parameters and criteria pertaining to the employment or dismissal of its General Counsel and all other personnel without compromising either its authority or that of the Executive Superintendent as prescribed in N.J.S.A. 18A:17A-1 et seq.

The Commissioner finds and determines that the Board, pursuant to specific provisions of N.J.S.A. 18A:17A-1, has the power to appoint its Executive Superintendent, to fix his salary and to fix his term of office. His term of employment is non-tenurable.

Consequently, should the Board determine that its Executive Superintendent, as chief executive officer and administrator of the school district, fails to or refuses to implement its rules or regulations promulgated pursuant to N.J.S.A. 18A:17A-3, 5 and 7, it may consider invoking the terms of its employment agreement with the Executive Superintendent to effect a remedy under the conditions described above. (N.J.S.A. 18A:17A-1) Thus, the Board's resolution of May 29, 1984 (J-3) is determined to be ultra vires for the following reasons:

1. It arbitrarily appointed General Counsel without consideration, discussion or recommendation from its Executive Superintendent.

2. As concluded by the judge and affirmed herein, it was without authority to authorize its newly-appointed General Counsel to shorten the termination date of employment of her predecessor.

Accordingly, the Board is directed to take the necessary remedial steps forthwith to comply with the provisions of N.J.S.A. 18A:17A-5(c) regarding its employment of General Counsel related to its resolution of May 29, 1984.

Additionally, the Commissioner hereby reverses the recommended finding and conclusion in the initial decision which denies petitioner counsel fees in instituting this action pursuant to N.J.S.A. 18A:6-9. This determination with respect to awarding petitioner counsel fees is grounded upon the Commissioner's prior ruling in Gibson I, supra, which holds in pertinent part:

> "***[T]he Commissioner finds and determines that petitioner is entitled to be awarded counsel fees inasmuch as the action which was initiated by him as a Board member before the Commissioner was taken at his own personal expense in an effort to force the Board to comply with statutory prescription with regard to the concept of unit control and organization pursuant to the enacted provisions of N.J.S.A. 18A:17A-1 et seq. This determination is consistent with the reasons laid down by the Commissioner's prior ruling in Ross, supra.***" (Slip Opinion, at p. 43)

Accordingly, for the reasons set forth, the initial decision in this matter is reversed and petitioner's prayer for relief is granted insofar as it awards petitioner counsel fees in this action and, further, that the Board's resolution of May 29, 1984, appointing General Counsel without recommendation of its Executive Superintendent is determined to be inconsistent with the specific provisions of N.J.S.A. 18A:17A-5(c).

The Board is hereby ordered to take the appropriate action forthwith in order to lawfully comply with the appointment of General Counsel.

COMMISSIONER OF EDUCATION

JANUARY 21, 1985

Pending State Board

INITIAL DECISION
OAL DKT. NO. EDU 4113-84
AGENCY DKT. NO. 178-5/84

ELSA HILL,
Petitioner,
v.
BOARD OF EDUCATION
OF WEST ORANGE,
Respondent,
and,
MARILYN KUHLMANN,
Intervenor.

Richard A. Friedman, Esq. for petitioner
(Ruhlman, Butrym & Friedman, attorneys)

Samuel A. Christiano, Esq. for respondent

Sheldon H. Pincus, Esq. for intervenor
(Bucceri & Pincus, attorneys)

Record Closed: October 22, 1984 Decided: December 5, 1984

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

Statement of the Case

This case involves the application and validity of the new seniority standards for teaching staff members, which became operative on September 1, 1983. N.J.A.C. 6:3-1.10. [See 15 N.J.R. 464 (adopted June 1, 1983).] Petitioner Elsa Hill, an art teacher, claims that the West Orange Board of Education ("Board") violated her tenure and seniority rights when it terminated her employment for the 1984-85 school year as the result of a reduction in force. Several related issues are raised. First, Hill contends that the new regulations operate only prospectively and do not affect rights accrued prior to September 1, 1983. Second, she argues that the language of the new regulations preserves rights granted under the prior regulations. Third, she insists that any other interpretation would be inconsistent with the statutory scheme for tenure and seniority. Last, she urges that the Board's action deprived her of a "vested right" guaranteed under the Federal and State Constitutions. For the reasons which follow, the new regulations, as applied to the facts, compel the conclusion that Hill has less seniority than other teachers in her specific category. Hill's attack on the validity of the new regulations must also be rejected.

Procedural History

On May 16, 1984, Hill filed her verified petition seeking reinstatement and back pay with the Commissioner of Education. The Board filed its answer on May 31, 1984. Subsequently, on June 6, 1984, the Commissioner of Education transferred the matter to the Office of Administrative Law for handling as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. By letter dated July 30, 1984, the Clerk of the Office of Administrative Law served notice of the pendency of this case on other teachers who might be adversely affected by the outcome of this litigation.[1] One of them, Marilyn Kuhlmann, applied under N.J.A.C. 1:1-12.1 for leave to intervene in the proceedings. Her application was granted on October 2, 1984.

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[1]Notice was sent to two art teachers currently employed by the district: Marilyn Kuhlmann and Nola-Adamo Young.

Meanwhile, the Office of Administrative Law held a hearing on August 7, 1984.[2] At the hearing, Hill and the Board placed on the record a joint stipulation of facts. Kuhlmann later joined in that stipulation. Upon receipt of briefs from all parties and a reply brief from Hill, the record closed on October 22, 1984.

Findings of Fact

The basic facts are simple and undisputed. I **FIND:**

Elsa Hill has been employed by the Board since January 1, 1975. She worked as an art teacher for six months of 1974-75 and each full school year thereafter, except for 1982-83 when she was assigned to a guidance counselor position. In 1983-84, the Board returned her to an art teacher position. During all of her employment, Hill was assigned to a junior high school consisting of grades seven through nine. She has never taught art at the elementary level. On February 28, 1984, the Board adopted a resolution terminating Hill's employment for 1984-85 "as a result of reduction in force." For seniority purposes, the Board compared Hill's length of service with that of other art teachers at the secondary level.

Hill claims seniority over two other art teachers: Nola-Adamo Young and Marilyn Kuhlmann. Young began working for the Board in 1976-77 and continued through 1983-84. Throughout her entire service, Young taught art to students in the elementary grades (Kindergarten to six). Currently she is on a maternity leave of absence for 1984-85. To fill Young's vacant position for 1984-85, the Board recalled Marilyn Kuhlmann, who had previously taught art in the district from November 1977 through the 1982-83 school year. Like Young, Kuhlmann's experience as an art teacher was limited to the elementary grades. Due to a reduction in force, Kuhlmann was not employed during 1983-84.

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[1]Originally this case was consolidated for hearing with a companion case, Capodilupo v. West Orange Bd. of Ed., OAL Dkt. No. EDU 3814-84 (filed May 11, 1984), involving similar questions of fact and law. When it became necessary to reopen the record in Capodilupo in order to develop additional facts, the Hill case was severed so as not to delay the decision.

At all relevant times, all three teachers possessed an instructional certificate endorsed as "teacher of art." Such certificate authorized its holder to teach art in any grade from Kindergarten to the senior year of high school.

Thus, the battle lines in this case are clearly drawn. At the time the reduction took effect, Hill had nine years and six months of overall service as an art teacher (counting time spent as a guidance counselor), compared to eight years of service for Young and five years and eight months of service for Kuhlmann. However, Hill's service was at the secondary level, whereas Young's and Kuhlmann's service was at the elementary level.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the new regulations are applicable to a seniority determination occurring after September 1, 1983; that under the new regulation Hill's service is credited at the secondary level and Young's and Kuhlmann's service at the elementary level; and that the adoption of the new standards was properly within the rule-making powers of the Commissioner of Education.

Seniority provides a mechanism for ranking all tenured teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accord with sound educational policies. N.J.S.A. 18A:28-9 et seq. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362, 368 (1983); Howley v. Ewing Twp. Bd. of Ed., 1982 S.L.D. ___ (Comm'r of Ed. 1982). As such, it is distinguishable from tenure which is primarily designed to protect teachers from dismissal for "unfounded, flimsy or political reasons." N.J.S.A. 18A:28-5. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 73 (1982). Unlike tenure which attaches to a "position" for which certification is required, N.J.S.A. 18A:28-5, seniority accrues in "fields or categories" fixed by regulation. N.J.S.A. 18A:28-10 directs that a reduction in force "shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board." This express delegation of rule-making power is subject to specific limitation. In N.J.S.A. 18A:28-13, the Legislature provided:

> The Commissioner in establishing such standards shall classify insofar as practicable the fields or categories of administrative, supervisory, teaching or other educational services . . . which are being performed in the school districts of this state and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both.

Within these broad parameters, however, the Legislature has deferred to the expertise of the Commissioner in matters of educational policy. Pursuant to this legislative grant of power, the Commissioner, with the approval of the State Board, has promulgated N.J.A.C. 6:3-1.10, setting forth the "categories or fields" in which years of service are to be credited.

Under the old regulation, as written prior to September 1, 1983, Hill received seniority credit in the general category of "teacher of art," undifferentiated as to the elementary or secondary level. Young and Kuhlman received seniority in the identical category. As the teacher with the longest service among the three, Hill would have been the last to go in the event of a reduction in force.

The amendments to N.J.A.C. 6:3-1.10 were designed to correct what was perceived as a fundamental weakness in the seniority system. As amended, N.J.A.C. 6:3-1.10(1)(15) states that,

> . . . any person employed at the secondary level in a position requiring . . . a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such . . . special field endorsement. Persons employed and providing services on a district-wide basis under a special subject field endorsement . . . shall acquire seniority on a district-wide basis.

Similarly, any person exclusively "employed at an elementary level" in such position "shall acquire seniority only in the elementary category and only for the period of actual service." N.J.A.C. 6:3-1.10(1)(16).

There can be no doubt about the result which the drafters of these changes hoped to achieve. An official publication, entitled Revision of Seniority Regulations: A Position

Statement of the New Jersey State Department of Education (June 1983), explains that "[t]he essential purpose of the proposal is to limit each teacher's entitlement in a district to those subject fields or levels at which the teacher actually taught" (at page 2). With regard to art teachers, the Revision comments:

> Additionally, the Commissioner's proposal also applies the distinction between secondary category and elementary category to special subject teachers such as art, music, and physical education, as well as noninstructional service personnel such as school nurses and librarians. Thus, a person hired by a local board for service in the elementary schools will not acquire seniority at the secondary level even though his or her certificate endorsement is for grades K-12. Those who have served at both levels will obtain seniority at both levels. [at page 3]

See also, In re Seniority Rights of Certain Teaching Staff Members, 1984 S.L.D. ___ (Aug. 6, 1984). If the new regulation is applicable, Hill, having never served at the elementary level, would receive seniority in the art teacher category only at the secondary level. Young and Kuhlmann, who never served at the secondary level, would earn seniority only at the elementary level.

At the outset, Hill contends that the new regulations operate prospectively and were never intended to affect seniority rights previously "accrued" under the former regulations. It is, of course, generally true that new statutes or regulations should be applied prospectively, absent the clear expression of an intent that they are to be given retroactive effect. Gibbons v. Gibbons, 86 N.J. 515, 521-525 (1981); Nichols v. Jersey City Bd. of Ed., 9 N.J. 241 (1952). Here, in fact, N.J.A.C. 6:3-1.10(m) expressly provides that the new rules "... shall apply prospectively to all future seniority determinations as of the operative date of this rule, September 1, 1983." Recent school law decisions have applied the new regulation only to seniority determinations made after that date. Illustratively, in Edison Twp. Ed. Ass'n v. Edison Twp. Bd. of Ed., 1984 S.L.D. ___ (Comm'r of Ed. 1984), a local board of education imposed a reduction in force at its meeting in April 1983,

although the impact of its decision was not felt by the affected teachers until commencement of the 1983-84 school year. Rejecting the board's contention that the new rule should apply, the Commissioner held that any seniority determination reached prior to September 1, 1983 was governed by the old rule. Accord, Mele v. Ramapo-Indian Hills Reg. High Sch. Dist., 1984 S.L.D. ___ (Comm'r of Ed. 1984).

Hence, it is not retroactivity to which Hill really objects. Rather, her main complaint rests on the false assumption that she acquired "vested or accrued" rights under an earlier seniority rule no longer in existence. That contention will be more fully considered in the discussion of the constitutionality of the regulation. At this stage, it is sufficient to note that an administrative agency has the power, if not the absolute duty, to reassess or reconsider its old policies in light of changing public needs. St. Joseph's Hosp. & Med. Ctr. v. Finley, 153 N.J. Super. 214 (App. Div. 1977), certif. den. 75 N.J. 595 (1978). Whatever rights are conferred by the seniority regulation spring into being only in the event of a "dismissal" resulting from a reduction for reasons of economy, declining enrollment, or other good cause. N.J.S.A. 18A:28-9, -10. Until such occurrence, a teaching staff member has merely an expectancy in the existing seniority rules. Since the reduction in this case did not occur until February 28, 1984, the situation is controlled by the new seniority rule which became operative on September 1, 1983.

Nothing in the language of the new regulation suggests any intention to preserve obsolete seniority categories. In support of her assertion that the new regulations provide for continuation of previously accrued seniority, Hill points to N.J.A.C. 6:3-1.10(c), which reads:

> In computing length of service for seniority purposes, full recognition shall be given to previous years of service within the district . . . .

She finds further support for her views in N.J.A.C. 6:3-1.10(d), which states:

> Employment in the district prior to the adoption of these standards should be counted in determining seniority.

And she also relies on N.J.A.C. 6:3-1.10(h), which provides:

> Whenever a person shall move from or revert to a category, all periods of employment shall be credited to his or her seniority in any or all categories in which he or she previously held employment.

The first two sections have no bearing whatsoever on the category in which Hill's prior service should be credited. They simply require that all of Hill's prior years of service will be recognized in some category. Hill has been given full credit for her nine years and six months of service, so the requirement of these sections has been satisfied. Although the third section does refer to categories, it does not say that a category is immutable. Instead, it allows a transferred teacher to tack on service in a new assignment to prior service in an old one. Applied to the instant case, it means that Hill's service as a guidance counselor counts toward her seniority in the category of secondary art teacher. Nowhere does the regulation purport to freeze categories for those who have already served in them. By virtue of his statutory power to establish seniority standards, the Commissioner always retains the option of altering the definitions of the categories. Any other interpretation of the regulation would frustrate or defeat the policy embodied in the statute. N.J. Chamb. of Commerce v. N.J. Elec. Law Enforc. Comm., 82 N.J. 57, 82-83 (1980).

Hill has not cited a single New Jersey case directly on point. Her reliance on Nichols v. Jersey City Bd. of Ed. is misplaced. Nichols was a tenure dispute in which the New Jersey Supreme Court applied the law existing at the time petitioner's position was abolished in 1949 rather than a statute subsequently enacted in 1951. This ruling is entirely consistent with the approach that the law on the date of the board's action governs.

Nor does Hill derive much benefit from cases in other jurisdictions. New York is substantially different from New Jersey in that it apparently permits tenure and seniority "areas" to be defined by local school districts as well as by uniform state regulation. In the leading case of Baer v. Nyquist, 34 N.Y. 2d 291, 331 N.E. 2d 751, 357 N.Y.S. 2d 442 (Ct. App. 1974), New York's highest court invalidated an attempt by a local district to

impose a new three-year probationary period on a teacher whose assignment had been changed from science to social studies. Warning of the dangers inherent in "tenure experimentation" which is "open-ended and devoid of standards," 357 N.Y.S. 2d at 446, the New York court declared that,

> . . . [r]adical restructuring of tenure areas, compatible with the purpose of the tenure statutes, should not be free of controlling regulations or express standards propounded by the Board of Regents or enacted by the Legislature. Most importantly, they should be prospective in effect. 357 N.Y.S. 2d at 444.

Such reaction to the unique circumstances of New York cannot be taken as an excuse to restrict the statutory power of the New Jersey Commissioner of Education to adopt carefully drawn and comprehensive regulations taking effect on a definite future date. Indeed, the experience of New York underscores the advantages of the centralized New Jersey system. Later New York cases reflect the prevailing theme of preventing local districts from subverting the underlying purpose of tenure and seniority laws. In Waiters v. Amityville Union Free Sch. Dist., 46 N.Y. 2d 885, 387 N.E. 2d 615 (Ct. App. 1979), the court overturned a local district's "belated attempt" to recompute tenure and seniority of teachers in the "remedial reading area" rather than the traditional "elementary school area." On the other hand, in Steele v. New York City Bd. of Ed., 40 N.Y. 2d 456, 354 N.E. 2d 807, 387 N.Y.S. 2d 68 (Ct. App. 1976), the court upheld a massive layoff by the local district on the theory that treating "guidance counseling" as a separate classification from "elementary school teaching" was not a departure from traditional tenure areas. See also, Brewer v. Plainview-Old Bethpage Cent'l Sch. Dist., 69 App. Div. 2d 377, 419 N.Y.S. 2d 159 (App. Div. 1979), aff'd on other grounds, 51 N.Y. 2d 855, 414 N.E. 2d 389, 433 N.Y.S. 2d 1009 (Ct. App. 1980). Compare McNamara v. Rochester Bd. of Ed., 54 App. Div. 2d 467, 389 N.Y.S. 2d 682 (App. Div. 1976), where the intermediate appellate court concluded that the Baer rule is binding only on local districts and does not preclude the Legislature from enacting retroactive tenure and seniority provisions.

Other state cases on which Hill relies are not more favorable to her position. Wisconsin has refused to give retroactive effect to a new statute exempting one-room

school districts from the tenure law. State v. Dist. No. 2, Town of Red Springs, 237 Wis. 186, 295 N.W. 36 (Sup. Ct. 1949). On the date of the school board's action, the new statute had not yet been enacted. Again, the Wisconsin case is merely an example of a court applying the existing law. California has held that a local board of education may not retroactively reduce a teacher's placement on the salary guide for reasons other than fraud, error or mistake. Barnes v. Mt. San Antonio College Dist., 32 Cal. Rptr. 609, 218 Cal. App. 2d 881 (Dist. Ct. App. 1963); Aebli v. San Francisco Bd. of Ed., 62 Cal. App. 2d 706, 145 P. 2d 601 (Dis. Ct. App. 1944). But the court's reasoning in these cases rests on the finding that the reduction would be arbitrary, capricious or unreasonable. Certainly it is not unreasonable for New Jersey to seek to improve the quality of education by taking teaching experience into account in its seniority determinations. Moreover, the California cases dealing with salary involve potential impairment of contract problems not present in the New Jersey dispute over seniority rights.

Finally, Hill asserts that she possesses a "vested right" to seniority secured by either the Federal or State Constitution. Insofar as Hill's claim is based on the impairment of contract clause, U.S. Const., Art. I, § 10, cl. 1, her claim must fail. Tenure rights in New Jersey, and by implication seniority rights as well, are created by statute and not by contract. Shelko v. Mercer Cty. Special Service Sch. Dist., 97 N.J. 414, 417 (1984); Spiewak v. Rutherford Bd. of Ed., 90 N.J. at 72. New Jersey is not precluded by the contract clause from adopting new statutes or regulations which abrogate prior statutory or regulatory rights. Phelps v. State Bd. of Ed., 115 N.J.L. 310 (Sup. Ct. 1935), aff'd sub. nom. Phelps v. West New York Bd. of Ed., 116 N.J.L. 412 (E. & A. 1936), aff'd 300 U.S. 319 (1937); Greenway v. Camden Bd. of Ed., 129 N.J.L. 46 (Sup. Ct. 1942).

Accordingly, Hill's rights, if any, must be founded on the due process clause of the Fourteenth Amendment to the United States Constitution, U.S. Const., 14th Amend., or the corresponding provision of the State Constitution, N.J. Const., Art. I, para. 1. Both sources prohibit New Jersey from depriving a person of life, liberty or property without due process of law. Property entitled to protection under the due process clause is not an abstract or formless concept, but rather a term given meaning and substance by state law. In Board of Regents v. Roth, 408 U.S. 564, 577 (1972), the Supreme Court explained:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

As already noted, New Jersey statute confers seniority rights ". . . according to standards to be established by the commissioner with the approval of the state board." N.J.S.A. 18A:28-10. Teachers possess inchoate seniority rights until such time as a dismissal actually occurs. Ibid. Hill has no claim to greater rights than those which are conferred by this statute. "There can be no vested right in the continued existence of a statute or rule of the common law which precludes its change or repeal." Magierowski v. Buckley, 39 N.J. Super. 534, 558 (App. Div. 1956). Nobody has "a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." Cirelli v. Ohio Casualty Ins. Co., 133 N.J. Super. 492, 501 (Law Div. 1975), modified 72 N.J. 380 (1977). Since the Commissioner of Education amended the seniority rules before the date of her dismissal, Hill does not have a "property interest" qualifying for protection under the due process clause.

In re Jamesburg High Sch. Closing, 83 N.J. 540 (1980) does not dictate another outcome. The dissent as well as the majority agreed that the existence and scope of teacher tenure rights were dependent on the meaning of the applicable statutes. They differed only in their statutory interpretation. Likewise, Taureck v. City of Jersey City, 149 N.J. Super. 503 (Law Div. 1977) does not hold that municipal firefighters possess "vested rights" apart from statute. To the contrary, the case stands for the proposition that firefighters are entitled to certain statutory rights which cannot be waived or bargained away by agreement of the parties.

In sum, Hill's seniority rights vested at the time of the reduction. Prior to that event, the Commissioner of Education adopted regulations, prospective in effect, which changed the categories for determining seniority. Hill's rights are governed by the regulation in force on the date of the Board's action.

Order

It is **ORDERED** that the relief requested by Hill is **DENIED.** Hill is entitled to be placed on the preferred eligibility list for reemployment in the category of art teacher at the secondary level.

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

Dec. 5, 1984
DATE

KEN R. SPRINGER, ALJ

12/6/84
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

DEC 10 1984
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

al

ELSA HILL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
MARILYN KUHLMANN,	:	
INTERVENOR.	:	
	:	

The record and initial decision have been reviewed. Exceptions by petitioner and Intervenor Kuhlmann were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the initial decision by the judge in arguments previously advanced before the Administrative Law Court, analyzed therein and rejected. Petitioner contends that the interpretation herein of N.J.A.C. 6:3-1.10 is unfair because it eliminates previously accrued seniority.

Intervenor Kuhlmann in exceptions in reply to those of petitioner notes specifically that the exceptions so filed are virtually identical to the arguments advanced before the Administrative Law Court, were fully considered by the judge and rejected by her. The Commissioner concurs with the arguments advanced by Intervenor Kuhlmann. The Commissioner observes that the seniority regulation N.J.A.C. 6:3-1.10 was amended to benefit the pupils of New Jersey by providing for the retention of teachers with actual experience in a given teaching area. The Commissioner particularly rejects petitioner's argument that the ALJ's interpretation of the regulations eliminates previously accrued seniority. As appropriately pointed out by the ALJ "[t]eachers possess inchoate seniority rights until such time as a dismissal actually occurs." (Emphasis supplied.) (Initial Decision, at p. 11) Such conclusion is unmistakably supported by the language of N.J.S.A. 18A:28-11 which provides:

> "In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status.***" (Emphasis supplied.)

The foregoing is precisely what occurred in the instant matter. The reduction in force took place and petitioner was correctly accorded her seniority entitlement pursuant to the "standards *** established by the Commissioner with the approval of the state board." (N.J.S.A. 18A:28-10) The standards utilized by the Board were the latest standards recommended by the Commissioner and approved by the State Board of Education for application prospectively from September 1, 1983.

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

Accordingly, the Petition of Appeal is hereby dismissed.

Petitioner's entitlement to placement on the preferred eligibility list for reemployment is in the category of art teacher at the secondary level.

JANUARY 21, 1985 COMMISSIONER OF EDUCATION

STATE BOARD OF EDUCATION

DECISION

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

May 1, 1985

Pending N.J. Superior Court

INITIAL DECISION
OAL DKT. NO. EDU 4678-84
AGENCY DKT. NO. 153-5/84

PETER FISCHBACH,
Petitioner,
v.
NORTH BERGEN
BOARD OF EDUCATION,
Respondent.

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

John C. McGlade, Esq., for respondent
(Greenberg & Covitz, attorneys)

Record Closed: October 29, 1984 Decided: December 12, 1984

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

Statement of the Case

This case involves the issue of whether interest can and should be allowed on an award of back salary entered by the Commissioner of Education. An award of back pay in favor of Peter Fischbach ("Fischbach") was entered on December 29, 1983 and not paid by

the North Bergen Board of Education ("Board") until nine months later on September 25, 1984. Although the parties agree on the amount of the award, they differ on whether Fischbach is entitled to interest for the period during which the award remained unpaid. The amount in dispute is $2,791.

Procedural History

On May 7, 1984, Fischbach filed a verified petition with the Commissioner of Education seeking liquidation of the amount of a previous award of back pay, together with interest from entry of the award until date of payment. The Board filed its answer on June 21, 1984. Subsequently, on June 27, 1984, the Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

Both parties waived the opportunity for a hearing. Instead, they submitted a joint stipulation of facts on September 25, 1984. By consent order entered on October 29, 1984, the amount of back pay due from June 15, 1979 through August 25, 1983 was fixed at $31,329. Upon receipt of legal briefs filed by both parties, the record closed as of October 29, 1984.

Findings of Fact

All of the relevant facts are undisputed. From the pleadings and the joint stipulation of the parties, I **FIND:**

On December 15, 1981 Fischbach instituted a prior proceeding before the Commissioner of Education, designated OAL Dkt. No. EDU 311-83, in which he claimed that certain actions of the Board constituted a violation of his tenure and seniority rights. As a result of this prior proceeding, on December 29, 1983 the Commissioner of Education issued an order directing the Board to "forthwith reinstate Fischbach to the position of assistant superintendent in the district" and to "promptly pay to Fischbach the difference,

if any, between the salary on the negotiated guide for a high school vice principal and the amount actually earned by Fischbach for the period from June 15, 1979 to the date of reinstatement." Fischbach v. North Bergen Bd. of Ed., 1983 S.L.D. ___ (Comm'r of Ed. 1983). Fischbach took an appeal from a portion of the Commissioner's decision, which was affirmed by the State Board of Education and is presently pending on appeal before the Appellate Division. However, respondent never brought a cross-appeal and, therefore, must be regarded as having accepted the amount of the award granted by the Commissioner of Education to Fischbach.

The dollar amount of the award may be readily ascertained from the language of the Commissioner's order and the Board's own records. Within two months after the Commissioner's decision, Fischbach wrote to the Board setting forth his calculation of the principal amount due and owing. Because of the subsequent abolition of the position of assistant superintendent in the district, the parties could not agree on the amount of the award, if any, to which Fischbach may be entitled for the 1983-84 school year. That question is the subject of a separate appeal now pending before the Office of Administrative Law under Dkt. No. EDU 2691-84. Nevertheless, the Board ultimately accepted Fischbach's figures for the amount of back pay due from June 15, 1979 through August 25, 1983 in the amount of $31,329. I am informed by the parties that the Board paid that sum to Fischbach on September 25, 1984.

Fischbach continues to claim that he is entitled to interest from the date of the Commissioner's decision on December 29, 1983 until his receipt of the money on September 25, 1984. Calculated at the simple rate of 12 percent per annum, the amount of interest accrued during that period would be $2,791. In response, the Board contends that the Commissioner of Education lacks jurisdiction to allow interest on an unpaid award.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the existing policy of the Commissioner of Education precludes the allowance of interest on

an unpaid award; however, the circumstances of this case would be appropriate for the allowance of interest if the Commissioner wishes to change that policy.

N.J.S.A. 18A:6-9 confers upon the Commissioner of Education the jurisdiction "to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws." Traditionally, the Commissioner has awarded back pay and other emoluments to teachers whose tenure rights have been violated. See Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) (remand of matter to Commissioner of Education to determine what benefits are owed to successful litigants in a tenure dispute); Garfield Bd. of Ed. v. State Bd. of Ed., 130 N.J.L. 388 (Sup. Ct. 1943) (upholding award of back pay to tenured teacher who was illegally terminated). No statutory authority exists for the allowance of interest in connection with an award of back pay. Absent such express statutory authorization, the Commissioner of Education has consistently refused to allow interest on an award for lost earnings. McLean v. Glen Ridge Bd. of Ed., 1977 S.L.D. 311 (Comm'r of Ed. 1977); North Bergen Fed'n of Teachers v. North Bergen Bd. of Ed., 1975 S.L.D. 461 (Comm'r of Ed. 1975); David v. Cliffside Park Bd. of Ed., 1967 S.L.D. 192 (Comm'r of Ed. 1967); Romanowski v. Jersey City Bd. of Ed., 1966 S.L.D. 219 (Comm'r of Ed. 1966). The rationale of these cases appears to be that a state administrative agency lacks jurisdiction to allow interest unless such power is directly granted by statute.

Interest serves the two-fold purpose of making the injured party whole and preventing the losing party from becoming unjustly enriched. Decker v. Elizabeth Bd. of Ed., 153 N.J. Super. 470, 475 (App. Div. 1977). Its primary purpose is compensatory rather than punitive. City of East Orange v. Palmer, 52 N.J. 329, 334 (1968). Generally, the State or other governmental entity is not liable for interest unless by statute or contract it has assumed that liability. Fasolo v. Div. of Pensions, 190 N.J. Super. 573 (App. Div. 1983); Elizabeth Police Super. Off. Ass'n v. Elizabeth, 180 N.J. Super. 511 (App. Div. 1981). Annotation, "Recovery of interest on claim against a governmental unit," 24 A.L.R. 2d 928 (1952). But there is growing recognition of important modifications to this general rule. Thus, in Fasolo, at page 583, the Appellate Division declared that,

> . . . even in the absence of a statutory provision for interest on an obligation of a governmental entity "a legislative purpose to allow interest . . . may be found in the nature of the burden imposed and the relative equities between the beneficiaries . . ." [Citation omitted.] Nor is it necessary to find a "legislation intent" in all cases. As this court has said
>
> > such interest may, in a proper case, be awarded in the absence of such a statute because of overriding and compelling equitable reasons.

With increasing frequency, courts have permitted administrative agencies to add interest to the total package of relief, notwithstanding the lack of any statutory authority. Illustratively, in Law v. Parsippany-Troy Hills Bd. of Ed., Superior Court, Appellate Division, Dkt. No. A-280-82T2 (Sept. 25, 1983) (unreported), the State Board of Education found that petitioner had been improperly denied his salary increment for the 1980-81 school year. On appeal, the Appellate Division accepted petitioner's argument that the local board of education would "benefit unjustly from the use of his moneys if interest is not imposed." (slip op. at p. 5). Consequently, the court remanded the matter for determination of the amount of the increment withheld "together with interest to be calculated in accordance with R. 4:42-11(a)." (slip op. at p. 6). There is no mention of any statutory basis for this ruling. Similarly, in Salem Cty. Bd. for Voc. Ed. v. McGonigle, Superior Court, Appellate Division, Dkt. No. A-3417-78 (Sept. 29, 1980) (unreported), the Public Employment Relations Commission followed its usual practice of declining to award interest along with the back pay award resulting from an unfair labor practice. Without citing any specific statute, the Appellate Division held that allowance of interest would be "entirely appropriate on the record in this case." (slip op. at p. 5). Again, the case was remanded with instructions to the Commission to modify its original order to include an allowance of simple interest.

More recently, in Kramedjian v. Town of Irvington, Superior Court, Appellate Division, Dkt. No. A-2989-80T3 (Nov. 15, 1983) (unreported), the court addressed the question of whether the Civil Service Commission possessed the power to grant interest on an award of back pay. At the administrative level, the Commission had ruled that its

powers were limited to those "expressly set forth in, or reasonably derived from, the controlling statutes." (slip op. at p. 6). Rejecting this narrow approach, the Appellate Division noted that the Commission had misconstrued the extent of its own powers:

> The absence of a specific statutory grant of power to award interest is not a complete answer to appellant's application. The absence of such specific legislative grant does not preclude an award of interest upon equitable grands, although it may require "particular circumspection" in the granting of interest. Klein v. Hudson Cty., 187 N.J. Super. 433, 434-435 (App. Div. 1982).
>
> Kramedjian, (slip op. at p. 7.)

Since the intent of civil service legislation is to insure that wrongfully discharged employees do not suffer any loss in earnings, late payment of salary without interest constitutes "a diminution of the salary to which the employee is entitled." Ibid. Accordingly, the Appellate Division reversed the Commission's denial of interest and remanded the matter for calculation of interest. After Kramedjian was decided, the Civil Service Commission amended its regulations on awarding back pay, N.J.A.C. 4:1-5.5, to remove a prohibition on the allowance of interest. 16 N.J.R. 2519 (Oct. 1, 1984).

If the Commissioner of Education would also like to reconsider his past policy in light of the trend of recent cases, the present matter provides an excellent opportunity for doing so. Here the equities point strongly in favor of allowing interest. Just as in the area of civil service, a teaching staff member who has been deprived of his tenure rights is entitled to be made whole. As of December 29, 1983, the amount of Fischbach's award, while not yet reduced to a liquidated sum, was "readily ascertainable" on the basis of information available to the board. Kamens v. Fortugno, 108 N.J. Super. 544, 549 (Ch. Div. 1970). Nonetheless, the Board offers no convincing justification for its nine month delay in complying with the Commissioner's order. Once the Commissioner of Education had rendered his decision, the Board had a choice of paying the award or applying for a stay pending the outcome of an appeal. The Board did neither. It did not even pursue an appeal. Meanwhile, it continued to enjoy the use of Fischbach's money. Presumably, this money was deposited in an interest-bearing account on which the Board continued to earn

interest. In any event, the Board has never suggested that the reason for its failure to make timely payment was lack of adequate appropriations or a deficit in its budget. The Board's only excuse is its claim that a portion of the award was still in litigation. No explanation had been given to as to why the Board could not have immediately paid to Fischbach the amount agreed to be due and retained only the smaller disputed amount (which, in fact, was what the Board ultimately did after nine months of delay). Even assuming the "good faith" of the Board's denial of liability, such a defense does not toll the payment of interest on the portion determined to be due. Fasolo, at 584; Kamens, at 552-553. These circumstances highlight the major disadvantage of a flat rule prohibiting the award of interest in all education cases. As long as it can continue to keep the interest earned on funds in its possession, there is no incentive for a board of education to act quickly to satisfy the Commissioner's award of back pay. Instead, it is to the Board's financial benefit to delay payment for as long as possible.

Given the clear existing policy against the allowance of interest in education cases, it would be improper for an administrative law judge to depart from the current rule. Any change likely to have widespread applicability to a class of similarly situated persons would best be handled by the Commissioner of Education and the State Board of Education through their rule-making powers, rather than on an adjudicatory basis. Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313 (1984). While the decision on whether it is appropriate to allow interest in a particular case might be left, at least initially, to the sound discretion of the trier-of-fact, the basic decision of whether to allow interest at all is a question reserved for state educational officials. There may well be important policy considerations involved with the financing of public education and the solvency of school boards which make the problem different from other fields of administrative law where interest is now allowed on awards to successful litigants. Unless and until a new policy is announced, interest will not be allowed in education cases.

Order

It is **ORDERED** that Fischbach's application for interest on his award of back pay is hereby **DENIED.**

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

Dec. 12, 1984
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 17 1984
DATE

Ronald L. Parker/pdd
FOR OFFICE OF ADMINISTRATIVE LAW

al

PETER FISCHBACH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

At issue in this matter is the awarding of post-judgment interest due to the dilatory actions of the North Bergen Board of Education in carrying out the December 29, 1983 order of the Commissioner to compensate petitioner pursuant to the final decision rendered in a prior matter involving the parties. Upon review of the initial decision and a recent decision of the Superior Court of New Jersey, Appellate Division, it is the determination of the Commissioner that post-judgment interest should be awarded in this case. The November 29, 1984 Appellate Court decision in Board of Education of Newark v. Levitt and Sasloe (A-5614-82T2) has clearly and definitively determined that the Commissioner of Education is empowered to award interest, both pre-judgment and post-judgment. The Court has stated:

> "***The question then is whether in awarding money damages to a petitioner, the Commissioner has the same power with respect to both pre-judgment interest and post-judgment interest as the court has in entering a money judgment. We conclude although this power has not been expressly accorded to the Commissioner by statute, it is nevertheless an ancillary power which he must be deemed to have in order fully to execute his statutory responsibility to hear and determine all controversies and disputes arising out of the school laws. See N.J.S.A. 18A:6-9.***"
> (Slip Opinion, at p.6)

The Court goes on to express that in its view "***interest on a money award which the Commissioner is authorized to grant is an essential and integral part of the award itself since the purpose of the fixed-sum award is to make petitioner whole." (Id., at pp.7 and 8) It also states that the rationale for post-judgment interest is enhanced by the dimension of an adjudication of improper withholding.

In the instant matter, the Board was ordered on December 29, 1983 to compensate petitioner the difference, if any, between the salary on the negotiated guide for a high school vice principal and the amount he actually earned for the period from June 15, 1979 to the date of his reinstatement. This amount was a fixed sum in that the negotiated salary guide yields only one possible amount to be awarded at least to August 25, 1983. Therefore, no basis for controversy could have existed over the sum to be paid with the exception of that portion relative to the 1983-84 school year due to the abolishment of the assistant superintendent position. As such, it is the conclusion of the Commissioner that the Board wrongfully withheld the compensation owing to petitioner by not providing him until September 25, 1984 the uncontroverted sum for June 15, 1979 to August 25, 1983.

Consequently, the Commissioner exercises his authority to award post-judgment interest to petitioner on the $31,329 rightfully due him but improperly withheld from him for an extensive period by the Board. However, the Commissioner is obligated by the Appellate Court decision in Levitt and Sasloe, supra, to accord to the Board a reasonable time under the circumstances to have made payment of the judgment before allowing post-judgment interest to begin to run. (Id., at p. 10) In the Commissioner's estimation 60 calendar days is a reasonable time to be accorded from the date of the judgment to actual receipt of the award by petitioner. Therefore, it is the determination of the Commissioner that post-judgment interest shall run from February 28, 1984 to September 25, 1984, the date petitioner was finally provided the uncontroverted portion of the award due him. The tolling of interest beginning on February 28, 1984, in the Commissioner's opinion, also meets the requirement articulated in Levitt and Sasloe that post-judgment interest cannot start until the precise amount of money damages is fixed. The Board accepted the calculation submitted by petitioner on February 20, 1984 as accurate for the period June 15, 1979 to August 25, 1983.

The 12 percent simple interest rate requested by petitioner is deemed reasonable and appropriate in light of the discretion accorded to the Commissioner to set the rate of post-judgment interest by the Appellate Court in Levitt and Sasloe, supra; R. 4:42-11(a); Fasolo v. Division of Pensions, 190 N.J. Super. 573 (App. Div. 1983) and other pertinent cases involving the issue of interest.

In accordance with the above, the North Bergen Board of Education is ordered to provide petitioner forthwith an amount equal to 12 percent simple interest on $31,329 from February 28, 1984 to September 25, 1984.

COMMISSIONER OF EDUCATION

IN THE MATTER OF THE TENURE HEARING OF WILMA J. COLELLA, SCHOOL DISTRICT OF THE BOROUGH OF ELMWOOD PARK,

INITIAL DECISION
OAL DKT. NO. EDU 5144-83
AGENCY DKT. NO. 171-5/83A

WILMA J. COLELLA,

Petitioner,

v.

BOARD OF EDUCATION OF ELMWOOD PARK, BERGEN COUNTY

Respondent.

OAL DKT. NO. EDU 7787-84
AGENCY DKT. NO. 412-9/84

Matthew P. DeMaria, Esq., for Board of Education of Elmwood Park

Louis P. Bucceri, Esq., for Wilma J. Colella (Bucceri and Pincus, attorneys)

Record Closed: November 17, 1984 Decided: December 14, 1984

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

The Board of Education of Elmwood Park (Board) certified tenure charges against Wilma J. Colella on May 9, 1983. On September 28, 1984, Colella filed a petition alleging an improper vote by certain Board members against withdrawing the earlier charges. The matters were transmitted to the Office of Administrative Law for determination as contested cases pursuant to N.J.S.A. 52:14F-1 et seq.

The tenure case was assigned to Sybil Moses, ALJ for possible consolidation with other tenure charges pending before her (EDU 3229-83). ALJ Moses adjourned the instant tenure docket without date until the resolution of the earlier docket which she decided on August 24, 1984. She then recused and the case was reassigned to the undersigned ALJ in September 1984. At the prehearing on October 10, the parties advised me of the filing of another docket by Colella as petitioner in which the legal issue was closely related to the issue in a motion to dismiss which Colella planned to file in the tenure case. The parties therefore agreed to consolidate the dockets. A decision favorable to Colella on the motion to dismiss tenure charges will render her companion petition moot since the petition seeks to effectuate Board withdrawal of the tenure charges.

FINDINGS OF FACT

The background facts underlying the motion to dismiss are undisputed and can be found in affidavits, verified pleadings and officially noticed documents such as ALJ Moses' decision in a prior docket. There was extensive prior litigation between the parties. Colella was demoted to vice principal and subsequently reinstated as principal of the high school after favorable decison by the Commissioner (March 1983), State Board (July 1983) and Appellate Division (July 1984). The Board certified tenure charges against her in April 1983 which ALJ Moses eventually dismissed after full hearing in August 1984 (EDU 3229-84). The Commissioner affirmed the dismissal in October 1984. The tenure charges in the instant docket were certified about a month later than the prior charges but concern two incidents which occurred in February and March 1983 respectively. The Board alleges that Colella wrote and/or sent a scurrilous anonymous note to Board member George P. Nestory on February 24, 1983 and sent an anonymous letter on March 28 to Board member Joan Branccacio which contained inter alia allegations of gross improprieties by a certain teacher and various accusatory statements, including some concerning family members. If proved, the Board claims such conduct would constitute insubordination and conduct unbecoming a teaching staff member.

Board member Brancaccio believed that she recognized the handwriting in the letter to her. She asked the Superintendent to investigate. She described herself as "extremely

upset, disgusted and saddened" that such a letter would be written. Nestory described himself as "very upset" and viewed the note as an attempt to "intimidate myself and my family." The superintendent agreed with Brancaccio's assessment that the handwriting in the long letter to her was similar to Colella's. Nestory's communication was a short, printed note, but the Superintendent believed the envelope was similar to that enclosing Brancaccio's letter. He submitted samples of Colella's writing to experts, one of which was retained with Brancaccio's own funds. The documents and the reports of these experts were made a part of the documentary support underlying the certified charges.

On May 9, 1983, when the Board certified tenure charges against Colella grounded upon her alleged writing or sending the two anonymous letters, the resolution was approved by a five to four vote. Voting affirmatively were both Nestory and Brancaccio. If they had abstained, the vote would have been three to approve and four opposed. Certification of the charges would have failed, since a majority of five was needed.

Board members Nestory and Brancaccio filed criminal complaints against Colella based on the same alleged conduct of sending the letters. One complaint was withdrawn and the other resulted in acquittal. (See, verified petition in EDU 7787-84). Subsequently, on August 28, 1984, the Board considered a resolution to withdraw the tenure charges. The vote was four in favor, four against (including Nestory and Brancaccio; one member was absent.) This action formed the basis for a petition (EDU 7787-84) claiming that votes of the two members named should be declared void due to their alleged personal interest in the matter and requesting a remedy of declaring the resolution adopted and the charges withdrawn.

In opposition to the motion to dismiss, the Board filed affidavits of Nestory and Brancaccio averring that they voted based on the information available and in the interest common to all Board members for proper lawful conduct in the system and to provide a thorough and efficient education. Both disclaimed any personal motivation. Brancaccio additionally stated that other members of the Board evidenced support for Colella on various occasions and if her vote is disqualified for personal interest so should the votes of other Board members.

Conclusions of Law

Colella brings this motion to dismiss the tenure charges, arguing that the resoluton is void as a result of the participation of the two board members which "fatally tainted [the vote] by a blatant conflict of interest."

In its response, the Board first addressed a concern with the confidentiality requirements of N.J.S.A. 18A:6-11 which, arguably mandate that the votes of Board members on tenure charges not be revealed. The Board cross moves for a protective order or dismissal of the petition (EDU 7787-84) alleging it cannot defend properly without stating that which it is prohibited by law from stating under N.J.S.A. 18A:6-11, namely, the votes of Board members and, possibly, facts concerning deliberations. Since it is obvious that someone who knew the vote has spoken, and Colella has affidavited what the votes were, it seems apparent that the Board may speak of that which others have publicly revealed, specifically the results of the vote on both resolutions and the votes of Nestory and Brancaccio. It should be recalled that the entire record of tenure proceedings at OAL is public. When the actual vote becomes a fact in issue within the Commissioner's jurisdiction, N.J.S.A. 18A:6-11 by its terms no longer applies. It says, "The consideration and actions of the board as to any charge shall not take place at a public meeting." Both actions of the Board on the tenure charges took place long since. I **CONCLUDE** the statute is not violated by discussion of the recorded roll call votes as facts in issue in these dockets and that dismissal of the petition is not warranted on this ground.

The Board also argues that it is too late for Colella to claim that the resolution to certify charges is void in that Colella's claim was not stated in her answer to the original charges back in 1983. But Colella's motion to dismiss on these grounds was expressly permitted in my prehearing order of October 10, 1984 and, had Colella moved to amend her answer at that time, I would have allowed it. Since counsel for the Board was substituted counsel, he may not be aware that in the early stages of this case before ALJ Moses, Colella was not satisfied with the representation of her then counsel which eventually resulted in substitution of Mr. Bucceri. Under these circumstances, amendment to an answer would be favorably considered. N.J.A.C. 1:1-6.3 The issue on the motion to

dismiss was known at least since October 10, 1984.

The Board's next argument addresses the conflict of interest issue by analysis of leading New Jersey cases. There is no question that the seminal cases define a disqualifying interest as a direct or indirect personal pecuniary or other beneficial interest of the official himself or of a family member or employer. Griggs v. Princeton Borough, 33 N.J. 207 (1960), Van Itallie v. Franklin Lakes, 28 N.J. 258 (1958). But the Supreme Court also says, "No definitive test can be devised." Van Itallie, at 258.

An interest which the public officer has in common with all other citizens or Board members is not a disqualifying one. Aldom v. Borough of Roseland, 42 N.J. Super. 495 (App. Div. 1956). The mere fact that voting Board members expressed themselves verbally for or against Colella would not show disqualifying interest. Conversations and the expression of opinions for and against an action are to be expected during deliberations prior to vote. Two interests can coexist: one would be the interest in common with other Board members for a properly functioning school system. The alleged disqualifying interest is different: it is a personal interest capable of producing bias whether or not bias was actually operative in motivating the vote. It is the capacity of the interest to tempt the official which makes the interest disqualifying. Van Itallie, at 268. It is the existence of the interest which is decisive, not whether the interest was actually influential. Griggs, at 219, 220. Thus the Board members' affidavits describing their common interests and intent may be accepted as entirely true, but these sworn facts are not dispositive of the question. The court describes such interests as invalidating dual interests. Griggs, supra, 218.

In the instant case, Nestory and Brancaccio filed criminal charges against Colella upon the clear belief that she sent the letters. The two Board members admit that they were greatly disturbed by the statements in the letters. The note to Nestory included grossly insulting references to his family. The letter to Brancaccio made disparaging comments concerning the conduct of her niece and sister-in-law. These two Board members believed that Colella attacked them and their families. Brancaccio advanced personal funds to hire a handwriting expert. Most assuredly their votes to charge and

remove Colella had the capacity to be affected by a personal interest in the result. The Commissioner has previously held that a similar interest was disqualifying. In South Plainfield Independent Voters v. Bd. of Ed. of South Plainfield, 1975 S.L.D. 47, Board member Crilley voted to reinstate a teaching staff member against whom the Board had previously certified tenure charges. His was the pivotal vote. The conduct of the staff members in disseminating confidential personnel records which formed the basis of the tenure charges and the withholding of increments arose because Crilley gave the records to the teaching staff members. The Commissioner held that Crilley possessed a serious self-interest in the disciplinary actions taken and that the affirmative vote was infected with the taint of self-interest. Crilley's vote was disqualified and the action of the Board was declared null and void. The Board was cautioned that the disqualified member might not be permitted to participate in deliberations, counsel with other members or vote and that absent compliance with this directive, any future action by the Board on the subject matter could result in nullification.

The Board herein argues that the rule of necessity applies. There are nine members of the Board. There is no claim that six members do not constitute a quorum. N.J.S.A. 18A:6-11 requires a majority vote of the full membership. A majority is five. Thus, the Board was not disabled from taking action on the matter, Pyatt v. Mayor and Council of Dunellen, 9 N.J. 548, 557 (1952), and the rule of stern necessity does not apply. The stern necessity rule is called into play only when there is no means of proceeding because the sole statutory agent for hearing a matter is disqualified by bias, prejudice or some disqualifying conflict of interest. Rinaldi v. Mongiello, 4 N.J. Super., 7, 12 (App. Div. 1949).

The Board suggests that any rule which would bar board members who have received letters from voting to certify charges against that person would result in permitting the accused to control who may vote. Such is not the case here, for even if Colella did send the letters, it was not with an intention to disqualify votes, but with the belief that the sender would never be determined. Further, if a majority of Board members received scurrilous letters prior to a tenure charge vote from the proposed subject of such charges, they could act asserting the rule of necessity with a contingent request for the Commissioner to invoke his primary jurisdiction. **I CONCLUDE** that the resolution to

certify charges herein was void since the votes of Brancaccio and Nestory are disqualified and the vote was infected with the taint of self interest.

Colella argues that, absent a valid and proper vote to certify charges, the Commissioner lacks subject matter jurisdiction. That argument is without merit. Note that N.J.S.A. 18A:6-16 says, "upon receipt of such a charge and certification, or of a charge lawfully made to him, the commissioner . . . shall examine the charges and certification and . . . shall dismiss . . . [or] conduct a hearing . . .". Colella's argument would render the underlined statutory language meaningless. A construction of a statute which renders any part of it inoperative must be avoided. Shell Oil Co. v. Marinello, 120 N.J. Super., 357 (Law Div. 1972) certif. den. 62 N.J. 186 (1972) cert. den. 415 U.S.. 920 (1974).

A thorough discussion of the legislative history, intent of the Legislature and interpretation to be given the Tenure Employees Hearing Act can be found in In re Fulcomer, 93 N.J., Super. 404 (App. Div. 1967). Included therein, at page 412, the court says:

> [4] There is nothing in the new act which suggests the local boards were intended to retain any part of the jurisdiction which they formerly exercised in such conroversies other than a preliminary review of the charge and the required certification to the Commissioner. Their participation in such proceedings is specifically confined to that limited function. Thus, the Legislature has transferred, from the local boards to the Commissioner, the duty of conducting the hearing and rendering a decision on the charge in the first instance. His jurisdiction in all such cases is no longer appellate but primary.

Note, also, the language used when the court concludes, in the factual circumstances of that case, that a referral back to the local board represents a vice which the Legislature sought to eliminate. It then says, "particularly is this true where the board itself prefers the charges or becomes an adversary on appeal." The underlined language implicitly recognizes that the Commissioner's jurisdiction is not limited by the inability or failure of a board to act. Fulcomer, at 414.

Lastly, the comprehensive jurisdiction of the Commissioner is illustrated in Manalapan-Englishtown Ed. Ass'n v. Bd. of Ed., 187 N.J. Super., 426 (App. Div. 1981). In that case, the Board failed to certify disciplinary charges against a principal; certain teachers petitioned the Commissioner to order the Board to certify the charges. The teachers' association directly filed its charges and the tenured principal directly filed his answer before the Commissioner. Manalapan, 1979 S.L.D.. 505, 506. The Commissioner found that the local board did not abuse its discretion. The State Board affirmed. The Appellate Division discussed an "arguable" position that the Commissioner could be viewed as having determined that the charges were not sufficient to warrant dismissal, functioning "as though the charges had been certified." The court stated the Commissioner was not privileged to make subsection 16 (18A:6-16) findings except after a hearing. It did not suggest in any way that the Commissioner was precluded from acting as though the charges had been certified. Because of a lack of appropriate determination and reasons therefor on probable cause and whether a sanction was warranted on the part of both the Commissioner and local board, the court remanded to the latter.

It is clear that the Manalapan case was brought before the Commissioner in the first instance by petitioners under N.J.S.A. 18A:6-9, which gives the Commissioner jurisdiction to hear and determine all controversies and disputes arising under the school laws. In numerous holdings this statute has been interpreted as granting the Commissioner the broadest of authority. The Commissioner has broad powers and responsibilities to supervise public education in the state and to effectuate constitutional and legislative policies concerning it. Piscataway Tp. Bd. of Ed. v. Burke, 158 N.J. Super, 436 (App. Div. 1978). He has fundamental and indispensible jurisdiction over all disputes and controversies arising under school laws. Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407 (App. Div. 1982).

I have no doubt that, in the event a majority of a local board were disqualified from voting to prefer tenure charges, any party with standing could petition the Commissioner to act in his primary jurisdiction to determine probable cause and whether or not a sanction might be warranted under N.J.S.A. 18A:6-11 and that a charge raised in this manner would be "a charge lawfully made to him" under N.J.S.A.18A:6-16. If he were to

make a positive determination, he could then direct that a hearing on such charges be held. Similarly, even if a majority of a local board were not disqualified but failed to act, the Commissioner could determine whether they should have acted.

Thus, **I CONCLUDE** that he Commissioner is not ousted from determination of any matter in the instant case which is now properly before him by virtue of his determination, if such it be, that the Board's resolution to certify charges against Colella is void. Within his supervisory powers, he may if he so desires review the charges and proofs presented on certification and bring the charges directly within his primary jurisdiction, remanding for a hearing. I deem it inappropriate for an administrative law judge to attempt to exercise the Commissioners' primary jurisdiction in these circumstances, absent the directive of a remand to do so. Only the agency has authority to submit a contested case to OAL and my conclusion that the resolution of the Board is void requires a dismissal in the case submitted to OAL (EDU 5144-83).

Further, **I CONCLUDE** that the determination on docket EDU 5144-83 requires a dismissal in EDU 7787-84 since the issue therein, which concerns the vote to withdraw the charges, is now moot. My conclusions lead inescapably to a determination of disqualification of the votes of the two Board members who received letters, but there is no resolution to void because none was adopted. In any event, the vote was tainted under the Commissioner's holding in the South Plainfield case, so that a remedy which would in effect validate any part of the vote would appear improper. No purpose is served at this time by making determinations on EDU 7787-84 based upon contingencies. I rest my dismissal upon a concluson that the matter is moot in light of the results in EDU 5144-83.

It is therefore **ORDERED** that the tenure charges against Wilma J. Colella in EDU 5144-83 be **DISMISSED**; and further **ORDERED** that her petition in EDU 7787-84 be **DISMISSED** as moot.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman

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

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

December 14, 1984
DATE

Naomi Dower LaBastille
NAOMI DOWER-LaBASTILLE, ALJ

Receipt Acknowledged:

December 18, 1984
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 2 0 1984
DATE

Ronald L. Parker /pkb
FOR OFFICE OF ADMINISTRATIVE LAW

jrp

IN THE MATTER OF THE TENURE HEARING OF WILMA J. COLELLA, SCHOOL DISTRICT OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY.	:	
WILMA J. COLELLA, PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Elmwood Park Board seeks reversal of the judge's dismissal of the tenure charges in this matter due to conflict of interest and personal involvement by two Board members who voted to certify said charges against Respondent Colella. The Board relies on the brief it submitted to the judge in this record for support of its exceptions to the initial decision.

The Board supports the judge's conclusion that the Commissioner of Education has sufficient powers to exercise jurisdiction in the instant matter despite disqualification of two votes in favor of certification of charges, being in agreement with the reasoning expressed by the judge in the initial decision.

Respondent, while agreeing with the dismissal of the tenure charges based on the conflict of interest of two Board members, takes exception to language in the initial decision she considers to be analytically incorrect. Citing N.J.S.A. 18A:6-16, respondent argues that the Commissioner lacks jurisdiction to hear the matter because the Board failed in the basic prerequisite to certify the charges. She acknowledges that he may have authority to order the certification of charges if a local board fails to act or is incapable of acting but contends this is not the case herein.

Upon careful review of the record in this matter and the exceptions filed by the parties, the Commissioner is in complete agreement with the judge's analysis leading to the conclusion that the resolution to certify charges was fatally tainted by the self-

interest of Board Members Brancaccio and Nestory. Such a determination is entirely consistent with Griggs, supra; Aldom, supra; South Plainfield, supra; and Van Itallie, supra. The personal interest of two Board members who filed criminal charges against respondent cannot be considered merely remote or speculative. Although the Board members may have voted in the belief that they were acting in the common interest of all Board members and not in personal interest, the filing of criminal charges against respondent necessarily gives rise to the issue of bias and/or personal interest tainting the vote. As stated in Aldom, supra, regarding interest which disqualifies, recognition must be given

> "***to the moral philosophy that next in importance to the duty of the officer to render a righteous judgment is that of doing it in such a manner as will beget no suspicion of the pureness and integrity of his action.***"
>
> (42 N.J. Super. at 502)

The two Board members in question should have abstained from participating in any Board action with respect to the tenure charges herein. South Plainfield, supra, and Bayless, 1974 S.L.D. 595, 604 Such abstention would not have prevented the Board from meeting the mandate of N.J.S.A. 18A:6-11 for a majority vote of the full membership.

Therefore, it is the determination of the Commissioner that the procedures to certify charges against respondent were fatally flawed such that the Board's action is deemed null and void. Consequently, he adopts as his own the order of the judge to dismiss the tenure charges against respondent. Such charges are dismissed without prejudice.

The Commissioner's determination in the instant matter is limited to the issue of the Board's failure to certify charges due to the procedural defects noted. He sees no purpose being served in addressing the arguments by the judge or the parties raised with respect to whether he does or does not have the power to exercise primary jurisdiction or to act as though the charges were certified in this controverted case.

COMMISSIONER OF EDUCATION

FEBRUARY 1, 1985

INITIAL DECISION
OAL DKT. NO. EDU 7182-83
AGENCY DKT. NO. 3-1/82A
ON REMAND - EDU 772-82

CLAUS SCHWARZKOPF,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CAMDEN AND CHARLES SMERIN, SUPERINTENDENT OF SCHOOLS,
Respondents.

Allen S. Zeller, Esq., for petitioner (Freeman, Zeller & Bryant, attorneys)

Karen A. Bulsiewicz, Esq., for respondents (Murray & Granello, attorneys)

Record Closed: November 5, 1984 Decided: December 20, 1984

BEFORE **AUGUST E. THOMAS**, ALJ:

Petitioner appeals the determination of the Board of Education of the City of Camden (Board) which abolished his position and reassigned him with a subsequent reduction in salary.

This matter was filed in the Office of the Commissioner of Education on January 4, 1982, and thereafter was transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Filed with the Answer on January 28, 1982, is the Board's Motion to Dismiss the petition as untimely, with supporting brief. Petitioner filed a brief in opposition to the motion.

At the continued prehearing conference on May 26, 1982, decision on the motion was withheld pending the litigants' attempts to settle their dispute. By letter received on June 15, 1982, the Administrative Law Judge (ALJ) was notified by respondent that settlement attempts had failed. The Board requested a decision on its Motion to Dismiss; consequently, the matter was considered for Summary Decision on the pleadings, briefs and exhibits attached to the Board's Answer to the original Petition of Appeal (Exhibits A through F).

The following facts are not in dispute. Petitioner is a tenured psychologist employed by the Board. For several years, petitioner had been the Chief Psychologist. On April 27, 1981, the Board voted in public session to abolish the position of Chief Psychologist, in connection with a reduction in force, effective June 30, 1981. In accordance with petitioner's seniority rights, he was reassigned on July 29, 1981, to the position of psychologist effective September 1, 1981 (Exhibits A, B, C, D). None of these listed exhibits addresses petitioner's salary in the new position.

On or about January 4, 1982, petitioner filed a Petition of Appeal with the Commissioner, alleging that his reassignment to the position of psychologist and the concomitant reduction in salary violated his tenure rights. Believing that the Petition of Appeal was filed more than 90 days from the date of the action complained of, the Board filed the Motion to Dismiss.

The Commissioner adopted the findings of the ALJ, which concluded that the Petition of Appeal was filed out of time; however, the State Board of Education reversed the Commissioner's decision on September 7, 1982, and remanded the matter for hearing. The Board's motion for leave to appeal the State Board's determination and request for stay of administrative hearing pending appeal was denied by the Superior Court, Appellate Division, on November 4, 1983. Accordingly, a prehearing conference was held in this matter on December 28, 1983, during which the parties agreed to the following issues:

1. Is Petitioner entitled to the Chief Psychologist's salary for the 1981-82 school year?

2. Is Petitioner entitled to advanced placement or additional salary based upon his years' experience and the practices of the Board?

3. Respondent reserves the right to amend or modify issue number 2.

4. Did the Board or its agent violate the Open Public Meeting Act when it acted to reduce Petitioner's salary?

On or about January 13, 1984, the petitioner submitted an amended petition which contained three counts. The first count restated the allegations of the original petition. The second count alleged that petitioner had received and continues to receive a salary equal to or less than other psychologists with lesser seniority and/or experience than petitioner, in violation of an alleged pattern and practice of the Board's of adding steps to the psychologists' salary guide to accommodate the psychologist with the most experience and/or seniority. The third count alleged that the petitioner, on or about November 1983, learned that a psychologist with approximately three years' lesser seniority was being paid a larger salary than the petitioner, allegedly in retaliation against petitioner for the exercise of his legal rights of redress before agencies of the State of New Jersey, the Education Department and the Public Employees Relations Commission (PERC). The respondents filed their Answer to the amended petition on February 2, 1984.

On or about February 6, 1984, the Board filed three separate motions seeking (1) dismissal of paragraph ten of the first count and the entire second count on the ground of timeliness, (2) dismissal of the entire second count on the ground of lack of subject matter jurisdiction, and (3) an Order of partial summary judgment in favor of respondents.

On February 16, 1984, the petitioner filed a Certification and Memorandum in Opposition to the Motion for Partial Summary Decision. Said Certification contained a new allegation that, prior to the abolition of the Chief Psychologist position, petitioner had recommended against the hire of a school psychologist who was "a close personal friend and fraternal associate of the Camden City School Deputy Superintendent" and that, despite petitioner's recommendation, the psychologist was hired. The new allegation charged that there were serious problems with this psychologist's performance; that, when petitioner attempted to discuss these problems with the psychologist, the latter threatened to have the petitioner replaced; that, on one occasion, the petitioner was "physically assaulted" by this psychologist; that, despite petitioner's complaints, no action was taken against this psychologist regarding the assault incident; and, that shortly after the threats made by this psychologist, the position of Chief Psychologist was abolished.

On February 22, 1984, the undersigned ALJ entered an Order dismissing only paragraph ten of the first count of the amended petition. That paragraph had raised the claim that the Board had violated the Open Public Meetings Act in reducing petitioner's salary from that of Chief Psychologist to that of psychologist. The dismissal of paragraph ten decided Issue No. 4 of the prehearing order; therefore, it was not considered at the hearing.

Hearings on the instant matter were held before me on the following dates: March 13 and 15, 1984; May 21 and 22, 1984; July 31, 1984; and August 1, 2, 3, 7 and 8, 1984.

The record shows that, in addition to the instant action filed by the petitioner, on April 28, 1982, the Camden Administrator's Council (Council) filed an unfair practice charge against the Board with PERC on behalf of the petitioner. The charge alleged that the Board violated certain subsections of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1, et seq., when it unilaterally abolished the position of Chief Psychologist, transferred the incumbent Chief Psychologist, who is the petitioner in the instant matter, to the position of Psychologist, and reduced his salary, despite allegedly being aware that petitioner continued to perform the same duties he had as Chief Psychologist. On November 18, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On December 5, 1983, after five days of hearings, the hearing examiner issued his Recommended Report and Decision (Camden Board of Education and Camden Administrators' Council, PERC Docket No. CO-82-288-42; reported at 10 NJPER 48 (15027, 1983)). He recommended dismissal of the entire complaint and specifically found no merit in petitioner's allegations. The hearing examiner found that the Board had legitimate business reasons for abolishing the Chief Psychologist position and for paying him on the psychologists' salary guide. He also found that the petitioner's duties did change after his Chief Psychologist position was abolished "particularly in the elimination of his supervisory duties over the other psychologists" (Id. at 52).

On December 20, 1983, the Council filed exceptions with PERC on behalf of petitioner, challenging the factual and legal conclusions reached by the hearing examiner. The Board filed a reply brief urging the Commission to adopt the hearing examiner's report and recommendations. The Council filed a brief in response to the Board's.

On January 20, 1984, the Commission issued a unanimous decision adopting the hearing examiner's report and recommendations and dismissing the complaint. 10 NJPER 119 (15061, 1984). There was no appeal from the decision.

As stated to counsel during the hearing, I will take official notice of the PERC decision in this matter. (N.J.A.C. 1:1-15.3b). The PERC decision is attached to the Board's earlier Memorandum of Law in Support of Motion for Partial Summary Decision.

It is important to reconsider the filing dates in this matter when examining petitioner's charge that his transfer was made in bad faith. A review of the earlier Initial Decision, which concluded that this Petition of Appeal was filed out of time, shows that petitioner was notified on April 28, 1981, that his position as Chief Psychologist was being abolished effective June 30, 1981[1]. In accordance with his seniority rights he was reassigned on July 29, 1981, to the position of psychologist effective September 1, 1981. However, none of the communications regarding his transfer mentioned salary and petitioner testified at hearing that he was led to believe his salary would not be reduced. According to petitioner, it was only after the receipt of his pay check on September 15, 1981, that he realized his salary had been reduced and he thereafter appealed on January 4, 1982.

No allegation of bad faith was asserted at that time. Significantly, petitioner's salary remained the same after the effective date of the abolishment of his position on June 30, 1981 through August 31, 1981, when he was transferred. It seems to me that had there been a deliberate attempt to reduce his salary for arbitrary reasons, as petitioner contends, the Board could have seen to it that his salary would have been reduced immediately after June 30, 1981.

However, the record shows otherwise. PERC found that petitioner did not contest the Board's right or reason for abolishing the Chief's title and that the Board abolished that position because of business reasons and because of conflicts between petitioner and Dr. James, the Board's Director of Special Education. PERC concluded

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1 Reversed and remanded, State Board of Education, September 7, 1982.

that once that position was abolished, the Board had the right to assign petitioner to a psychologist position and to reduce his salary in accordance with the salary scale for school psychologists. PERC found specifically that petitioner's duties had changed after June 1981, particularly in the elimination of his supervisory duties over other psychologists.

It was announced to counsel at hearing that we would not relitigate the matters which were considered and decided by PERC. Nevertheless, petitioner asserted that PERC made findings outside of its jurisdiction and decided issues that could be decided only by the Commissioner of Education. The positions taken by petitioner in light of the charges filed with PERC, that the Board engaged in unfair practices within the meaning of the Act, and that the Board unilaterally abolished the position of Chief Psychologist and unilaterally demoted the former Chief Psychologist to psychologist and reduced his salary were also filed with the Commissioner. It is obvious, therefore, that petitioner sought the same relief in both fora.

From my review of the PERC decision and based on the testimony and documentary evidence submitted at hearings I **CONCLUDE** that the PERC decision is correct in all respects and that there is nothing in this record that would lead to a contrary conclusion even if this matter had been heard in the first instance by the Commissioner of Education. The PERC and Education matters could not be consolidated, which resulted in some overlapping of the prosecution of these cases. Nevertheless, the testimony at hearing and the record adequately show that petitioner was transferred to the school psychologist position in accordance with his seniority status after the Chief's position was abolished and that such action is within the statutory authority of the Board. N.J.S.A. 18A:28-9 et seq.

Petitioner was not able to sustain his burden of proof, as charged in the original Petition of Appeal, that his seniority rights were violated by the abolition of his position and his reduced salary.

Accordingly, when an employee of a board of education is transferred for proper reason to a position which has a lesser salary expectation, that employee is entitled only to the salary in the new position according to his/her appropriate step on the

salary scale. Lavine v. Trenton Bd. of Ed., 1984 S.L.D. _____, decided by the Commissioner, (June 6, 1984); Kigerl v. Bd. of Ed. of the Borough of South Plainfield, 1981 S.L.D. _____, decided by the Commissioner, (August 18, 1981).

Petitioner asserts that he is entitled to advanced placement or additional salary when placed on the top of the psychologists' salary guide based upon his years' experience and the past practices of the Board. The Board raised as an affirmative defense in its Answer to the Amended Petition of Appeal that the Amended Petition of Appeal should be dismissed as untimely. This affirmative defense was also raised by motion and repeated at the hearing. It was held in abeyance. The Board again raised the motion in its brief following the hearing. The Board also asserts that the first count of the amended petition was fully and fairly litigated by PERC and that the remainder of the Amended Petition of Appeal was filed out of time.

In a June 1984 decision, the Supreme Court of New Jersey in North Plainfield Ed. Assoc. v. Bd. of Ed. of the Borough of North Plainfield, 96 N.J. 587 (1984), decided a matter similar to the one litigated here. In North Plainfield, two teachers who returned from sabbatical leaves noticed that their pay checks received on September 15 of the year in question were less than they calculated they should have been. They waited more than nine months in which to file their appeal of that Board action; however, the Court held that they were effectively put on notice on September 15 when they received their checks. The matter contested here is similar; however, the State Board of Education has remanded this matter for decision on the merits and during that remand the Amended Petition of Appeal incorporating issues not set forth in the initial Petition of Appeal were added in January 1984. These matters set forth in the Amendment to the Petition of Appeal are, according to petitioner, reasons or motivating factors utilized by the Board which petitioner believes are evidence of discrimination and/or arbitrary action taken against him. However, if that is so, petitioner knew or should have known of such alleged arbitrary action at the time he filed his initial Petition of Appeal in January 1982. Therefore, if this matter was timely filed as decided by the State Board of Education the limits of this appeal are delineated in the initial Petition of Appeal, and the Amendment to the Petition of Appeal is clearly out of time in accordance with the North Plainfield decision.

The second count of the Amended Petition of Appeal, which alleges that petitioner continues to receive a salary less than that of other psychologists with lesser

seniority and/or experience than petitioner, in violation of an alleged pattern and practice of the Board's of adding steps to the psychologists salary guide to accommodate the psychologist with the most experience and/or seniority, is simply not supported by this record. Neither is there support for petitioner's third count of the amended petition, which alleges that petitioner learned that a psychologist with approximately three years' lesser seniority was being paid a larger salary than the petitioner allegedly in retaliation against petitioner for the exercise of his legal rights of redress before state agencies. The evidence adduced at hearing is devoid of proof which would support these allegations.

However, the factual pattern leading to these conclusions need not be discussed in detail since it is now evident from the Court decision in North Plainfield that the entire second and third counts incorporated in the Amendment to the Petition of Appeal are clearly out of time. The record adequately shows that petitioner had no complaint or grievance alleging disparate treatment by his Board until long after he noticed his pay check was reduced on September 15, 1981. As a matter of fact, in his original Petition of Appeal, which was not filed until January 1982, there was no allegation of disparate treatment.

Accordingly, the entire Amended Petition of Appeal beginning with the second count is **DISMISSED** as untimely filed.

Based on the testimony at hearing, the documents in evidence and the briefs filed by the litigants, I **CONCLUDE** that petitioner is not entitled to the Chief Psychologist salary for the 1981-82 school year. Petitioner was placed at the top of the psychologists' salary guide, is being paid the same salary as other psychologists at the top of that guide, and that salary is commensurate with his background/training and experience. Petitioner has been unable to sustain his burden of persuasion that he is entitled to advanced placement or additional salary based upon his years of experience and the practices of the Board.

Because the remaining issues in this matter are dismissed as being untimely filed in the Amendment to the Petition of Appeal, there is no relief to which petitioner is entitled.

Accordingly, the entire matter is **DISMISSED WITH PREJUDICE.**

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

20 December 84
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

12/21/84
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 24 1984
DATE

Ronald L. Tuker/jdb
OFFICE OF ADMINISTRATIVE LAW

ij/ee

CLAUS SCHWARZKOPF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, AND CHARLES SMERIN, SUPERINTENDENT OF SCHOOLS, CAMDEN COUNTY,	:	DECISION ON REMAND
RESPONDENTS.	:	
	:	

The record and initial decision have been reviewed. Exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

Petitioner, in primary exceptions, argues with and objects to the entire initial decision herein contending that the merits of the case were not discussed. He alleges that the salary reduction, effectuated without advance notice, was improper and violative of his rights to due process of law. Petitioner argues that when the Board abolished his position of Chief Psychologist in April 1981 (R-1) and voted to transfer him to the position of School Psychologist in July 1981 (P-3), it never voted to reduce his salary when he was transferred and such action is accordingly ultra vires and illegal and must therefore be set aside. Petitioner in closing exceptions alleges that the present judge is incapable of making a decision in this matter on its merits and therefore the matter must be assigned to a different judge.

The Board filed exceptions in reply to those of petitioner and in support of the initial decision by Judge Thomas. The Board notes that the judge expressly and properly determined that PERC correctly found petitioner's first count meritless and also found that petitioner's first, second and third counts were unsupported by the record evidence.

The Board notes that in the holding of the initial decision that the second and third counts were untimely filed, the judge properly relied on the Supreme Court decision in North Plainfield Education Association, 96 N.J. 587 (1984) decided subsequent to the State Board of Education's determination that the original petition was timely filed:

> "***Certification was granted, and the Supreme Court held that: (1) statutory annual increment in a teacher's salary was subject to annual evaluation of teacher performance, and thus, was not a statutory entitlement; (2) since the award of the annual increment was not a matter of statutory right, but was subject to denial for

> inefficiency or other good cause, it was subject to 90-day time bar set forth in regulation issued by the Commissioner of Education; (3) petitions of teachers who were aware that they had not advanced on the salary scale when they received their first paycheck for the subsequent school year, but did not file a petition for more than a year later and more than nine months after expiration of 90-day period of limitations, were time barred; (4) time bar applied to future years; and (5) withholding of increment did not constitute a continuing violation.
>
> Judgment of the Appellate Division reversed."
> (at 588)

The Board argues that petitioner was not denied due process because he was "bumped" into a school psychologist position at a prescribed salary nor was he entitled to a prior hearing. The Commissioner finds the Board's arguments to be clear and convincing.

The Commissioner observes that the Supreme Court of New Jersey firmly established that teacher assignment and transfer in the school district are managerial prerogatives as stated in Ridgefield Park Education Ass'n., 78 N.J. 144 (1978):

> "***We hold that the enactment of L. 1974, c. 123, secs. 4 and 6, N.J.S.A. 34:13A-5.3 and 8.1, did not have the effect of creating a new category of negotiating subjects in public employment labor relations comprised of matters negotiable at the option of the parties even though primarily concerned with governmental policy. PERC's scope-of-negotiations determination requiring that the Ridgefield Park Board of Education submit the propriety of teacher transfers and reassignments to binding arbitration is disapproved. In view of the foregoing, the Chancery Division order that the parties proceed to arbitration is reversed and arbitration is permanently enjoined.***" (at 166)

Petitioner's claim that he was entitled to a due process hearing prior to his "bumping" into a school psychologist position, with the concomitant receipt of a school psychologist's salary, is clearly without legal merit. The relevant State law, relied upon by Judge Thomas in his initial decision (ante), establishes that once petitioner's former position was abolished and he was bumped to the position of school psychologist, he was entitled to nothing more than the salary of a school psychologist. Lavine, supra; Kigerl v. Board of Education of the Borough of South Plainfield, decided by the Commissioner August 18, 1981, aff'd State Board December 2, 1981. Under New Jersey law, when one is bumped into a lower posi-

tion pursuant to a bona fide reduction in force, one has an entitlement only to the salary of the new position, and no claim may be made for the continuation of payment at the former, higher rate.

Finally, contrary to petitioner's repeated assertion, payment of the lower salary following a "bump" is not contingent upon a separate Board action to pay the lower salary. The above cases establish that once the Board acts to bump an individual into the lower-paying position, he is entitled solely to the salary for that position, without the need for a separate action by the Board.

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

Accordingly, the entire matter is dismissed with prejudice.

COMMISSIONER OF EDUCATION

FEBRUARY 4, 1985

INITIAL DECISION
OAL DKT. NO. EDU 9253-83
AGENCY DKT. NO. 364-10/83A

EDWARD H. BROWN,

Petitioner,

V.

BOARD OF EDUCATION OF THE TOWNSHIP of SPARTA, SUSSEX COUNTY and ANDRE MONTAGNE,

Respondents.

Arthur Penn, Esq., for petitioner

Nathanya G. Simon, Esq., for respondents
(Schwartz, Pisano and Simon, attorneys)

Record Closed: October 31, 1984 Decided: December 20, 1984

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

When Edward H. Brown was denied employment upon his application for the advertised position of food service director by the Board of Education of the Township of Sparta, Sussex County, he charged the Board and/or its agent had unlawfully discriminated against him by that denial, because of his race, in violation of the New Jersey Law against Discrimination, N.J.S.A. 10:5-12(a). He is black. He sought punitive and compensatory

damages for ecomonic loss and for humiliation, mental pain and suffering. The Board and its Board secretary, Andre Montagne, denied allegations of the petition, contending denial of petitioner's application for employment was due solely to the Board's determination reasonably to prefer another applicant for the position, a white female, possessed of superior experience, certifications and other qualifications, consistently with standards and criteria of N.J.S.A. 10:5-2.1.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on October 6, 1983. Respondents' answer was filed there on November 15, 1983. The Commissioner of the Department of Education, in accordance with N.J.S.A. 18A:6-9, N.J.A.C. 6:4-1.9 and N.J.A.C. 6:4-1.6, transmitted the matter to the Office of Administrative Law on November 21, 1983 for hearing and determination in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, a prehearing conference was conducted in the Office of Administrative Law on February 2, 1984, and an order entered establishing, inter alia, hearing dates beginning April 10, 1984. That date and hearing dates thereafter on May 9, 1984 and June 6, 1984 were adjourned at request and/or with consent of the parties. Hearing was conducted and concluded in the Office of Administrative on July 31, 1984, August 1, 1984 and August 2, 1984. Thereafter, the transcript having been prepared and post-hearing submissions having been completed, the record closed.

The prehearing conference order established that at issue in the matter generally is whether petitioner shall have proven by a preponderance of the credible evidence he was unlawfully denied employment by the Board in the position of food service director because of his race, in violation of the New Jersey Law against Discrimination, N.J.S.A. 10:5-12(a), and N.J.A.C. 6:4-1.6, which provides:

> (a) All persons regardless of race, color, creed, religion, sex, or national origin shall have equal access to all categories of employment in the public educational system of New Jersey.

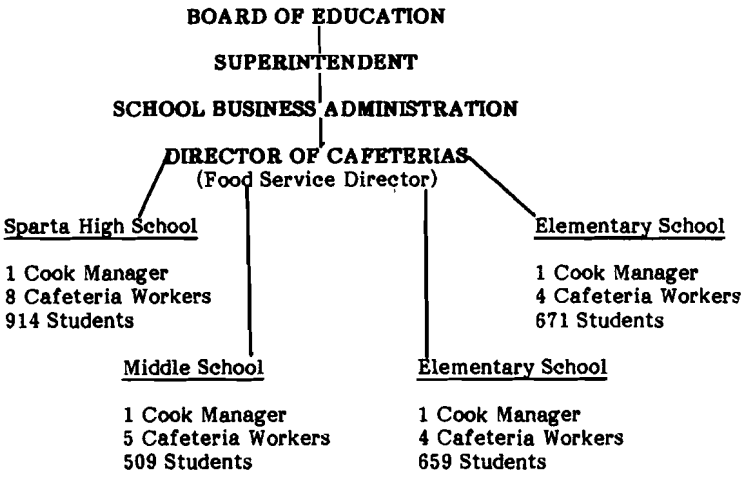
(b) All New Jersey public school districts shall comply with all State and federal laws related to equal employment, including but not limited to the New Jersey Law against Discrimination (N.J.S.A. 10:5-1 et seq.), Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, Executive Order 11246 as amended, Equal Pay Act of 1963 as amended, and Title IX of the Education Amendments 1972 (Higher Education Act).

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so stipulated, I make the following **Findings** of **Fact:**

1. Sparta school system, located in Sussex County, is a K-12 district composed of four schools: two elementary schools, a middle school and a high school. Each school has it own food service operation and staff.

2. The table of organization as it affects the food service operation as of 1982-83 school year in the Sparta district is as follows:



3. The total operating budget of the food service operation in Sparta for the 1982-83 school year was $406,434.

4. In or about January, 1983, Helen Mock, cafeteria director, submitted her notice of retirement to the Sparta Board of Education.

5. In or about February/march, 1983, the Sparta Board of Education Personnel and Policy Committee reviewed, discussed and established criteria for the replacement of Helen Mock. Andre Montagne, school business administrative/Board secretary, is supervisor in that area of Board operations and participated with the Committee in the establishment of the criteria.

6. The position held by Helen Mock is the same one designated for advertisement - food service director.

7. On April 24, 1983, the position of food service director was advertised in the Sunday Star Ledger, education section. J-6.

8. On April 24, 1983, the position of food service director was advertised in the Sunday Herald, classified ads section. J-7.

9. Shortly subsequent to the above - mentioned advertisements, petitioner Edward Brown placed a phone call to Montagne; a conversation between petitioner and Montagne was held and Montagne advised petitioner that he should submit an application for the position of school food service director.

10. Applications for the position of school food service director were received at the office of Montagne approximately the third week in May, 1983. During this time period, petitioner submitted to Montagne, his cover letter, resume and curriculum vitae for the position of food service director.

11. Prior to scheduling of interviews, petitioner spoke on the phone with Montagne concerning status of the process, and Montagne informed petitioner he would be contacted concerning an interview.

12. There were 13 applicants for the position of school food service director; all were paper-screened by Montagne and Mrs. Mock prior to scheduling interviews. Mrs. Mock did not participate in the interviewing process. Nine of the applicants were scheduled for interviews with Montagne. One of those nine withdrew her name from consideration due to acceptance of another position, and another one of the nine could not be reached for interviewing. Seven applicants were personally interviewed by Montagne.

13. Petitioner was interviewed by Montagne at the Sparta Board office on Wednesday, June 1, 1983.

14. Subsequent to the interview, petitioner called Montagne concerning status of the process and Montagne informed petitioner the Personnel and Policy Committee of the Board would be reviewing the candidates with Montagne and that if the Committee wanted further information, petitioner would be contacted.

15. On June 16, 1983, the Personnel and Policy Committee of the Sparta Board met with Montagne, who reviewed with the members of the Committee the

top four candidates for the position. The four candidates were Virginia Littell, Catherine Hydo, Paul DiMarco and petitioner.

16. The recommendation made by Montagne to the Committee for the position was Virginia Littell. The Committee concurred with the recommendation, for submission to the full Board of Education at its next scheduled work meeting.

17. At the June 27, 1983 meeting of the Board, Virginia Littell was appointed to the position of food service director for the 1983-84 school year, effective July 1, 1983, at an annual salary of $18,000. J-23.

18. Letters were sent to all candidates after the June 27, 1983 Board meeting advising that Littell had been appointed to the food service director position. Petitioner was sent such a letter dated June 28, 1983. J-22A.

19. After petitioner received the letter, he called Montagne concerning the selection of Littell.

20. Compensatory damages are limited to $19,500, calculated as follows:

$18,000 lost salary
3,000 lost fringe benefits
$21,000
-1,500 mitigation earnings
$19,500

EVIDENCE AT HEARING

Edward H. Brown, petitioner, a resident of Hampton Township, Sussex County, testified he is a 1958 graduate of Fairleigh Dickinson University with a B.S. in hotel and restaurant technology management. His first job after college was as assistant manager of a country club over three operating club seasons, duties of which position entailed hiring and training employees both at front and back of the house, the purchasing function, licensing application functions and all food and beverage service functions. He was next employed from 1962 to 1964 by Fairleigh Dickinson University as director of food service at the Teaneck campus. His duties entailed the total personnel function: hiring, firing and suspension. He performed menu planning, purchasing and housekeeping functions, handled labor and management problems and performed liaison with the university department. He had some 200 employees under him. His division was responsible for serving some 3,000 covers at noon meals for students and faculty. From 1965 to 1972 he was engaged in his own restaurant operation and was vice president of a concession at the New York World's Fair. From 1966 to 1967 he was an instructor at New York Community College in hotel technology, which included accounting, baking, dining service, institutional management and food science. His next job from 1968 until about 1971 was director of food service at Madison campus of Fairleigh Dickinson University. After that, until about 1976, he was Director of purchasing at Fairleigh Dickinson. His duties included a redesign of the purchasing program to a systems organization, supervising staff on a day-to-day basis, developing a computer system, attending conferences and informing the university of new methods. He next worked as a consultant for Essex County Educational Services Commission for seven months in 1979-80. In 1981 he was employed by Educational Improvement Center, an LEA.

Since June 1983, he said, he has not been employed nor has he had any earned income.

He is a member of Educational Buyers Association, American Purchasers Society and the Greeters' Association. Honors include candidacy for induction to Who's Who in Food and Lodging, membership in the Chefs' Association, the New Jersey Tavern Owners Association and the Branchville Association.

Concerning food service experience in public schools, he said, he was not aware of any real differences between his Fairleigh Dickinson experience and public school experience, which were essentially similar in creation of food service and forecasting, menu preparation, accounting materials, inventory control methods, training of employees, back of house functions, health and OSHA requirements, state and federal bid regulations, nutrition and eye appeal.

Petitioner said he first learned of the food service director job in Sparta in May 1983 from an advertisement in the Herald. J-7. He was interested in the position, he said, because at his point in life he found the prospect of working with pupils challenging and exciting. He had a keen interest to do some writing and viewed the opportunity as a laboratory for student behavior and student reactions to food. He found traveling outside of his community laborious and thought the Sparta job seemed close to his home, which was some ten miles away. He thought he could bring new dimensions to the food industry and hoped to see a swing from old methods to new and to see the job flourish. He felt he could pay back a community investment in him.

He called Board secretary/business administrator Montagne, whom he had known since 1946, and announced his interest. It was suggested he submit credentials, petitioner said, and he did so. J-22c, d and e. At an interview later with Montagne, petitioner said, which took about an hour, Montagne informed him he had read his resume and curriculum vitae. He was told they seemed fairly good and was asked why he wanted the food service director position in view of apparently superior credentials. Public school food service operations and position idiosyncrasies were discussed. The interview was casual and relaxed, petitioner said, with nothing too technical touched upon. He was told he would

be contacted for a follow-up interview. The next contact, petitioner said, was a written communication from Montagne notifying him he was not the successful candidate and that Vera Littell had been chosen by the Board. Petitioner offered to submit further job references but was told they were untimely. Petitioner's feeling on rejection, he said, was one of dejection. He was saddened because Montagne had said he had superior qualifications and was, perhaps, overly qualified. In a telephone call to Montagne, he said, he was told Vera Littell had been chosen because she had a school lunch supervisor's certificate and that petitioner, perhaps, should seek employment in the hotel industry. When petitioner continued to press questions, he said, Montagne became disturbed and hung up the phone. There were no further conversations. Petitioner said the rejection affected him adversely because he felt he had prepared himself for 37 years in the industry and thought he should have been treated in a fairer way. He felt Littell's credentials were subordinate to his and thought that his race, black, was the reason he was rejected. He was saddened to the point of tears, he said. He felt to be denied opportunity to serve the community without justification was something more than he could bear.

Shown J-9, job responsibilities for Sparta school lunch director, which itemized by topic heading certain functions of the position, petitioner said he felt his experience as a purchaser of foods for 37 years, his experience at record-keeping, staffing of kitchens, working with government, wage negotiations, special functions, and professional opportunities, all more than adequately qualified him for the position outlined.

Called by petitioner, John Kates testified he has been employed as professor of hotel technology by Sullivan County (New York) Community College since 1966. He has taught elementary food preparation and baking, institutional management, restaurant and dining-room management, food and beverage cost control and wines and beverage procurement. He holds the a B.S. in hotel management from Fairleigh Dickinson University in 1958. Among his awards are honorable mention as restaurant chef from the French Chefs' Organization of New York. He was offered as a witness in food service

management. Basic elements in a food service program, he said, were to prepare food in consideration of the background of people served, to collect for it and to assure enjoyable service to users. Those considerations are true for both private and public employment. Kates said he had examined the applications of petitioner (J-22), Littell (J-10), DeMarco (J-16) and Hydo (J-12). He said he has known petitioner since 1954 but did not know the other applicants. In giving an opinion on the relative merits of the four, he said, his criteria was a comparison of their background and experience. In his judgment, he said, petitioner's credentials were superior for the job applied for to the others because of petitioner's education and experience. He made his evaluation solely on the basis of the written material shown him, he said, and did not personally communicate with any of the candidates. Comparing the resume and application of Littell, the successful candidate for the position, with that of petitioner, he said, petitioner's appeared more complete and gave more information about himself. Littell's experience as a high school food service director showed good background for her, he said, but it was not as extensive as petitioner's in the private or public sectors. Public school or institutional food service, he said, was not too different from public college food service. Petitioner's experience in that respect, he felt, would translate readily. His opinion in ranking the four candidates interviewed put petitioner first, DeMarco second, Hydo third, and Littell the successful candidate last at number four. He conceded his ranking might change, however, were he to interview the candidates or if, perhaps, they produced greater or more complete information. He emphasized his opinion was limited only to the information given on the applications themselves. He conceded he had been a personal friend of petitioner since college on both a social and professional basis. They worked together during college in summer employment. On cross-examination, he admitted he could not disqualify Littell as an unreasonable choice. Indeed, he conceded, all four candidates for the position could have performed adequately in the position. His view was narrowed to consideration of petitioner's application (J-22) and Littell's application (J-9), from which he concluded petitioner was a superior choice to Littell because of his more explanatory application, his opinion necessarily being subject to interviews.

Petitioner introduced into evidence the following deposition testimony of Montagne:

Q. In your area when you do paper-screening, what affirmative action considerations do you employ during this process?

A. I am sensitive to the fact that the district has a need for looking and making available and during the interview process people of minority nature if those are applicants for the position.

Q. Do you consider white females to be minorities?

A. Yes [Montagne deposition, May 30, 1984, transcript 6-12 to 6-21].

Q. During the paper-screening process for the position which Mr. Brown applied for, did you give equal weight to her application as you did to Mr. Brown's in terms of your affirmative action considerations?

A. Yes. [Transcript, 8-15 to 8-19].

Q. Do you recall saying to Mr. Brown at any time during the interview or any subsequent or prior conversations that he was overly qualified for the position he sought?

A. Yes, I probably stated the over-qualification issue. I am not convinced that I stated in the context that would preclude him from further consideration at the point. I indicated to Ed that given his background and experience and job experience that when I asked him the question during interview

process, why are you looking for a school food service position with this level of training and as well as background experience that you have, why a public school food service position. It was done in that context. [Deposition, 35-17 through 36-3].

Q. Did you hear about Virginia Littell's educational experience was superior to that of Ed Brown?

A. No I do not. [Deposition, 40-17 through 40-20].

At conclusion of petitioner's case, the Board moved to dismiss the petition against Montagne individually because no prima facie case of discrimination had been made against him. The administrative law judge granted the motion on the grounds Montagne was not himself the employing authority, that he acted as an agent under instruction of his employer, the Board, to conduct screening interviews and grading of applicants, that he did so and in the process recommended petitioner for further consideration by the Board along with three other interviewees, and that, essentially, no evidence had been adduced by petitioner that Montagne was acting in any other capacity than as an agent clothed with authority, a circumstance that precluded him from liability as alleged against him by petitioner. Montagne had acted if at all, that is to say, entirely within the scope of his employment duty.

Called by the Board, Walter J. McCaroll testified he was employed by the Board as superintendent of schools for 12 years. Since May 1983 he has been an assistant commissioner employed by the State Department of Education. He holds the doctorate from New York University in administration and supervision. McCaroll said he had been involved in affirmative action programs in the district and was its affirmative action officer until he left his post. He coordinated the Sparta program. In general, he said, the Board sought to employ minorities and encouraged their employment in the recruitment

and selection processes. Women were considered minorities by the district under State guidelines. The district was understaffed in females in administrative positions. He identified J-2 as the district's Affirmative Action Plan, which was adopted in the Fall of 1977 and submitted to the Office of Equal Education Opportunity. In a letter to the Office of Equal Educational Opportunity on June 4, 1977, McCaroll noted to the director of the Office the following goals were established by the district for the hiring of females/minorities in areas which they were under-utilized (J-5):

> Based upon an analysis of the school district's staffing pattern, service-maintenance workers are under-utilized. It shall be the goal of the Sparta Public School District to add two minority workers to the service-maintenance category.
>
> 2. The staffing pattern of the school district indicates an under-utilization of minorities in the position of classroom teacher. It shall be the goal of the Sparta Public School District to employ one minority classroom teacher.

Among the duties of the district Affirmative Action Officer generally, it was noted (J-2 at 3), was a duty of "reviewing of recruitment and selection processes and accelerating of the hiring of women and minorities where under-utilization is evident."

By letter dated December 28, 1979, the Office of Equal Educational Opportunity acknowledged McCaroll's additional information on the district's Affirmative Action Plan on Employment/Contract Practices and inquired of McCaroll whether 1985 seemed a reasonable time-line for accomplishment of goals. J-4. McCaroll's answer was in the affirmative.

McCaroll said Montagne was delegated the function of recruiting and screening candidates for the food service director position. McCaroll recalled a discussion with Montagne in March or April of 1983 in which Montagne told him there would be four or five candidates to be given serious consideration by the Board Committee. Petitioner was one of those. At that time, McCaroll said, Montagne indicated Vera Littell was perhaps one of the strongest candidates and would be so recommended to the Board.

McCaroll said Montagne told him petitioner had a discrimination claim pending against Sussex County Vo-Tech School District and warned if petitioner were not hired there might result a suit against the Sparta Board. McCaroll said he replied that should be of no concern since there were procedures required for recruitment and selection and those procedures had been followed.

McCaroll said the Sparta district had no blacks employed in 1982 or 1983. Assuming all else equal, he said, as between white females in administrative positions vis-a-vis blacks both ought to be treated the same for affirmative action purposes. In this case, he said, the recruitment and selection process was not faulty or flawed for such purposes. He denied the Board or its Personnel and Policy Committee rubber-stamped his or Montagne's recommendations. In the case of Littell, he said, she had the requisite qualifications for the position over petitioner's, he felt, and she also had current experience in a similar position as food service director. In the position of food service director, he added, which was a supervisory position, there was an obvious under-utilization of females in an administrative or supervisory category in the district. His opinion was that prior similar experience within the recent or immediate past was a most important factor.

Called by the Board, Kathleen Nolan, a retired administrator in the Passaic schools who had lived in Sparta some 30 years, testified she served three years as a member of the Sparta Board of Education from 1981 to 1983. She was a director of pupil personnel services in Passaic and had become familiar with affirmative action programs from Passaic and from orientation while serving as a Sparta Board member. She served on the Board's Personnel and Policy Committee, which consisted of four Board members, from 1981 to 1983 and was its chairman for 1982-83. The selection process for the Committee for the position of food service director entailed consideration by the Committee of applicants recommended after first screening, followed by consideration by the entire nine member Board, which would make the final selection. There were four candidates recommended by Montagne, including petitioner. The Committee did not meet

before April 24, 1983 when the position was advertised in the newspapers. J-6. Usually, she said, only three candidates would be recommended for final consideration by the Committee but in this case Montagne suggested the Personnel and Policy Committee review petitioner's application also, since he was a black male. Montagne had informed the Committee petitioner was not then in any public school system and that he had had experience in other employment situations where he had brought suit on discrimination grounds. Nolan said Vera Littell met all of the Committee's criteria, including present employment in food service in the public schools. Nolan listed the criteria employed by the Board for its judgment:

1. Present employment in a public school food service position;

2. A women, because there were so few women then employed in administrative staff positions in the district; and

3. Experience with state and federal regulated food service programs.

Nolan said the Committe reviewed all four resumes and considered Montagne's recommendation. The Committee was convinced Littell was best qualified and so recommended to the full Board, which accepted the Committee recommendation.

Called by the Board, Michael J. Gallagher, testified he has been a member of the Sparta Board since 1981. He is a retired New Jersey State Police officer. Upon his election to the Board, he said, he received a three-day orientation from the State Board of Education regarding affirmative action. He noted Montagne had always urged

compliance with the affirmative action plan in Sparta. Dr. McCaroll, he knew, was the Board's Affirmative Action Officer. Gallagher was a member of the Personnel and Policy Committee of the Board in 1983-84, when the food service position vacancy occurred. Criteria for filling the position, he said, was that the successful candidate was then presently employed in a food service position in public schools and the candidate was a female, thus filling a supervisory administrative position. Gallagher noted there were nine candidates for the position, of whom seven were interviewed by Montagne and of whom four ultimately were recommended for consideration by the Personnel and Policy Committee. All applications were reviewed, he said. The reason for selection of Littell was that she had met the criteria employed by the Committee. Although petitioner had a B.S. degree, Littell had an associate's degree. Two others had no degree at all. The Committee knew petitioner was black because Montagne told them, adding petitioner had instituted suit against other institutions and that refusal to employ petitioner might generate another discrimination suit. In the final analysis, however, he said, it was the feeling that petitioner did not fit all criteria and that Vera Littell did. He personally felt that the K-12 food service experience of Littell differed from petitioner's college or university food service experience.

Called by the Board, Andre Montagne testified he holds the B.S. degree in business management from Fairleigh Dickinson University. In 1979 he took a M.S. degree from the University in school administration and school management. He is certified as a school business administrator. He is a member of the New Jersey Association of School Business Officers and that of the U.S. and Canada. He is a member of the Schoolmasters Association. As school business administrator in Sparta, he said, his duties and responsibilities include payroll and accounting, transportation, maintenance and custodians, and the food service program together with personnel in those areas. He

reports to the superintendent and to the Board of Education. He is familiar with the Affirmative Action Plan of Sparta since it was generated in the mid-1970's and he was involved in categorization of employees. He helped prepare the Plan for adoption, which he identified as J-2. The Board adopted the Plan by resolution in 1975. It was approved by the Equal Education Opportunity Office of the State Board of Education. New members to the Board of Education, he said, are told of their duties and given orientation in affirmative action programs.

Food service in Sparta comprises all grades K-12. There are four school buildings each with its own food service: two elementary schools, one middle school and one high school 9-12. There are approximately 3,000 students in the district and 25 total employees in food service, including four cook-managers (one in each building) and 21 other food preparers. Annual unfunded budget for food service runs between $300 - 400,000.

The first service director appointed in the district, he said, was in 1958 at a time when there were only three schools. An elementary school, the fourth, was added in 1960's. Each building has its own kitchen and provides a hot and a cold lunch depending upon the building. During 1982-83, he said, there were discussion on the Board concerning retirement of the incumbent in the position, a woman. She was to retire in June 1983. The question before the Board was whether to utilize food service by contractor or by keeping its own operation. The Board decided to stay with its own operation and, thus, to advertise for a replacement for the retiring food service director. The incumbent director was a supervisory position, having overall charge of four kitchens, menus, food preparation and the like. There was no formal job description available. As a result, he said, he asked the incumbent to prepare a description of the functions identified as most important. The result was J-9, which though never officially adopted by the Board was used for screening applications for the position advertised. Criteria recomended to the Personnel and Policy Committee were experience in food service in grades K-12, current employment in a public school situation, and capability of understanding the job as it relates to public schools.

Montagne drafted advertisements and placed them once in a local and in a state-wide newspaper. Montagne said he received some 13 applications. He received a telephone call from petitioner, he said, whom he had known for a long time and who he knew had a degree in hotel management. He suggested petitioner submit his credentials, which petitioner did. Following a paper-screening of applications, Montagne created his own interview list after reviewing applications with the retiring job incumbent. He narrowed his list to the nine candidates but not all could be scheduled for interview. He reviewed the process with the county supervisor of the Equal Educational Opportunity Office of the county superintendent. During interviews conducted by him, he said, each of which lasted from a half-hour to an hour and half, he used an appraisal evaluation form in general use for supervisory positions, as modified for the particular food service director position being considered. After all of the interviews, and before the meeting of the Personnel and Policy Committee, he ranked all seven candidates in order. He discussed his findings and rankings with the superintendent several times. In his order of ranking, Vera Littell was first and petitioner was fourth. He recalled being questioned at length by the superintendent concerning affirmative action implications in the selection process. J-10b is Vera Littell's appraisal form by Montagne; J-22b is petitioner's appraisal form by Montagne. On petitioner's appraisal form, Montagne noted, he graded petitioner as "fair" under a heading "Appropriateness of background and experience with requirements of position." He was also graded "fair" in personality. He noted specifically petitioner "did not have direct public school food service experience or certification in school lunch." His final grade was "good but not in top three." J-10b, Littell's candidate appraisal form by Montagne, contained the comment "has Sparta experience, knows staff, degree in hotel and restaurant management, holds supervisor's certificate school lunch, certified by New Jersey and American Dietetic Association for Hospital Food Service Director, working dietitian's license, worked as menu coordinator for Meals-on-Wheels." She was graded as one of the best. J-10b. Littell holds the A.A. degree in hotel and restaurant management from Fairleigh Dickinson University in 1955. She holds a school lunch supervisor's certificate and that of Hospital Food Service Director. Her then present food service experience was as food service director from 1980 to the present at

High Point Regional High School. J-10e. She completed the 99-hour dietetic assistant course sponsored by the New Jersey State Department of Health and the New Jersey Department of Education in June 1978. J-10g. She completed School Food Service Management Courses I, II and III in 1978, as sponsored by the State Department of Education, Division of Field Services. J-10h. She is a certified food service supervisor. J-10g.

Montagne advised the Personnel and Policy Committee of his ranking of the four applicants. He informed the Committee petitioner was ranked in only fourth position because of his work experience, which was not recent, and because of its nature which, he felt, was not what the Board should look for. He informed the Committee that he had learned petitioner had instituted suit on discrimination grounds against another district and that they might expect a similar suit should petitioner not be the one selected. Montagne said felt it was his responsibility to inform the Board of that circumstance but, he said, he tried not to use the knowledge that petitioner was black and had had other suits in a negative way. Indeed, he said, he specifically included petitioner as a fourth candidate for presentation to the Committee because petitioner was black and because Montagne thought he should be considered.

Concerning the New Jersey School Food Services Association, Montagne noted it is a recognized professional organization with which he is familiar. The former job incumbent had been a founder of it and was very active at county and state levels. Vera Littell, he said, was also active in it. Petitioner, on the other hand, was not a member and did not appear familiar with its work.

After the Board made its selection and after candidates were notified, Montagne said petitioner called him to ask why he was not selected. Though pleasant at first, he said, petitioner said his experience was good and suggested there were other reasons — race — for his non-selection. Montagne said petitioner told him he, Montagne, was unfair

and if he wanted to play hardball, he would see him in court. Petitioner hung up, Montagne said, denying as petitioner said that Montagne had hung up on him.

Montagne noted he considered petitioner and Littell equal from the standpoint of affirmative action considerations, because of under-utilization in female supervisory categories and because petitioner was a black. He denied his rating of petitioner was in any way based on the fact petitioner had other discrimination suits. On the contrary, he said, he viewed petitioner's experience in food service generally to be superior to that of Littell in food service but not superior to Littell in terms of recent public school food service experience. As to that, he noted again, Littell was then currently employed in food service management in another district.

SUPPLEMENTAL FINDINGS OF FACT

From all of the above, and from having considered proposed findings of fact submitted by the parties, I hereby make the following supplemental findings:

1. Petitioner is a black male;

2. No blacks are currently employed by the Board, and, indeed, no blacks have been employed by the Board since at least 1969 (J-1; III T-73);

3. In 1983, the Board employed a total of 305 persons, of whom 101 were white males, 203 white females, and 1 hispanic female (J-1);

4. Since at least 1978, the Board has not employed in any year more than two persons of racial or ethnic minority (J-1);

5. The successful candidate for the job petitioner sought was a white female, and her predecessor in the job was also a white female;

6. The Board considered the successful candidate to be a "minority" person because she was a female, and, from an affirmative action perspective, she was considered on an equal status with the petitioner (III T-72-73; 83-84);

7. The Board considered a white female to be on an equal affirmative action status with a black male because of its perceived under-utilization of females in administrative positions (II T 90; 115-116; III T 83-84);

8. The position of food service director was considered to be an administrative position, of which there were 11; with the food service director vacancy, the administrative positions were filled by 9 white males and one white female (II T-90; III T-72-73);

9. The Board had an affirmative action program which called for employing females or minorities in areas where they were under-utilized (S-2);

10. Petitioner, by virtue of his education, training, and experience was qualified for the position of food service director (J-22a to f);

11. The Board believed that petitioner's education and training in the food service area was superior to that of the successful candidate (III T-88-89);

12. The Board believed that the basic distinction between petitioner and the successful candidate was that petitioner was not currently employed and did not have a certification as a school lunch supervisor (III T-88-89);

13. The advertisement for the job as food service director did not specify that current experience was needed, nor did it specify that a certification was needed (J-6; 7);

14. The Personnel and Policy Committee of the Board, consisting of four Board members, met in the late Winter or early Spring of 1983 to establish criteria for the position of food service director (II T-125-129);

15. The Committee established three basic criteria:

    (a) A person who was currently employed by a public school as a food service director;

    (b) A person knowledgeable of state and federally regulated programs; and

    (c) A female (II T-128-129; 149; III T-72).

16. The chair of the Committee on personnel wanted a female for the job because of the "majority" of male administrators and because "90 percent of the people in the cafeteria service were women and we wanted to have an administrator that was a woman" (II T-129);

17. The Committee members were made aware, prior to their final decision, of the fact that petitioner had previously filed a race discrimination suit against another school board (II T-144, 152 161-164);

DISCUSSION

It is unlawful discrimination for an employer, and in this case a public school district employer, to refuse to hire or promote because of race. N.J.S.A. 10:5-12(a); N.J.A.C. 6:4-1.1, 1.6(a), (b). Employment discrimination because of race or any other invidious classification is peculiarly repugnant to a free society. See Peper v. Princeton University Bd. of Trustees, 77 N.J. 55, 80 (1978). Acts of employment discrimination are

subtle and difficult to prove, more so, it is said, than any other forms. The higher the job level the more difficult the proof, as matters of personality and the subjective judgment of selectors become determinative. Nevertheless, nothing in the Law against Discrimination may be construed to preclude discrimination among individuals on the basis of competence, performance, conduct or any other reasonable standard or conditions. N.J.S.A. 10:5-2.1 provides:

> Nothing contained in this Act. . .shall be construed to prohibit the establishment and maintenance of bona fide occupational qualifications or the establishment and maintenance of apprenticeship requirements based upon a reasonable minimum age nor to prevent the termination or change of the employment of any person who in the opinion of the employer, reasonably arrived at, is unable to perform adequately the duties of employment, nor to preclude discrimination among individuals on the basis of competence, performance, conduct or any other reasonable standard... [emphasis added].

In disparate treatment cases, therefore, it is a proper judicial inquiry to see whether the failure to promote or employ was the product of a legitimate business consideration rather than proscribed invidious discrimination. Peper, id. at 80-84. And a complainant's burden in such cases includes satisfactory proof of discriminatory motive or intent. Indeed, it is a crucial element in discrimination cases of this nature. See Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 30 (1981).

The order and allocation of proof in a private, non-class action challenging employment discrimination in New Jersey, as under Title VII cases, requires that complainant must carry the burden of establishing a prima facie case of racial discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), quoted in Peper, supra at 82:

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

> . . . Assuming complainant meets these requirements, the burden shifts to respondent to come forward with a legitimate non-discriminatory reason for rejection. If respondent does satisfy the burden, complainant is permitted to come forward with evidence indicating the non-discriminatory reason was no more than a pretext to hide discriminatory activities or was discriminatorily applied. [citations omitted; and see Goodman, supra, at 31-32 of 86 N.J., (but the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff)].

In Kearny Generating System v. Roper, 184 N.J. Super, 253 (App. Div. 1982), it appeared plaintiff applied for a position as utility man with a public utility (PSE & G). Plaintiff, a black, was not selected for the position and another, an Hispanic, was hired instead. Defendant's articulated reason for selecting the latter over plaintiff was that plaintiff had insufficient maintenance experience and that the successful candidate had more such experience and more "hands-on" experience. An affirmative action program in effect at the time had as one of its goals to increase the percentage of minority employees to equal the percentage of minority population in the county in which plaintiff was located. From a decision of the Division on Civil Rights finding unlawful discrimination, the employer appealed. The Appellate Division found the hearing examiner had totally ignored the legal principle that the burden was on plaintiff to prove the asserted reason for hiring the Hispanic was pretextual and that there was in fact intentional racial discrimination. The court said in order to sustain a claim of unlawful discrimination under N.J.S.A. 10:5-12 there must be proof of an intent to discriminate for an unlawful purpose. For instance, said the court, if an employer is presented with a choice between two qualified applicants, selection of the less qualified because of greater experience or personal attributes that enhance the applicant's value to the prospective employer is perfectly valid and permissible. Traditional management prerogatives still have utility. In reversing the administrative agency, the court quoted from Texas

Community Affairs Department v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2nd 207 (1981):

> Title VII prohibits all discrimination in employment based upon race, sex, and national origin. "The broad, overriding interest, shared by employer, employee and consumer is efficient and trustworthy workmanship assured through fair and . . neutral employment and personnel decisions." [citation omitted]. Title VII, however, does not demand that an employer give preferential treatment to minorities or women. . . The statute was not intended to "diminish traditional management prerogatives.". . . It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. [emphasis added; 184 N.J. Super, 261].

The court noted [184 N.J. Super, 261], quoting from Jones v. College of Medicine and Dentistry of New Jersey, Rutgers, 155 N.J. Super, 232 (App. Div. 1977), certif. den. 77 N.J. 482 (1978):

> Discrimination involves the making of choices. The statute does not proscribe all discrimination, but only that which is bottomed upon specifically enumerated partialities and prejudices. Thus, we have held that in discrimination cases an intent to discriminate must be proved. . . Obviously, this means an intent to discriminate for the prohibited purpose charged. [155 N.J. Super, 236].

Petitioner here does not dispute allocations of proof nor does he dispute the ultimate burden is upon him to establish intentional discrimination against him by the Board. He argued, and I agree, that he has established a prima facie case in that he is black, that he applied for and was presumptively qualified for the job advertised and that, despite his qualifications, he was rejected in favor a white female. He argued, nevertheless, the evidence in the record showed preponderately the Board's articulated reasons for not employing him in favor of a white female, Vera Littell, were pretextual and, therefore, unlawfully discriminatory. Specifically, he said, the Board's assertion he

lacked actual experience in the public school food service area, the circumstance the successful candidate was certificated as a school lunch supervisor, which was not a licensure requirement of the State, and the circumstance that the Board had not hired any black in any position for at least 15 years were all conclusive indicia of the Board's intent to discriminate against him. Despite the Board's affirmative action plan design to accelerate the hiring of women and minorities where under-utilization is evident, he argued, white females in general do not enjoy the same status as blacks such as he nor indeed do other racial minorities for affirmative action purposes. The gross disparity in the work force between white females and racial minorities, he said, entitled him to a "preference over white females" for the position in view of his qualifications for the job. In my view, the major thrust of petitioner's argument on the evidence here is precisely that: namely, that he is entitled to a preference for the position as a matter of law on the prima facie evidence adduced. He need not prove, he said, he would have been selected for the job. He need only demonstrate his qualifications for it and that he was discriminated against on the basis of his race. (Petitioner's brief at 13-16).

For its part, the Board argued generally that a person who is a member of a protected group and who appears qualified for hiring or promotion may not be rejected for any reason other than the fact that another qualified individual was selected for non-invidious reasons. Anti-discrimination laws, the Board argued, do not permit courts to make personnel decisions for employers. They simply require an employer's personnel decisions be based on criteria other than those proscribed by law. The Board disputed petitioner's contention that by law he was entitled to preferential treatment and, therefore, an award of the position over an otherwise qualified female applicant. In particular, the Board argued the opinion testimony of petitioner's expert witness was not competent to prove discriminatory intent in its rejection of petitioner. Taken in its most favorable light, the testimony merely tended to establish the relative equality of petitioner's and the successful candidate's educational and/or experiential backgrounds. The witness' preference for petitioner, that is to say, was just that — a preference — and was without legal consequence to petitioner's underlying proof burden.

It is my view that although the parties here would seem to have been in agreement on the general relative equality of petitioner's and the successful candidate's qualifications for the position of food service director, there nevertheless became apparent in the record certain dissimilarites which themselves could be said to have been capable of favoring the successful candidate over petitioner. Thus, while petitioner was possessed of a bachelor's degree in hotel and restaurant management, Littell, the successful candidate, had an associate's degree in the same area. While petitioner had experience in university level food service management and in private restaurant operation, Littell had experience in public school food service management and was at the time of her application then currently employed in that area in another public school. Petitioner, on the hand, in his testimony admitted that he had not had any permanent employment position since 1975. (II T 7-14 to 7-16). And, finally, Littell was certified as a food service administrator and was a member of a professional association of food service professionals of which petitioner had no professed acknowledge. A conclusion that those circumstances constituted legitimate reasons for Littell's preferment, therefore, becomes evident.

In respect of the application and selection process itself, moreover, one finds it difficult to conclude petitioner was discriminatorily treated. Although his original application was screened by the Secretary/business administrator, it was screened with three other applicants and all four were presented to the Personnel and Policy Committee for review and final recommendation to the Board. According to testimony, the usual practice was for the Board to consider three recommended candidates but in this case petitioner's became the fourth. The inference is invited, therefore, petitioner thus received greater consideration than he otherwise might have been accorded. I am unable to conclude from testimony of the witnesses that the Board's fore-knowledge of petitioner's prior record of discrimination litigation, and his ultimate rejection, constituted a deliberate or invidious act of intentional discrimination against him. Such fore-knowledge, I find, cannot be said to have played any demonstrably invidious part in

the selection process: that is, it was but a neutral factor if it was a factor at all. Finally, it is my view the Board's selection of Littell was at least consonant with the Board's professed affirmative action program for increasing employment of minorities and female employees in administrative/supervisory positions in the district. Affirmative action guidelines for treatment of individuals in a protected class require employers not to accord absolute preference to such classes or to subordinate qualified persons in favor of such classes but only to assure minority candidates of fair consideration with all other equally qualified non-minority persons. See Kearny Gen. Syst. v. Roper, supra, 184 N.J. Super, 261-264; and Flanders v. William Paterson College, 163 N.J. Super, 225, 234-5, (App. Div. 1976). Petitioner here has not shown he was accorded any less such consideration.

CONCLUSION

From all of the above, I **CONCLUDE** (1) the Board's selection of Littell over petitioner was for reasonable, articulated, legitimate and non-discriminatory reasons identified and applied in the selection process; (2) the selection process, which resulted in preferment by the Board of a white female over petitioner's candidacy, was a reasonable and allowable discrimination between him and her on the basis of relative competence, performance, education, prior and then present experiential standards, all within criteria of N.J.S.A. 10:5-2.1; (3) petitioner was not entitled as a matter of law to absolute preferential treatment at the hands of the Board simply by reason of the fact of his race; (4) the result of the selection process was consonant with aims and goals of the Board's pre-existing affirmative action program and was not, as petitioner claimed, violative thereof; and, finally, (5) petitioner has failed to sustain his burden of proof that his non-selection was the result of invidious discriminatory intent against him because of his race. As a result, therefore, the petition of appeal herein should be, and it is hereby, **DISMISSED** with **PREJUDICE.**

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

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

December 20, 1984
DATE

James A. Ospenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

12/24/84
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 26 1984
DATE

Ronald L. Parker /phb
FOR OFFICE OF ADMINISTRATIVE LAW

js

EDWARD H. BROWN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA AND ANDRE MONTAGNE, SUSSEX COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

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

Petitioner's exceptions to the initial decision and the Board's reply exceptions were filed pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Petitioner's exceptions to the initial decision are set forth below in pertinent part:

> "***1. The Administrative Law Judge erroneously found that the petitioner was not entitled to a preference over white females (see pages 25-26). It is the petitioner's position that because of the broad disparity in the work force between whites and racial minorities, thus resulting in underutilization of racial minorities, an otherwise qualified racial minority is entitled to a job preference over a white applicant. This preference is necessary in order to achieve proper racial balance of the work force.
>
> In regard to the above argument, it is to be noted that the Administrative Law Judge found as a fact that no blacks have been employed by the respondent since at least 1969 and that, since at least 1978, the respondent has not employed in any year more than two persons of racial or ethnic minority. In 1983, respondent employed a total of 305 persons of whom 203 were white females (see page 20). It is further to be noted that the Administrative Law Judge specifically found that the petitioner herein 'by virtue of his education, training and experience was qualified for the position of food service director.' (see page 21)

2. The Administrative Law Judge erroneously concluded that respondent's preference for a female applicant did not discriminate against petitioner on the basis of his race.

The Administrative Law Judge found as a fact that respondent sought a female for the job in question (see page 22). This preference for a female was patently illegal. Assuming arguendo that a preference for a racial minority would be illegal, as the Administrative Law Judge found, (but see paragraph 1 above), then certainly a preference for a female was illegal. Given the composition of the work force there could be no justification for preferring a female for the job.

Not only was the preference illegal, but it had the result of discriminating against the petitioner since at the time petitioner applied for the job, respondent was predisposed to select a female over a racial minority.***"

(Petitioner's Exceptions, at pp. 1-2)

Conversely, the Board in its reply exceptions rejects petitioner's contentions on the grounds that he was accorded equal access to the vacant position of Food Supervisor pursuant to the applicable provisions of N.J.S.A. 10:5-12(a) as well as N.J.A.C. 6:4-1.6.

Moreover, the Board maintains that petitioner failed to carry his burden of proof that he was denied the position of Food Supervisor because of his race. Finally, the Board points out that two and one-half days of hearings were conducted in this matter at which time the judge had full opportunity to observe and question all of the witnesses concerning all factual allegations presented. On that basis the Board urges the Commissioner to accord full deference to the findings and conclusion reached by the judge in this matter as trier of the facts.

The Commissioner upon review of the factual circumstances giving rise to the matter controverted herein cannot agree with those arguments advanced by petitioner that the Board discriminated against him because of his race in denying him employment as Food Supervisor in the Sparta Township School District.

In affirming the findings and conclusion in the initial decision the Commissioner finds and determines that two of the three criteria established by the Board for the purpose of screening and interviewing candidates for the position of Food Service Director were reasonable (i.e. a person currently employed by a public school as a food service director and a person knowledgeable of state and federally regulated programs).

It is clear that the Board in establishing such criteria for the position of Food Service Director conformed to the legal parameters set forth in N.J.S.A. 10:5-2.1 which provides in pertinent part that:

> "Nothing contained in this act *** shall be construed *** to prohibit the establishment and maintenance of bona fide occupational qualifications or the establishment and maintenance of apprenticeship requirements based upon a reasonable minimum age nor to prevent the termination or change of the employment of any person who in the opinion of the employer, reasonably arrived at, is unable to perform adequately the duties of employment, nor to preclude discrimination among individuals on the basis of competence, performance, conduct or any other reasonable standard***." (Emphasis added).

The Commissioner cannot ignore the fact that the Board, by virtue of its having established as its third criterion that the successful candidate be a woman, was not fully consistent with the declared objective of its affirmative action plan to give priority to both females and minorities. Moreover, the Board's affirmative action plan failed to provide adequate information as to its administrative staffing pattern within the Service/Maintenance category by failing to identify any administrative positions in that category. Such failure resulted in a less than accurate picture of the number of females/minorities employed in such category. In this regard the Commissioner finds and determines that further revision of the Board's affirmative action plan is required. Such revision must be submitted for approval forthwith to the Department's Office of Equal Educational Opportunity.

However, it cannot be concluded by the Commissioner based on the facts of the record before him that it was the intent of the Board to discriminate against petitioner because of his race. The record amply demonstrates that all candidates were granted equal access to apply for the position of Food Service Director and that petitioner was one of the four persons who was considered by the Board's Committee. It is further evident that petitioner, by virtue of his lack of any prior employment experience in a public school food service program, did not possess one of the remaining two prerequisite employment criteria the Board was seeking. Consequently, in the Commissioner's judgment on this basis alone the Board's final selection of Virginia Littell as the successful candidate over petitioner as well as two other candidates (one male and one female) was a proper exercise of its lawful discretionary authority.

Accordingly, for the reasons set forth in the findings and conclusions in the initial decision as supplemented by the Commissioner herein, it is found and determined that the instant Petition of Appeal can be and is hereby dismissed.

FEBRUARY 7, 1985 COMMISSIONER OF EDUCATION

EDWARD H. BROWN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA AND ANDRE MONTAGNE, SUSSEX COUNTY,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, February 7, 1985

For the Petitioner-Appellant, Arthur Penn, Esq.

For the Respondents-Respondents, Schwartz, Pisano and Simon (Nathanya G. Simon, Esq., of Counsel)

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

June 5, 1985

Pending N.J. Superior Court

INITIAL DECISION
OAL DKT. NO. EDU 5553-84
AGENCY DKT. NO. 206-6/84

BARBARA MC ELROY,
Petitioner,
v.
HARDYSTON TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Robert A. Fagella, Esq., for petitioner (Zazzali, Zazzali & Kroll, attorneys)

Paul F. Koch, Esq., for respondent

Record Closed: November 14, 1984 Decided: December 31, 1984

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Barbara McElroy (petitioner), a teacher in the employ of the Hardyston Township Board of Education (Board), challenges a determination made by the Board to withhold a salary and an adjustment increments from her salary for 1984-85. Petitioner alleges the complained of action was taken by the Board without good cause under N.J.S.A. 18A:29-14, that even if the Board had good cause her salary for 1984-85 was improperly established for failure of the Board to establish it at the proper step of the teachers' salary scale and, petitioner alleges, that even if the Board had good cause to withhold her salary increment for 1984-85 and even if her 1984-85 salary is properly established, the Board acted beyond the scope of its authority in its determination to "permanently" withhold the controverted salary and adjustment increments from her. After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a plenary hearing was conducted November 13, 1984 at the Franklin Municipal Building, Sussex County. The record closed November 14, 1984.

BACKGROUND FACTS

Petitioner has been employed by the Board as a teacher of English and Reading for the past 15 years. Her assignments have been at grades six, seven and eight. A.M. Norod has been and is the superintendent of schools since 1979. James Opiekun began employment with the Board as its school principal on or about October 1, 1983. Mr. Opiekun, who had prior experience elsewhere as a vice-principal, succeeded J. Ericson as school principal when Ericson left the Board's employ to accept a superintendency in a neighboring district on or about October 1, 1983. Ericson had been principal with this Board for two years, prior to which he was employed by it as a teacher for 13 years. Each of the three administrators observed and evaluated petitioner's performance as a classroom teacher. Though Ericson's evaluations were prepared prior to 1983-84, he did testify on behalf of petitioner and his testimony shall be discussed later. In respect of the present administrators, Norod and Opiekun, neither administrator recommended to the Board that petitioner's salary increment or adjustment increment be withheld for 1984-85. Such recommendation was made to the Board by Board member Honig, who is the chairman of the Board's evaluation committee. It appears that copies of teachers' observations and evaluations throughout the year are submitted to Honig and his committee. It further appears that that committee then discusses the evaluations with the school administrators.

PROOFS OF THE PARTIES

Following a special meeting[1] conducted by the Board on April 24, 1984 at which it determined " * * * that the step increment and the adjustment guide increment be withheld from Ms. Barbara McElroy's 1984/85 contract on a permanent basis * * *" (J-1, at p. 2), the Board president advised petitioner, in writing, that the reasons for such action were as follows:

1. Failure to show improvement continuously over a period of years.

---

[1] The Board originally determined at a meeting held April 10, 1984 to withhold petitioner's increments. However, because of a procedural error, ostensibly in regard to N.J.S.A. 10:5-4 et seq. the Open Public Meetings Act, the special meeting of April 24 was conducted to correct the procedural defeciency.

2. Failure to develop lessons that provided students the opportunity to develop critical thinking.

3. Failure to attempt and maintain suggestions for improvement as outlined in previous evaluations.

4. Insufficient positive evidence of teaching effectiveness and failure to conduct lessons using appropriate teaching techniques to motivate students.

5. Poor grading procedure, with regard to homework and class assignements in correlation with student assessment.

6. Lack of sufficient classroom management and use of physicial presence to enhance lesson presentation.

7. Lack of proper lesson presentation, with fully developed introduction, body and conclusion.

(J-17)

Formal observations and evaluations prepared by the school administrators upon petitioner's performance, and upon which Honig recommended the withholding action, reveal the following.

During 1983-84, Opiekun observed petitioner on January 10, 1984 and, although Opiekun completed a "Teacher Performance Evaluation" report (J-2) following that observation, a disclaimer that that report is not a performance evaluation is stated on the face of the document. The report consists of one page of numerical ratings, one page of explanation of the numerical ratings and judgments whether petitioner had met earlier established goals and objectives together with perceived continuing needs, and one page of Opiekun's recommendations for improvements.

The report key for the numerical ratings provides as follows: 1 for outstanding, 2 for superior, 3 for competent, 4 for not adequate, and 5 for unsatisfactory. These ratings are assigned three major categories: instructional techniques, classroom

control and management, and professional qualities. Under instructional techniques, 18 areas are rated; under classroom control and management, 13 areas are rated; and under professional qualities, 20 areas are rated. Opiekun did not rate any area under major category professional qualities because he states such areas are "not applicable this report" (J-2). Opiekun rated petitioner's performance in 12 of the 18 areas under instructional techniques as "competent" or a 3 and, he rated four of the 18 areas of petitioner's performance as "not adequate", or a 4. Opiekun judged that two of the 18 areas in respect of petitioner's performance under instructional techniques were not applicable. Under classroom control and management, Opiekun rated one of the 13 areas in this category as "superior", or a 2; nine of the 13 areas were rated by Opiekun as "competent", or a 3; one area was rated "not adequate"; and two areas were rated by Opiekun as not applicable.

In regard to Opiekun's observation of petitioner's progress towards meeting, or failing to meet, or exceeding her established performance goals and objectives, it must be noted that these performance goals and objectives are agreed upon between the affected teacher and her supervisor in an annual performance evaluation prepared the preceding school year. In this case, Mr. Ericson, the former principal whom Opiekun succeeded on October 1, 1983, had prepared petitioner's Teacher's Annual Improvement Plan (J-3) on June 13, 1983 which was to be applicable for 1983-84. Opiekun in his observation report on January 10, 1984 states that he observed petitioner then having the following NEEDS:

Instructional Techniques

> "1 - Assists and holds student (sic) responsible for work 3 -Organizing learning tasks 15 - Balance among subject area with regard to examples relating to lesson 18 - Physical presence with relation to movement about the room and projection of voice

For Classroom Control and Management

> 1 - classroom control is adequate but management techniques need to be reviewed 12 - attends to routine duties promptly

The numbers before each identified need in each of the two major categories correspond to the specific area under each major category of petitioner's performance Opiekun rated as "not adequate." The exception, however, is her classroom control being rated "competent" although Opiekun says petitioner's "management techniques" need to be

"reviewed". Opiekun did write petitioner's use of proper language and correct English as a strength. In regard to Opiekun's recommendations to petitioner to improve her performance, Opiekun lists eight recommendations (J-2, at p.3). Opiekun recommends that petitioner review each pupil's homework first at their desk, then review homework with the class orally; that petitioner should take the time to develop questions around incorrect answers so that all pupils may learn from their mistakes; that petitioner should develop a logical sequence before the lesson rather than depending upon extemperaneous dialogue; that petitioner should review vocabulary words with pupils prior to a reading lesson; that petitioner should involve the entire class in the lesson; that petitioner should move about the entire room; that when petitioner must leave the room she should ensure that pupils have work; and, that each lesson petitioner presents should be brought to some conclusion.

Petitioner's Annual Improvement Plan (J-3) applicable to her for 1983-84, and as agreed to between she and Ericson the preceding June 1983, shows the following "Plan" to have been adopted for petitioner in each of the enumerated areas:

I. In what areas has the teacher [petitioner] shown development and growth in the performance of teaching responsibilities?

[Ericson responds as follows]

1. Uses variety of visual aids
2. Command of subject
3. Presents accurate information
4. Broad knowledge that goes beyond text
5. uses correct English
6. Appropriate class displays
7. Classroom control

II. In what specific areas does the teacher need to demonstrate addition[al] development and growth?

[Ericson's response]

Ms. McElroy has met or exceed all areas at this time.

III. Supervisor's recommendations and suggestions for improvement.

(List recommendations and suggestions)

[Ericson's response]

1. Listen to series of motivational tapes to increase understanding of personal and professional potential.

2. Continue the fine progress in class control.

It is noted that during the 1982-83 year, Ericson had observed and evaluated petitioner's performance on two occasions (J-4; J-5). In neither instance did Ericson rate any of the subcategories to the three major categories as "not adequate". In fact, Ericson rated petitioner's performance in most subareas as "superior." The few areas in which Ericson rated petitioner's performance as "competent" were subsequently determined by Ericson in the Teacher's Annual Improvement Plan to have been sufficiently improved to the degree the merely "competent" areas were no longer an identified need.

Opiekun testified at hearing that the superintendent had earlier directed him to observe and evaluate petitioner's performance in the classroom. It is noted that generally Opiekun's obligation to observe and evaluate teachers in the Board's employ was limited to those teachers assigned fifth grade or below. Petitioner was the only teacher assigned the sixth grade or higher whom Opiekun observed and evaluated. Opiekun explained that though he formally observed petitioner on January 10, 1984 he had been in her classroom prior to that date although he cannot now specifically recall when. Opiekun suggests that he acquired a sense of petitioner's performance by walking around the building during October, November and December of 1983. Opiekun explained that though he did not consider whether or not petitioner's performance was adequate, he did conclude improvement in her performance was needed as indicated above. In regard to the controverted Board action of withholding petitioner's increment, Opiekun testified that the Board did not ask him for his recommendation whether petitioner earned an increment and he did not proffer he Board his opinion whether petitioner earned an increment. After the Board determined to withhold petitioner's salary increments, however, the Board president, whom Opiekun had earlier known prior to his employment with the Board because the Board president was formerly his teacher, directed the superintendent to prepare reasons why the Board withheld the increment. Opiekun testified he assisted the superintendent in that task.

Petitioner and Opiekun did discuss his evaluation subsequent to January 10, 1984. Petitioner testified that Opiekun explained he had difficulty with the numerical rating system on the form and petitioner insists Opiekun did not advise that her performance was unsatisfactory.

Opiekun had one further conference with petitioner and that was on or about April 4, 1984. As shown in Opiekun's "file note" (R-1), that conference was brought about by the following:

> As we [Opiekun and petitioner] discussed on April 4th, an incident was brought to my attention in which you allowed several students to use your grade book to "'help'" compute averages for the marking period in Spelling.
>
> Although you explained to me that this is not usual practice and was the first time you had done this I must confirm my feelings that this action is not acceptable on the basis that it violates the basic confidentiality of the student/teacher relationship. Your grade book is privileged information that should not be divulged to the public.
>
> As I pointed out in the discussion, I expect your immediate co-operation in assuring that this practice does not occur again.

The final communication Opiekun had with petitioner was on or about June 20, 1984, long after the Board acted to withhold her increments, by which Opiekun advised petitioner:

> Thank you very much for assisting us this year through your efforts as grade six coordinator. There were many times when you were asked to do extra tasks that helped my office and the school run smoother.
>
> Have a good summer and I look forward to a productive year.
> (J-18)

Petitioner testified, without contradiction, that when Opiekun learned the Board had withheld her salary increment, he advised her that that action was "not fair" because she had received neither from him, from the superintendent, nor from the Board any notice that her performance was deficient. Petitioner testified, again without contradiction, that Opiekun advised her to appeal the increment withholdings to the Commissioner of Education.

The superintendent, who had been on sick leave for three or four months and had been away from his school duties during January 1984, evaluated petitioner's teaching performance (J-1) on March 20, 1984 using the same Teacher Performance Evaluation report form as used by Opiekun. The superintendent assessed petitioner's performance as superior in three of the 18 subareas under Instructional Techniques; 14 of the 18 areas as "competent"; and one area as "not adequate." Curiously, the superintendent who has been evaluating teachers' performance since 1972 and inferentially has greater skill in such matters, rated petitioner's performance in one subarea of Instructional Techniques superior compared to Opiekun's rating as "not adequate". In other areas of petitioner's performance rated "not adequate" by Opiekun, the superintendent rated those same areas as "competent." The area of petitioner's performance Opiekun rated as "competent", the superintendent rated as "not adequate" after having originally rated that same area as "competent." The superintendent testified the change was made after he discussed the evaluation with petitioner for reasons not disclosed in this record. In the subareas of Classroom Control and Management, the superintendent rated petitioner's performance as "superior" in four of the 13 areas to be rated and "competent" in the nine remaining areas. In the third major category of "Professional Qualities" not rated by Opiekun, the superintendent rated petitioner's performance as superior in five of the 20 areas; "competent" in 14 of the 20 areas; and, "not adequate" in the area of "contributes to committee work and faculty meetings" (J-1). Recall that Opiekun expressed his appreciation on June 20, 1984 (J-18) to petitioner for her efforts as "grade six coordinator" and for the "extra tasks that helped [his] office and the school run smoother." No explication is in this record in regard to the basis upon which the superintendent concludes that petitioner's performance with respect to committee work and faculty meetings is "not adequate".

The superintendent, in the narrative portion of his evaluation on March 20, 1984, states that the identified NEEDS of petitioner's performance presumably as perceived by Opiekun were met in regard to her holding students responsible for their work and for organizing learning tasks. The superintendent then notes that petitioner has also met the objectives of lesson planning, the use of daily lesson plans, the acquisition of a command the of the subject being taught, and the presentation of accurate information to pupils. In the category of Classroom Control and Managment, the superintendent states that petitioner met Opiekun's observed need to improve attending to routine duties promptly. The superintendent, however, also notes that petitioner met the objective of

holding students responsible for school property, for assuming responsibility for the care of materials, equipment and the classroom, and her use of proper language and correct English. Curiously, the superintendent's view that petitioner met those objectives is not supported by competent evidence in this record that those areas of petitioner's performance were considered deficient. Finally, the superintendent, in regard to "* * * specific areas * * * the teacher need[s] to demonstrate additional development and growth", states as follows:

1. Need to provide for individual differences
2. Lesson presentation and conclusion
3. Motivational techniques to develop critical thinking
4. Use a variety of teaching techniques in student activities
5. Use a variety of audio-visual aids and other teaching aids

(J-1, at p. 2)

The superintendent recommended the following suggestions to petitioner to improve her performance:

1. May I suggest you set up an assignment corner on your chalkboard
2. Why not require your students to have notebooks to take down important information.

Though petitioner admits receiving a copy of the superintendent's evaluation of her performance, petitioner claims that he did not discuss the evaluation with her until after the Board withheld her increment. The superintendent explained that when he completed his evaluation of her performance on March 20, 1984 he placed it in her mailbox and that she then had the obligation to arrange a conference with him, through his secretary, to discuss the matter. Because petitioner failed in that obligation, the evaluation was not discussed until a time after the Board acted to withhold her increment.

In the superintendent's view, petitioner's performance is, as he says, "up and down". The superintendent explained that on a prior occasion petitioner was summoned by the Board to discuss her performance and was then advised that her performance must be improved. That advice, however, was given by the Board to petitioner on April 8, 1980 (R-3). The minutes of that executive session show that Honig was then the Board

president. The minutes inferentially show that superintendent Norod recommended to the Board that it withhold petitioner's salary increment for 1981-82. However, the Board did not adopt that recommendation because the minutes show that

> Mr. Honig told Ms. McElroy that after hearing Mr. Norod's recommendations that she could either respond at once or she could send the board a written response. Mr. Norod went over Ms. McElroy's performance which it was felt was inadequate and stated that a possible increment might take place in the 81/82 school year * * *
>
> (R-3)

This meeting in April 1980, 4 years prior to the date of the controverted Board action, is the only time an increment withholding was ever mentioned to petitioner.

Whatever deficiencies may have existed in 1979-80 regarding petitioner's performance were corrected as of June 30, 1983 according to Ericson evaluations of petitioner's performance and the agreed upon Annual Improvement Plan (J-3) for 1983-84.

Mr. Honig, who has been a Board member since 1971, testified that as chairman of the Board's evaluation committee, he has the obligation, along with his committee members, to review teachers' evaluations in order to counsel the Board at contract renewal time. In addition to Honig's experience with petitioner in 1980 regarding her performance, Mr. Honig explained that one of his children was assigned petitioner's classroom some years ago. Honig explained that at open house he discovered that petitioner intended to assign no term papers because, he says, she claimed they were "too much of a hassle." In Mr. Honig's view, term papers in an English class are significant writings. Mr. Honig explained he did prevail upon petitioner to change her view and that she subsequently did, as his daughter's teacher, assign major writing exercises to the class.

In respect of the present controverted increment withholding action, Honig testified that neither administrator recommended to the Board that petitioner's salary increment be withheld. Consequently, Mr. Honig says he "took the bull by the horns" and made that recommendation himself. Mr. Honig explained that as chairman of the Board's evaluation committee, he reviewed all of petitioner's evaluations over the years since 1979 and concluded that petitioner experienced and was continuing to experience the following deficiencies:

1. Severe discipline problems which, he says date back as far as 1974;

2. A lack of class control;

3. Deficient lesson plans which, in turn leads, he says, to a need for petitioner to make her classroom presentations more orderly;

4. A deficient instructional technique; and

5. Petitioner's tolerance of pupil's grading their own papers.

Furthermore, Honig also testified that because the principal and the superintendent during 1983-84 had many counselling sessions with petitioner to determine if improvement was made, he is of the view that petitioner's performance did not improve during 1983-84 and that good cause exists to withhold her increments. Note that there is no independent evidence from either Opiekun or from the superintendent that such counselling sessions were held by either or both persons throughout 1983-84 with petitioner in regard to her performance. The only evidence of record which exists to establish that petitioner met with either Opiekun or the superintendent is the post observation conference petitioner had with Opiekun and a conference petitioner had with the superintendent after the Board determined to withhold her salary increments.

Evaluations of petitioner's performance, in evidence, prior to the 1982-83 year, each of which contain a numerical rating system, though in modified form from the present numerical system, show petitioner had been rated, for the most part, as a competent teacher (J-6; J-8; J-10; J-11; J-14; J-15; J-16). While some subareas of major categories were rated "not adequate" on occasion[2], each evaluation reflects a majority of superior and competent ratings on each such form dating back to November 30, 1979.

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[2] In November 1979, petitioner was rated as "not adequate" in organization and preparation and in the use of good judgment (J-16). During March 1980, petitioner was rated as "not adequate" in instructional methods, organization and preparation, classroom appearance, participation in co-curricular activities and her contribution to parent-teacher activities (J-15). However, petitioner was simultaneously rated "superior" in professional growth, punctuality, and in her knowledge of her subject area. The second evaluation during March 1980 reflects no ratings of "not adequate". In fact, petitioner received several "superior" ratings on this occasion (J-14). During November 1980 petitioner did not receive any "not adequate" ratings. To the contrary, the numbers of "superior" ratings she received dramatically increased (J-11). During March 1981, petitioner's "superior" ratings continued and without "not adequate" ratings (J-10). During December 1981 petitioner received a "not adequate" rating in student activities and in classroom appearance (J-8). Most other areas rated during December 1981 by superintendent Norod received a "competent" rating. During March 1982, superintenden Norod did not rate any area as "not adequate". Rather, he did rate eight areas as "superior" and 22 areas as "competent."

Petitioner testified that with respect to Norod's criticism that her contribution to committee work and faculty meetings was not adequate, she was a volunteer member of the school's text book selection committee, she was a participant, by the superintendent's appointment, to the English curriculum development committee, and that she also participated on another school committee. Petitioner explained that at no time during 1983-84 was she ever advised that her performance needed improvement as against her then existing Annual Improvement Plan as prepared by her and Ericson. Petitioner explains she was not so advised by either Opiekun, the superintendent, or by the Board.

In regard to the reasons afforded her by the Board for its controverted withholding action, petitioner testified that she received no notice that the Board was to discuss the withholding of her increment on April 10, 1984. Rather, petitioner explained it was the president of the association who happened to be at that meeting who advised her of the Board's action. In this regard, petitioner testified that the superintendent, though he knew of the action taken by the Board on April 10, refused to discuss the matter with her. Recall that it was after April 10 that the superintendent and petitioner discussed his evaluation of her performance. In regard to the specific reasons given her by the Board, the reasons were not discussed with her on April 24, 1984 when the Board corrected its earlier action on April 10. Rather, petitioner explained that the Board went into executive session and she was not allowed to participate in that session until the Board and the administrators were finished. Petitioner recalls that no mention was made at that time of her prior evalutions by either the Board or by the administrators. Finally, when petitioner was invited to speak to the Board she refused because she felt she was "set up".

Petitioner, in respect of the reasons, testified that her asserted failure to show improvements continuously over a period of years is not supported by the record. Petitioner maintains that no one ever told her her performance was deficient and she relied on her evaluations in this regard. In regard to the second stated reason, her failure to develop lesson plans, petitioner explains that no one ever mentioned that criticism to her on a prior occasion. Furthermore, petitioner explains that a teacher simply cannot put everything they do into a plan book and that it is improper and unfair for the administrators to rate her performance based on one 40 minute observation. In regard to the third stated reason, her failure to attempt and maintain suggestions for improvement, petitioner testified she has no idea what that means. Petitioner explains she has no basis to know what the fourth stated reason addresses because the results of her pupil test

scores on the minimum basis skills tests were all high. In this regard, petitioner testified that even superintendent Norod complimented her on her pupils' achievements. In regard to her asserted poor grading procedure, petitioner points to the absence of such criticism in her prior evaluations. Petitioner did not respond to the sixth stated reason, perhaps through oversight, but in regard to reason seven, petitioner says that frequently neither the principal nor the superintendent, whenever they do evaluate her performance, are not in her class at the beginning or at the end of each class. Consequently, petitioner says they cannot observe the introduction or the conclusion to any lessons she presents.

Petitioner produced copies of audio-visual film orders she submitted for use in her classroom (P-2) which shows that several films were, in fact, ordered by petitioner from the Sussex County Audio-Visual Film Commission for use after March 1984.

The foregoing proofs are not in serious dispute between the parties and, consequently, I **FIND** the foregoing to constitute the facts of the matter. In addition, the following specific facts are found:

1. During April 1980, the Board advised petitioner it was displeased with her performance and that unless improvement was made it would withhold the 1981-82 salary increments from her.

2. Petitioner did, in fact, improve her performance thereafter according to the evaluations of Ericson and, inferentially, by the fact that the Board did not withhold salary increments from her in 1981-82.

3. Ericson's Annual Improvement Plan (J-3), agreed to by him and petitioner, which was applicable to petitioner for 1983-84, shows no areas of petitioner's performance in need of improvement. The single recommendation made was for petitioner to "Listen to series of motivational tapes * * *".

4. The Board, or at least its evaluation committee according to Honig's testimony, had knowledge of Ericson's 1983-84 Annual Improvement Plan for petitioner and, through silence, accepted that plan.

5. Though Opiekun became principal on October 1, 1983 and was instructed by the superintendent to evaluate the performance of petitioner, he did

not observe her until January 10, 1984. Moreover, Opiekun's observation report which followed is specifically disclaimed by him to be an "evaluation" of petitioner's performance. Again, the Board, through its evaluation committee, had knowledge of such disclaimer and, through silence, accepted Opiekun's observation not to be his evaluation of the merit of petitioner's performance.

6. If Opiekun's observation report can be considered an evaluation of petitioner's performance, then it must be said that Opiekun discovered deficiencies not perceived by Ericson nor by Norod, at least in writing, during the preceding 1982-83 year.

7. If Opiekun's observation is an evaluation of petitioner's performance and if deficiencies were then brought to petitioner's attention for the first time since June 1983, Opiekun did not observe petitioner's performance after January 10, 1984 to determine if progress had been made.

8. When the Board met first on April 10 then on April 24, 1984 and acted to withhold petitioner's salary and adjustment increments, the documents it had before it related to petitioner's performance in 1983-84 were Opiekun's observation/evaluation based on one 40-minute in-class observation, the superintendent's evaluation, and prior evaluations of petitioner's performance going back to 1979.

9. Petitioner's use of students to average grades on April 4 is, according to the evidence of record, the only instance of possible poor judgment by petitioner in her 15 years of employment with the Board. And, it should be pointed out, that that incident is not shown to be poor judgment by petitioner by a preponderance of credible evidence.

10. Without regard to the administrators' perception of petitioner's performance, Board member Honig determined that petitioner's performance "over the years" did not warrant a salary increase in 1984-85 and he persuaded the Board to his point of view.

11. After the Board determined to withhold petitioner's salary increments, it directed the superintendent to prepare the reasons why it took such action, which he did, and the Board president signed the statement of reasons as the Board's reasons.

LAW

N.J.S.A. 18A:29-8 provides:

> Any member holding office, position or employment in any school district of this state shall be entitled annually to an employment increment until he shall have reached the maximum salary provided in the appropriate training level column in the preceding section.

In this case, there is no dispute that petitioner is a "member holding office, position or employment" in the Board's school district. Nor is there a dispute present here that petitioner has not reached the maximum salary provided in the appropriate training level column of the Board's salary policy. Nonetheless, petitioner's entitlement to a salary increase under N.J.S.A. 18A:29-8, and under the Board's salary policy, is subject to denial by the Board by virtue of its authority at N.J.S.A. 18A:29-14 which provides:

> Any board of education may withhold, for inefficiency or other just cause, the employment increment, or the adjustment increment, or both, of any member in any year by a majority vote of all the members of the board of education * * *

When a member, or teacher, has had a salary or adjustment increment withheld by the employing board, and that teacher appeals to the Commissioner, the standard of review to be applied in such appeal is as stated in Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 296-297 (App. Div. 1960) which is:

> [S]ince the proceeding before the Commissioner was the first "'hearing'" afforded [the teacher] of the type specified * * *, we think the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving unreasonableness is upon the appellant * * *

It must be remembered that an annual salary increment is in the nature of a reward for meritorious service to the school district. Board of Educ. of Bernards Tp. v. Bernards Tp. Educ. Ass'n, 79 N.J. 311, 321 (1979). An adjustment increment occurs when the board and the local association negotiate higher rates of pay at specific steps of the salary policies. In this case, petitioner not only had her step increment withheld, but she also was retained at the former rate of pay called for at her appropriate step as opposed to the higher negotiated rate of pay at that same step. That salary increments must be earned, as opposed to being automatic, was clearly established by the New Jersey Supreme Court in North Plainfield Educ. Ass'n v. Bd. of Educ., 96 N.J. 587 (1984).

Petitioner may, of course, demonstrate that the Board's action to withhold her salary and adjustment increments for 1984-85 is unreasonable by showing that 'the underlying facts' were not as those who made the evaluation claimed and that it was not reasonable for the Board to conclude as it did upon those facts that she did not earn the controverted increment. In this regard, it is well to note that boards of education are required by administrative regulations to provide for the annual evaluation of all tenured teaching staff members. N.J.A.C. 6:3-1.21 et seq. The stated purposes of annual evaluations of a teacher's performance include:

1. Promote professional excellence and improve the skills of teaching staff members;
2. Improve pupil learning and growth;
3. Provide a basis for the review of performance of tenured teaching staff members.

N.J.A.C. 6:3-1.21(b)

DISCUSSION AND CONCLUSION

The question which must be addressed, then, is whether the evidence of record discloses the Board had a reasonable basis upon which to determine to withhold petitioner's salary increments for the reasons stated in its letter to her (J-17). In light of the fact Ericson, with at least the tacit approval of the Board and of the superintendent, prepared an annual evaluation of petitioner's performance in June 1983 which found no areas in need of improvement, and in light of the fact that between September through January no administrator visited petitioner's classroom to observe her performance, nor is there anything in this record to disclose any untoward incident surrounding petitioner

during that same period of time, I must **CONCLUDE** that petitioner's performance between at least September through January 10, 1984 was acceptable to the Board. By virtue of the Board's own agent, Opiekun, disclaiming his observation report is, in fact, an evaluation, no evaluation of petitioner's performance, as a tenured teaching staff member, was done throughout the course of the 1983-84 year until March 20, 1984 by the superintendent. Thus, the Board, to at least March 20, had no basis to find petitioner's performance was not meritorious.

The superintendent, in his evaluation of petitioner's performance, articulates perceived deficiencies of her performance in, at best, a cryptic fashion (J-1, at p. 2). The suggestions proffered by the superintendent to petitioner to improve her performance including setting up an assignment corner on the chalkboard and requiring students to have notebooks to take down important information is, in reality, not related to the noted deficiencies which can be at best only inferred from the superintendent's total evaluation. Furthermore, while the Board, in its statement of reasons to withhold the increment, lists petitioner's asserted failure to develop lesson plans, the superintendent states in his evaluation that petitioner met the objective of lesson planning. If petitioner met the objective of lesson planning, then the Board's third stated reasons of withholding the increment - a failure to attempt and maintain suggestions for improvement - is invalid. There is nothing in the superintendent's evaluation, nor is there is explication in the Board's statement of reasons, as to what it means by its fourth stated reason of "Insufficient positive evidence of teaching effectiveness* * *". Though Opiekun made a recommendation with respect to an improved way to handle homework review in the classroom as that relates to the Board's fifth stated reason, there is no evidence that petitioner did not comply with that recommendation by Opiekun. In regard to the Board's asserted lack of sufficient classroom management by petitioner, there is simply no evidence in this record to show the basis upon which the Board arrived at that finding. Neither the superintendent's evaluation, nor the evaluation of Opiekun, of petitioner's performance demonstrates a basis upon which the Board could conclude petitioner did not control her classroom. Finally, in regard to the lack of proper lesson presentation, the evidence is nonexistent that petitioner did not, in fact, properly present her lessons. While the Board need not prove the truth of each reason by a preponderance of credible evidence as it must in a tenure removal proceeding, it surely must demonstrate some basis for its stated reasons. Kopera, supra.

Board member Honig's conclusion that petitioner did not merit a salary increase is, I **FIND**, based not on her performance for 1983-84 but on his recollections of

her prior performance dating back to the days when one of his children was in her classroom and a dispute arose over term paper assignments. That dispute was heightened in 1980 when Board member Honig was Board president and petitioner was called before the Board because of asserted deficient performance. Even if petitioner's performance was deficient in 1980, the evidence in this record discloses that, according to the professional evaluators of her performance her performance did, in fact, improve over the succeeding years to the extent that deficiencies did not exist as of June 30, 1983. Recently, the Commissioner ruled that a board of education may not withhold salary increments from teaching staff members for conduct committed, and by extension for performance, in prior years. Borrelli v. Bd. of Ed. of Rutherford, 1983 S.L.D. ____ (Sept. 26, 1983).

When Opiekun observed petitioner on January 10, 1984 it is presumed here he had benefit of the contents of Ericson's annual improvement plan. If he did observe the deficiencies set forth in her performance evaluation on January 10, 1984 basic fairness dictates that he would so advise petitioner of those precise deficiencies and at least return to her classroom from time to time in the following months to see if his suggestions for improvement were being implemented by petitioner. While a teacher is not entitled to advance notice that an increment may be withheld unless performance improves, the absence of further observations of petitioner's teaching performance by Opiekun after January 10, 1984 leads me to conclude that whatever deficiencies he believes he may have observed that date cannot now be considered real deficiencies due to the absence of followup observations by him. In light of the total record of this matter, I cannot find, nor can I conclude, that the Board had good cause, as required by N.J.S.A. 18A:29-14 or as defined in Kopera, supra. to withhold either petitioner's salary or adjustment increments. Consequently, the action of the Board to withhold petitioner's salary and adjustment increments for 1984-85 is **REVERSED.**

Even if good cause existed to withhold petitioner's increments for 1984-85, this Board, being a noncontinuous body, cannot bind future boards in regard to a determination whether to bring petitioner to the step she would have been paid, but for the present withholding action, by way of adjustment increments. In regard to petitioner's argument that she must be paid according to the higher negotiated step of the salary policy, even if the increment withholding was valid, such position is clearly contrary to the authority granted boards of education at N.J.S.A. 18A:29-14. A board may withhold a

salary increment, adjustment increment, or both so long as inefficiency or good cause exists. Finally, in regard to petitioner's argument that all board members must be present at the meeting at which a salary or adjustment increment is withheld, such position is contrary to the statute. Increments may be withheld by a majority vote of the full membership of the Board.

In view of the foregoing, the Board of Education of Hardyston is directed to restore to Barbara McElroy the salary and adjustment increments it has withheld from her for 1984-85. The Board is further directed to tender to Barbara McElroy retroactive payments which reflect that amount of money she should have received had the Board not improperly withheld her salary increments.

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

December 30, 1984
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

12/31/84
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

JAN 03 1985
DATE

Mailed To Parties:

Ronald J. Parker ekb
OFFICE OF ADMINISTRATIVE LAW

ij

BARBARA MC ELROY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HARDYSTON, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision have been reviewed. Exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

The Board, in primary exceptions, in main offers correction to alleged errors of certain components of the decision by the judge. Further, the Board disclaims any importance of the prior relationship of the newly hired principal (October 1, 1983) and Honig, the former Board President. Lastly, the Board contends that petitioner was evaluated over the years prior to the 1983-84 school year for a teaching period covering both the beginning and end of the class.

Petitioner in reply to the exceptions of the Board affirms the decision of the judge that the Board did not have good cause for its action to withhold her increment as determined by N.J.S.A. 18A:29-14, nor as determined by the standard of review stated in Kopera, supra. Lastly, petitioner submits her entitlement to interest on any salary due her pursuant to Board of Education of the City of Newark v. Levitt and Sasloe, 197 N.J. Super. 239 (App. Div. 1984).

In Sellers v. Board of Education of East Orange, decided by the Commissioner January 26, 1983, it was determined that a board of education is free to take independent action on the withholding of a staff member's increment regardless of the recommendation of a supervisor to grant such increment, provided a factual basis existed for the withholding. Although the factual circumstances of that case and the instant matter differ, Sellers is relevant because it establishes that a board's action to withhold an increment need not arise from supervisory or administrative personnel. In Sellers, the board chose to consider information acquired through sources other than evaluation reports, information which was found to constitute sufficient factual basis for the action to withhold the increment.

In the instant matter, while the determination to withhold petitioner's increment emanated from the Board itself rather than from the superintendent or principal, the basis for its recommendation was evaluation reports; therefore, the pivotal issue to be determined is whether or not the Board's action had sufficient factual basis to warrant a presumption of correctness. Kopera, supra

Upon a careful review of the record as well as the evaluation reports and improvement plans, in particular J-1 to J-16, the Commissioner is in agreement with the conclusion of the Office of Administrative Law that, in light of the record, the Board did not have good cause as required by N.J.S.A. 18A:29-14 or as defined in Kopera to withhold petitioner's salary or adjustment increments for the following reasons.

For the two reports developed as a result of observations conducted during 1983-84 petitioner received no unsatisfactory ratings. (J-1; J-2) The vast majority of the factors rated indicated competent performance. Thirteen of the factors on the second observation (J-1) were rated as superior. Of the 5 factors which yielded a rating of 4/Performance Not Adequate (versus key number 5/Performance Unsatisfactory) for the January 10, 1984 observation, petitioner received a rating of superior on one factor and a rating of competent on the other three factors at the time of the second observation on March 20, 1984. Of the two factors which received a rating of 4/Performance Not Adequate on this later evaluation report, one factor which has appeared on the evaluation form since November, 1982 had been rated as competent or superior each time (J-2 to J-5) while the other factor was rated as competent for each of the nine times it was assessed. (J-4 to J-6; J-8; J-10; J-11; J-14 to J-16)

Therefore, the Commissioner adopts the recommendation of the Office of Administrative Law reversing the withholding of petitioner's salary and adjustment increments for 1984-85 as the final decision in this matter.

With respect to the issue of pre-judgment interest, it is the determination of the Commissioner that such an award is not warranted in the instant matter. As the Appellate Court articulated in the Levitt and Sasloe decision:

> "***Pre-judgment interest is in contemplation of law 'damages' for the illegal detention of a legitimate claim or indebtedness. *** It therefore serves to 'indemnify the claimant for the loss of what the monies due him would presumably have earned if payment had not been delayed.' [cite omitted]***"
>
> (197 N.J. Super. at 246)

The Board herein did not act illegally; on the contrary, it took the action to withhold petitioner's increment pursuant to the statutory authority granted by N.J.S.A. 18A:29-14. While the Commissioner has determined that the Board erred in its belief that it had a sufficient factual basis to so act, there has been no showing of bad faith. Consequently, the request for pre-judgment interest is denied.

FEBRUARY 14, 1985 COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

PETER FISCHBACH,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN,

Respondent

OAL DKT. NO. EDU 2691-84

AGENCY DKT. NO. 45-2/84

RAYMOND P. FARLEY,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN,

Respondent

OAL DKT. NO. EDU 2727-84

AGENCY DKT. NO. 54-3/84

LEO GATTONI, JR.,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN,

Respondent

OAL DKT. NO. EDU 2728-84

AGENCY DKT. NO. 56-3/84

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

John B. Prior, Jr., Esq., for petitioner Farley
(Greenberg Kelley & Prior, attorneys)

Bruce D. Leder, Esq., for petitioner Gattoni
(Schneider, Cohen & Solomon, attorneys)

David F. Lyttle, Esq., for the Board
(Giblin & Giblin, attorneys)

OAL DKT. NO. EDU 2691-84
OAL DKT. NO. EDU 2727-84
OAL DKT. NO. EDU 2728-84

Record Closed: November 29, 1984 Decided: December 28, 1984

BEFORE **WARD R. YOUNG**, ALJ:

Fischbach, a tenured assistant superintendent, alleged the action of the North Bergen Board of Education (Board), in abolishing the position of Assistant Superintendent, was designed to deny him reinstatement to said position pursuant to the Order of the Commissioner of Education, and was in bad faith, an abuse of its discretionary authority, and therefore arbitrary. He seeks to have said action set aside and reinstatement to the position pursuant to the Commissioner's Order, or in the alternative, to be placed in the newly created position of Supervisor of Instruction.

Farley, a tenured high school principal, alleged his transfer from that position to the newly created position of Supervisor of Instruction was without his consent, and therefore in violation of his statutory right. He seeks reinstatement to his position as high school principal.

Gattoni, a tenured assistant superintendent, alleged the action of the Board in abolishing the position of Assistant Superintendent held by him was in bad faith, an abuse of its discretionary authority, and therefore arbitrary. He seeks reinstatement to that position, or in the alternative assignment to the position of Supervisor of Instruction.

The three petitioners also jointly alleged the scenario in these disputes evolved as political machinations were created to reward one Raymond Dalton, a high school vice-principal, for his support of newly elected governmental officials by his promotion to the position of high school principal. Said position was vacated by the Board's transfer of Farley.

The Board denies all allegations and asserts its actions were motivated by economy and administrative restructuring to place greater emphasis on instruction.

The matters were transmitted to the Office of Administrative law as contested cases pursuant to N.J.S.A. 52:14F-1 et seq. and were preheard on June 22, 1984. They were consolidated on Motion of the undersigned pursuant to N.J.A.C. 1:1-3.9 and N.J.A.C. 1:1-14.1(a). A plenary hearing was held on August 28, 29, 30 and 31, 1984 at the Office of Administrative Law, Newark. Extension for submissions of post-hearing briefs was granted by Order of the Honorable Ronald I. Parker, A.L.J. and Acting Director of the Office of Administrative Law, and the record closed on November 29, 1984, the date established for final submissions.

The issues incorporated in the Prehearing Order entered on June 22, 1984 are as follows:

1. Shall default judgment be granted to Fischbach due to respondent's alleged failure to file a timely Answer?

2. Was the abolishment of the position of Assistant Superintendent and the creation of the position of Supervisor of Instruction more than a change of title, or was said Board actions an abuse of its discretionary authority?

3. If the Board's abolishment action is set aside, is Fischbach entitled to hold the position of Assistant Superintendent by virtue of a previous Order of the Commissioner?

4. If the Board's abolishment action is upheld, is Fischbach entitled to hold the position of Supervisor of Instruction by virtue of his tenure and seniority rights?

5. If the Board's action in creating the position of Supervisor of Instruction is upheld, is Gattoni entitled to hold the position?

6. Were the Board's actions incorporated in Issue No. 2 and the reassignment of Gattoni from his position as Assistant Superintendent to that of principal arbitrary, capricious, and/or in bad faith?

7. Was the reassignment of Farley from principal to Supervisor of Instruction nonconsensual and in violation of his statutory rights of tenure and seniority?

8. Is the Board entitled to a counterclaim recoupment judgment of alleged overpayments made to Fischbach when he held the position of School Administrator and the certificate held for same was revoked, or shall said counterclaim be dismissed due to laches, a violation of N.J.A.C. 6:24-1.2, N.J.S.A. 2A:14-1, the doctrines of entire controversy and/or unclean hands, estoppel, contributory negligence, res judicata, collateral estoppel, mootness, failure to state a cause of action, and/or failure to comply with N.J.A.C. 6:24-1.3(c)?

A Decision on Motion entered on July 16, 1984 disposed of issues No. 1 and No. 8. A Motion for Default Judgment by Fischbach was DENIED (issue No. 1) and the Board's Counterclaim was DISMISSED (issue No. 8).

An Order for Partial Transfer was entered by the Honorable Ken R. Springer, A.L.J., on August 1, 1984 in Fischbach v. North Bergen Bd. of Ed. (OAL DKT. NO. EDU 4678-84, AGY. DKT. NO. 153-5/84), which transferred Fischbach's claim to salary entitlements for the 1983-84 school year to the instant matter. That issue reads: "What amount of back pay, if any, is due and owing for the period from August 26, 1983 award?"

The following relevant facts were stipulated by the parties and are adopted herein as FINDINGS OF FACT:

1. Exhibits J-1 through J-25 (J-4 excluded) are evidentiary documents. See addendum.

2. Fischbach received base salaries of $32,722 and $35,311 in 1982-83 and 1983-84, respectively.

3. Gattoni received base salaries of $45,340 and $44,650 in 1982-83 and 1983-84, respectively.

4. Farley received a base salary of $43,527 in 1982-83, and was compensated in 1983-84 at a prorated annual salary of $44,460 from July 1, 1983 through December 31, 1983 and at the annual rate of $44,750 from January 1, 1984 through June 30, 1984.

The following FINDINGS OF FACT result from a review of evidentiary documents:

1. Fischbach, Gattoni and Farley all hold valid certificates for positions held and/or claimed. See J-3, J-5, J-6 and J-7.

2. Fischbach is tenured in the position of assistant superintendent, and was reinstated to that position with differentiated back pay pursuant to Fischbach v. North Bergen Bd. of Ed. 1983 S.L.D. ____ (decided December 29, 1983), aff'd State Board of Education, 1984 S.L.D. ____ (July 11, 1984). See J-23.

3. Gattoni is tenured in the position of assistant superintendent. N.J.S.A. 18A:28-6. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 81. See J-9.

4. Farley is tenured in the position of high school principal. N.J.S.A. 18A:28-6. Spiewak, supra. See J-10.

5. The Board abolished the position of Assistant Superintendent for Personnel and Curriculum at its August 25, 1983 special meeting, effective immediately "in order to effectuate economy and a better administrative structure" . . . . See J-11, Resolution No. 57.

6. The Board assigned Gattoni as principal of the Robert Fulton School at its August 25, 1983 special meeting, effective immediately. See J-11, Resolution No. 58.

7. The Board created the position of Supervisor of Instruction and adopted a job description at its November 22, 1983 special meeting, and authorized the Superintendent "to post the position in the North Bergen School System" and "to advertise for the position if he deems that an insufficient number of applications has been received." See J-12, Resolution No. 18.

8. Gattoni filed a letter of application with the Superintendent of Schools for the position of Supervisor of Instruction under date of November 23, 1983. See J-19.

9. The Board amended the job description for the position of supervisor of instruction at its December 22, 1983 special meeting to state: "The Supervisor of Instruction shall be directly responsible to the Superintendent of Schools, for the above defined areas. PRIOR TO THE IMPLEMENTATION OF ANY AND ALL PROGRAMS and instructional development THESE shall be approved by the Superintendent." See J-13, Resolution No. 1.

10. The Board promoted and appointed Farley to the position of Supervisor of Instruction at its December 22, 1983 special meeting, effective December 23, 1983 upon the recommendation of the Superintendent. See J-13, Resolution No. 34.

11. The Board appointed Raymond F. Dalton, acting principal of the North Bergen High School, effective December 23, 1983, as recommended by the Superintendent at its December 22, 1983 special meeting. Authorization to post the vacancy for the position of high school principal was also granted to the Superintendent. See J-13, Resolution No. 35.

12. The Board transferred Robert J. Dandorph from the position of vice-principal of Robert Fulton School to the position of acting vice-principal of the high school, effective December 23, 1983, as recommended by the Superintendent at its Decenber 22, 1983 special meeting. Authorization to post the vacancy for the position of vice-principal of the high school was also approved. See J-13, Resolution No. 36.

13. The Hudson County Superintendent of Schools advised the North Bergen Superintendent in a letter under date of November 21, 1983 "that the job description and performance responsibilities for Supervisor of Instruction appear to be in order based upon our review." See J-20.

The issues in these controverted matters will be addressed in seriatim as they appear in the Prehearing Order to determine FINDING OF FACT.

WAS THE ABOLISHMENT OF THE POSITION OF ASSISTANT SUPERINTENDENT (PERSONNEL AND CURRICULUM) AND THE CREATION OF THE POSITION OF SUPERVISOR OF INSTRUCTION MORE THAN A CHANGE OF TITLE, OR WAS SAID BOARD ACTION AN ABUSE OF ITS DISCRETIONARY AUTHORITY?

It is not disputed that the action of the Board in abolishing the position of Assistant Superintendent resulted in the transfer of Gattoni from that position to principal of the Fulton school, as well as the denial of Fischbach's reinstatement to the position as ordered by the Commissioner of Education. See J-23. It is also not disputed that the action of the Board in creating the position of Supervisor of Instruction resulted in the transfer of Farley to that position from his tenured position of high school principal; the transfer of Dalton from his position as vice-principal of the high school to acting high school principal; and the transfer of Dandorph from his position as vice-principal of Fulton to acting vice-principal of the high school.

The authority of the Board to "Perform all acts and do all things, consistent with law . . ." pursuant to N.J.S.A. 18A:11-1 is likewise undisputed. It is also recognized that Board actions are granted the presumption of correctness (citations omitted). The aforementioned actions of the Board are challenged for their unlawfulness based on alleged bad faith, and the burden of proof is borne by challenging petitioners.

The functions, responsibilities and duties of the Assistant Superintendent - Personnel and Curriculum, as incorporated in the job description (J-1) are as follows:

1. Shall perform duties under the direct supervision of the Superintendent of Schools.

2. Shall have the responsibility for the certification of all certificated personnel in the school system.

3. Shall be responsible for keeping up-to-date and in proper form all personnel records of teaching and supervisory personnel.

4. Shall be responsible for the preparation of all reports for the County Superintendent of Schools and the State Department of Education.

5. Shall be responsible for supervisory visits to the schools as assigned by the Superintendent of Schools.

6. Shall assist in personnel selection and evaluation.

7. Shall be responsible for planning, organization and implementation of curriculum.

8. Shall be responsible for coordination of Title/S.C.E. Programs.

9. Shall be responsible for any other duties concerning personnel, curriculum, administration and maintenance of the schools assigned by the Superintendent of Schools.

The performance responsibilities of the Supervisor of Instruction, as incorporated in the job description (J-2) are as follows:

1. Direction of the Educational Program within grades kindergarten through 12.
   (a) Improvement of methods of teaching
   (b) Direction for creation and improvement of courses of study
   (c) Development of the instructional program and time allocation for subjects
   (d) Selection of instructional media, inclusive of textbooks and supplemental library, remedial and enrichment materials
   (e) Selection and planning of school trips, in coordinated progressive stages through the grades K - 12.
   (f) Organization and direction of in-service training programs for teachers - - inclusive of elementary and secondary school system-wide workshops and graduate level staff meetings for instructional purposes.

(g) Coordination of instructional programs, instructional materials and instruction among the elementary and secondary schools, with the principals, curriculum coordinators and department chairpersons in the high school.

2. Coordination with the work of educational specialists serving the elementary and secondary schools.

(a) Inclusive of the areas of but not limited to the language arts, music, fine arts, library service, speech therapy, psychology, physical education, and physical recreation and special education, reading, mathematics, Title I/SCE, T&E, and bi-lingual programs.

(b) Inclusive of all phases of creative educational development, consultative service, and pupil instruction.

3. Planning with the principals their important contributory role and services for the futherance of the above-defined activities and objectives.

4. Supervision and direction of the teachers, in conjunction with the elementary and secondary school principals with recommendations to the superintendent.

5. Direction and supervision of the bilingual education program K - 2.

6. Direction and supervison of the programs for nonpublic school services as mandated by the State.

7. Direction and supervision of the K - 12 program for gifted and talented pupils.

8. Direction and supervison of the reading programs in the elementary and secondary schools.

9. Planning of the K - 12 program with the supervisor of the mathematics curriculum.

10. Other duties that the superintendent of schools, and/or the Board of Education may delegate to him.

11. The Supervisor of Instruction shall be directly responsible to the Superintendent of Schools, for the above defined areas. All program and instructional development shall be approved by the superintendent.

12. Attendance at regular and committee meetings of the Board of Education to provide expertise on the instructional program (attendance when necessary).

Joseph M. Lepore has been employed in the district since September 1960. He is currently a vice-principal at the high school, having held that position since 1962 excepting when he was acting principal in 1979. He has also served as president of the Council of Administrators/Supervisors since 1982. The Council is the bargaining unit for administrators and supervisors.

Lepore testified and related the functions of the Assistant Superintendent since 1962 to the performance responsibilities of the Supervisor of Instruction (J-2). He stated the responsibilities enumerated in J-2 at Nos. 1-4, 7-9, and 11 were functions of the Assistant Superintendent prior to the abolishment of that position. He further testified as to no knowledge concerning Nos. 5, 6, and 12.

Leo C. Gattoni, Jr. held the position of Assistant Superintendent since August 1, 1979 until the abolishment of the position and the subsequent transfer. He served as

Acting Superintendent from September 1982 to February 1983 as "Mr. Helstoski needed six more months administrative experience to get his school certificate," then returned to the position of Assistant Superintendent when Henry Helstoski was appointed Superintendent in February 1983. See Tr. II, 89.

Gattoni testified his performance responsibilities as Assistant Superintendent coincided with those incorporated in the job description of the Supervisor of Instruction in accordance with the direction of the Superintendent. He stated he performed Nos. 1b, d, e, f, g, 2a, 4, 5, 7, 8, 10 and 12 of the responsibilities incorporated in J-2, the job description of the Supervisor of Instruction.

The job description for the Assistant Superintendent states at No. 9: "Shall be responsible for any other duties concerning personnel, curriculum, administration and maintenance of the schools assigned by the Superintendent of Schools."

The job description for the Supervisor of Instruction states at No. 10: "Other duties that the Superintendent of Schools, and/or the Board of Education may delegate to him."

Henry Helstoski, superintendent of schools, testified on direct examination that he has been employed by the North Bergen Board of Education since July 1982. His first position was as special assistant to the then Superintendent. He then said: "I was appointed as the Superintendent in August of '82. However, in submitting credentials to the State Department of Education, he took six months to review it, and, therefore, I became the Superintendent in February, '83." (Tr. II, p. 138).

Counsel for Fischbach attempted to impeach the credibility of Helstoski in cross-examination. Helstoski testified that he was appointed Superintendent initially in August 1982, but because of the delay in the issuance of the School Administrator's certificate, he recommended that the Board appoint him Acting Assistant Superintendent for Personnel and Curriculum, effective September 1, 1982, and appoint Gattoni, then Assistant Superintendent for Personnel and Curriculum, to the position of Acting

Superintendent. The Board so acted. He stated his belief that the Board resolutions incorporated a termination date. (Tr. III, p. 106). He further stated that the County Superintendent told him he was eligible for the certificate (Tr. III, p. 110), then stated no recall of receiving any indication as to his eligibility (Tr. III, p. 111). Helstoski also testified that he made an inquiry of the State Board of Education in reference to alternate experience (Tr. III, p. 126). He then testified as to awareness that eligibility for the certificate was sufficient for one to serve in a position. (Tr. III, p. 129). His testimony revealed that he had not as yet met the New Jersey Regulations and Standards for Certification, School Administrator Endorsement Requirements IV D of "Successful completion of three years of educational administrative or supervisory experience," and that he did not know why it took "from June or July of 1982 until January or February of 1983 for the issuance of a [his] School Administrators Certificate." (Tr. III, pp. 111-128).

The genesis of this dispute appears to have occurred during the Spring of 1982 when Helstoski was being interviewed for the position of Superintendent by the Board president, vice-president and secretary. In response to direct examination concerning his "philosophy, especially in terms of the North Bergen District" Helstoski said: "Well in some preliminary conversations, we identified problems that existed in the District. In conjunction with that, some solutions were discussed and approaches educationally, how they should be handled, and on that basis I was asked to submit some Table of Organization and what I deemed would be a reasonable structure administratively in the District." (Tr. II, p. 139). The Board has never adopted the Table of Organization as the policy in the district (Tr. II, p. 140).

Helstoski consistently testified that the abolishment of the position of Assistant Superintendent for Personnel and Curriculum was for economy and emphasis on instruction.

The thorough and efficient education report submitted by Helstoski in September 1983 called for the involvement of the Assistant Superintendent for Personnel and Curriculum. In response to questioning concerning the role of the Assistant Superintendent in light of Helstoski's intention to have the Board abolish the position,

Helstoski said that, under the job description for that position, the Assistant Superintendent would perform "Under the premise he should do whatever he is directed to do by the superintendent." See P-7, P-1 (Nos. 7 and 9), and Tr. IV, p. 95.

The undersigned asked Helstoski why he did not consider a revision of the job description of the Asisstant Superintendent to reflect the emphasis on instruction sought by him to avoid the compound problems and litigation resulting from the scenario following the abolishment. His response was his desire to avoid patchwork and not to clutter the office full with titles such as assistant. (Tr. IV, pp. 131-135). Notwithstanding his intent to replace the Assistant Superintendent with two Supervisor of Instruction positions, Helstoski testified no such cluttering could occur without his recommendation and Board action to create additional positions (Tr. III, p. 154).

The rationale of economy to support the abolishment is clearly without merit. The record is replete with evidence of the efforts of Helstoski and the Board to implement an unadopted Table of Organization resulting in greater costs. An architect was employed to redesign the central office to accommodate two Supervisor of Instruction. (Tr. III, pp. 53-56). Additional positions were created. (Tr. II, p. 140). The failure of the Board to replace Dandorph and attributing the salary savings as an economy because of the abolishment of the Assistant Superintendent's position is pure sophistry.

I **FIND** the responsibilities assigned by the Superintendent to the Supervisor of Instruction pursuant to the job description (J-2) to be responsibilities readily assignable to the Assistant Superintendent for Personnel and Curriculum pursuant to the job description (J-1). I **FURTHER FIND** the abolishment of the position of Assistant Superintendent for Personnel and Curriculum to have been designed to transfer Gattoni from the central office and to avoid compliance with the Order of the Commissioner to reinstate Fischbach to that position. I **FINALLY FIND** the action of the Board in abolishing the Assistant Superintendent's position to be in bad faith and an abuse of its discretionary authority.

IF THE BOARD'S ABOLISHMENT ACTION IS SET ASIDE, IS FISCHBACH ENTITLED TO HOLD THE POSITION OF ASSISTANT SUPERINTENDENT BY VIRTUE OF A PREVIOUS ORDER OF THE COMMISSIONER?

In Peter Fischbach v. Board of Education of the Township of North Bergen, 1983 S.L.D. _____ (decided December 29, 1983), aff'd State Board of Education 1984 S.L.D. ____ (decided July 11, 1984), the Honorable Ken R. Springer, ALJ, ordered "That the Board forthwith reinstate Fischbach to the position of assistant superintendent in the district" in his Initial Decision rendered on November 15, 1983 (at 14). The Commissioner "affirms the findings and determination as rendered in the initial decision in this matter and adopts them as his own" and also "concurs with the order of the court reinstating petitioner to the position of assistant superintendent in the district" (at 24). The State Board of Education "affirmed for the reasons expressed therein" [the Commissioner's decision].

The entitlement of Fischbach to be reinstated to the position of Assistant Superintendent is clearly affirmative as a matter of law, and may only be set aside by a court of higher jurisdiction than the State Board of Education.

IF THE BOARD'S ABOLISHMENT ACTION IS UPHELD, IS FISCHBACH ENTITLED TO HOLD THE POSITION OF SUPERVISOR OF INSTRUCTION BY VIRTUE OF HIS TENURE AND SENIORITY RIGHTS?

This issue is moot by virtue of the determination herein that the Board's abolishment action be set aside.

IF THE BOARD'S ACTION IN CREATING THE POSITION OF SUPERVISOR OF INSTRUCTION IS UPHELD, IS GATTONI ENTITLED TO HOLD THE POSITION?

The Board's action in creating the position of Supervisor of Instruction was incorporated as a corollary issue only because of the abolishment of the position of Assistant Superintendent for personnel and curriculum and the allegations of petitioners that the latter action was taken in bad faith as a subterfuge to remove Gattoni from the central office, avoid compliance with the Commissioner's Order to reinstate Fischbach, and to transfer Farley to accommodate the subsequent transfers of Dalton and Dandorph.

Since the Board's abolishment action has been found to have been in bad faith, and since the intentions of Helstoski and the Board to create two positions in the central office, as Supervisors of Instruction were clearly established by Helstoski's testimony and the employment of an architect by the Board to redesign the central office to accommodate the staff, I **FIND** the creation of the position of Supervisor of Instruction not to be at issue by virtue of the Board's authority pursuant to N.J.S.A. 18A:11-1, which states:

> 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[1]; 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.

Thusfar only the abolishment of the position of Assistant Superintendent has been found to be inconsistent with law, which shall be addressed, infra.

It cannot be disputed that Gattoni acquired tenure as an Assistant Superintendent. See Fact Nos. 3 and J-9. Nor can it be disputed that Farley is nontenured in the position of Supervisor of Instruction.

Although expressed in different language, ante, the position of Supervisor of Instruction is a de facto and de jure Assistant Superintendent's position with a change of title. This change of title cannot act as a bar to Gattoni's entitlement to that position. **I SO FIND.**

WERE THE BOARD'S ACTIONS INCORPORATED IN ISSUE NO. 2 (the first issue addressed herein) AND THE REASSIGNMENT OF GATTONI FROM HIS POSITION AS ASSISTANT SUPERINTENDENT TO THAT OF PRINCIPAL ARBITRARY, CAPRICIOUS, AND/OR IN BAD FAITH?

It has been determined herein that the Board's abolishment of the position of Assistant Superintendent for Personnel and Curriculum was in bad faith, an abuse of its discretionary authority, and therefore arbitrary. I have found one of the reasons for such action was the removal of Gattoni from the central office. It necessarily follows that Gattoni's reassignment from his position as Assistant Superintendent to that of principal was in bad faith and arbitrary. **I SO FIND.**

WAS THE REASSIGNMENT OF FARLEY FROM PRINCIPAL TO SUPERVISOR OF INSTRUCTION NONCONSENSUAL AND IN VIOLATION OF HIS SATUTORY RIGHTS OF TENURE AND SENIORITY?

It has previously been determined that Gattoni, a tenured assistant superintendent, is entitled to the position of Supervisor of Instruction. If affirmed by the Commissioner the issue of Farley's appointment to the position of Supervisor of Instruction from his tenured position of high school principal would be moot, and he would revert to his position as high school principal. The issue will nevertheless be addressed for the edification of the Commissioner.

The gravamen of this issue is whether a deal was struck by Helstoski and Board Secretary Faistl with Farley which resulted in the acquisition of tenure by Farley as high school principal in exchange for his willingness to accept a transfer to the position of Supervisor of Instruction in order to placate the desire of Dalton to become high school principal. Although Dalton and Faistl were present during the hearing, neither testified. A determination of this issue must be made on the credibility of testimony from Lepore, Farley, and Helstoski, deductive reasoning, and logic.

In May 1983 following municipal elections in North Bergen, Faistl called Farley and asked him to take a ride with him and Helstoski. This is undisputed. Farley had not as yet acquired tenure as high school principal, and would not until he met the precise service requirements pursuant to N.J.S.A. 18A:25-6, which would occur with his service in that position following June 30, 1984.

Farley testified that he was advised at this meeting of an intent to promote Dalton from his position as high school vice-principal to the position of high school principal, but the position of Supervisor of Instruction was not mentioned (Tr. I, pp. 34-35). He also stated that Helstoski told him he (Helstoski) wanted Farley to remain as principal. (Tr. I, p. 35).

Shortly thereafter a meeting took place, at which Helstoski, Farley, Lepore and a Mr. Cappuccio were present, concerning a scheduling sequence. Lepore testified that Farley brought up the subject of his status as high school principal. (Tr. II, p. 9). He stated that Helstoski respondend that a solution to the problem might be "something that

can be done that would satisfy Mr. Dalton." (Tr. II, p. 12). Lepore further testified that he assumed Dalton would become high school principal because, after 24 years in the district, "this is the way the system works." (Tr. II, p. 14).

Lepore further testified that he and Cappuccio were asked to "come up with some kind of a description of a position for Mr. Dalton in order that Mr. Farley remain as the high school principal," and that Helstoski thought it was a good idea. (Tr. II, p. 14). Lepore and Cappuccio developed a job description for a position as Assistant Superintendent, which Helstoski later advised was not acceptable to Dalton. (Tr. II, p. 20).

It is undisputed that Farley was reappointed as high school principal by the Board at its regular July meeting.

Lepore then testified that the position of Supervisor of Instruction was posted in November. Farley did not apply. (Tr. II, p. 25). Nothing further occurred until December 22, 1983, the date on which a special meeting of the Board was scheduled. Lepore met with Helstoski the morning of December 22 to discuss Farley's concern that the Board may remove him as high school principal. (Tr. II, p. 27). Lepore recalled Helstoski told him nothing would happen at the Board meeting concering the high school principalship. (Tr. II, p. 28). On the morning of December 23, Farley told Lepore that the Board transferred him from high school principal to Supervisor of Instruction the previous night. (Tr. II, p. 30).

Farley testified that Helstoski asked him in August 1983: "Are you willing to come over here?" No mention was made of any specific position of Supervisor of Instruction, which was not posted until November, and the only central office position at that time was Assistant Superintendent. No response was made nor was there further discussion at that time. (Tr. I, pp. 39-40).

The next discussion between Helstoski and Farley took place on December 14, 1983 during lunch. Farley testified that Helstoski asked him "Why are you getting so paranoid about this position?. . . Its a good position." Farley said he told him of his

serious reservations in terms of seniority and the job description. Helstoski allegedly responded by saying "I'll give you time. I want you to speak to a man. He is secretary of the N.J.A.S.A., Mr. James Myran talk to him about it and see how he feels about the seniority and where that - - if that will help you. Nothing will be done before January. I'll wait on you to talk to Myran." (Tr. I, pp. 40-41). Farley testified he never consented to the transfer. (Tr. I, p. 43).

Helstoski testified that Farley had not applied for the position of Supervisor of Instruction, nor had Dalton applied for the position of high school principal. (Tr. III, pp. 65-66). He also testified that he never discussed with Faistl "putting Mr. Dalton in the principal position," but did discuss the abolition of the Assistant Superintendent and creation of the position of Supervisor of Instruction with Board attorney Covitz. (Tr. III, pp. 66-67).

It is inconceivable that the May conference indisputably held between Helstoski, Faistl and Farley took place without any discussion between Helstoski and Faistl concerning the promotion of Dalton to the high school principalship. The demeanor of witnesses Lepore, Farley and Helstoski revealed that Lepore's forthright testimony and Farley's were indeed credible. Helstoski's testimony is best characterized as evasive, less than candid, and lacking in credibility.

I believe Helstoski was directed to take care of Dalton to the latter's satisfaction, and worked very hard to placate all sides in the process. He certianly lost face when the Board transferred Farley and appointed Dalton on December 22 after telling both Lepore and Farley that nothing would happen until January.

The only evidence put forth on the record that Farley consented to his transfer was Helstoski's testimony. I don't believe him.

I **FIND** that Farley did not give his consent to his transfer from his tenured position as high school principal to the position of Supervisor of Instruction. **I ALSO FIND** Farley's transfer a dismissal from his tenured position as high school principal.

WHAT AMOUNT OF BACK PAY, IF ANY, IS DUE AND OWING [FISCHBACH] FOR THE PERIOD FROM AUGUST 26, 1983 ONWARD?

It is stipulated that Fischbach is received a salary of $35,311 for the 1983-84 school year. It is also stipualted that Gattoni received a salary of $45,340 in his position as Assistant Superintendent in 1982-83. It is also stipulated that Farley is compensated in 1983-84 at the annual rate of $44,750 in his position as Supervisor of Instruction.

It is noted that the base salary guide for administrators and supervisors in 1983-84 excludes the Assistant Superintendent. The highest salaries therein are afforded the high school principal, from $40,897 with an M.A. degree at step one to $49,604 with a Ph.D. at step five, which is the maximum. See J-15.

It is also noted that Gattoni is at the M.A. level while Fischbach is at the MA+30 level. See J-8 and J-9.

It is further noted that Judge Springer, in EDU 0311-82 (affirmed by both the Commissioner and State Board), ordered "the Board promptly pay to Fischbach the difference, if any, between the salary on the negotiated guide for a high school vice-principal and the amount actually earned by Fischbach for the period from June 15, 1979 to the date of reinstatement." See J-23 (at 15).

A review of the base salary guide for 1983-84 reveals that Fischbach's salary for 1983-84 would be $44,126 (MA+30 at step 5) according to Judge Springer's order.

I FIND Fischbach entitled to back pay represented by the difference between $35,311 and $44,126, prorated from August 23, 1983 to the actual date of his reinstatement

DISCUSSION AND CONCLUSIONS OF LAW

This controverted matter appears to be unique. Such is not the case in respondent's school district, however.

In Elizabeth Boeshore v. Board of Education of the Township of North Bergen, 1974 S.L.D. 805, the Board abolished the position of Assistant to the Superintendent of Schools and terminated Boeshore, who held that position. These actions were preceded by Boeshore's transfer to act as a principal and followed an arbitration award favorable to Boeshore.

In Boeshore, the Commissioner emphatically indicated that "good faith should be evident in all such instances" of reorganization and referred to Deborah Shaner v. Board of Education of Gloucester City, 1938 S.L.D. 542 aff'd State Board of Education, 1938 S.L.D. 543 in stating "that, while boards have statutory discretion to abolish positions, those discretionary powers are not absolute; they are required to be exercised in "good faith" (e.g. for reasons of economy)." [(at 812].

In North Bergen Federation of Teachers, et als. v. Board of Education of the Township of North Bergen, 1978 S.L.D. 18, 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" (at 249).

Having found the Board to have acted in bad faith in abolishing the position of Assistant Superintendent for Personnel and Curriculum, I **CONCLUDE**, therefore, that said action shall be and is hereby set aside. **IT IS SO ORDERED.**

Having also found the entitlement of Fischbach to be reinstated to the position of Assistant Superintendent clearly affirmative pursuant to the Commissioner's Order, I **CONCLUDE**, therefore, that Fischbach shall be reinstated, forthwith, **IT IS SO ORDERED.**

Relative to the transfer of Farley, the Board argues that consent by Farley was not required, and cites Williams v. Plainfield Bd. of Ed., 1979 S.L.D. 220, aff'd in part, rev'd in part, State Bd. of Ed. 1980 S.L.D. 1552, aff'd 176 N.J. Super. 154 (App. Div. 1980).

Williams is factually distinguished from the instant matter. In Williams it was determined by the State Board that her transfer was to a position of equivalent rank. The State Board said:

> Where the transfer is to a position of equivalent rank, the Board may act without the staff member's consent. Boor v. Newark Board of Education, 1979 S.L.D. 517 The phrase "with his consent" appearing in section 18A:28-6 applies only to transfers which are promotions or demotions, i.e. to a different rank. We cannot rationally construe the statute in any other fashion, for a tenured staff member already enjoys tenure within his rank, albeit in no particular assignment therein. Bigart v. Paramus Bd. of Ed., supra; Clark v. Rosen and Margate City Bd. of Ed., 1974 S.L.D. 678, aff'd St. Bd. 1975 S.L.D. 1082, aff'd N.J. Superior Court App. Div. 1976 S.L.D. 1134. The legislative history of the statute bears out this interpretation. Before the passage of this section as Chapter 231 of the Laws of 1962, a tenured teacher who was promoted to principal obtained tenure as a principal immediately. As observed in the amicus brief of the School Boards Association, local boards understandably preferred to hire administrators from outside the district in order to have the benefit of a three-year probationary period in which to evaluate the new administrator. The purpose of Chapter 231, as reflected in the sponsor's statement, was to make promotions within a district subject to a two-year probationary period for tenure in the higher position to be achieved. Thus the employing board would enjoy a two-year period in which to evaluate the new administrator's performance, and at the same time internal applications for promotions would be encouraged. The consent language was inserted because the acceptance of a promotion would put the employee in a nontenure status in the new position for two years, and the Legislature thought that the employee should not be forced into such a situation. (at 1553-1554)

In the instant matter, the record is replete with testimony from Helstoski that Farley's transfer was a promotion.

In the appeal of the State Board's decision, the Appellate Division did not address any issue on point herein, as stated at 160:

> Petitioner does not challenge her transfer from high school principal to elementary school principal as an invalid reduction in rank on the ground that she had attained tenure as a high school principal. Her sole argument on appeal is that her transfer from a high school principalship to an elementary school principalship resulted in a reduction of compensation and thus a reduction in her rank, because her salary expectancy is less as an elementary school principal than as a high school principal.

See also Childs v. Union Township Bd. of Ed., N.J. Super. (N. J. App. Div., July 19, 1982, A-3603-80T1) (unreported), cert den., 91 N.J. 550 (1982).

Having found that Farley did not consent to his transfer from high school principal to Supervisor of Instruction, I **CONCLUDE**, therefore that Farley shall be reinstated as high school principal, forthwith. **IT IS SO ORDERED.**

Having further found the creation of the position of Supervisor of Instruction to be a proper exercise of the Board's discretionary authority in fulfillment of the Superintendent's recommendation to add one central office position at the level of Assistant Superintendent, and having also found the change of title from Assistant Superintendent to Supervisor of Instruction to be a distinction without a difference, and having also found Gattoni, a tenured assistant superintendent, to be entitled to that position, I **CONCLUDE**, therefore, that Gattoni shall be placed in that position, forthwith, as a matter of law. **IT IS SO ORDERED.**

Having finally found Fischbach entitled to back pay represented by the difference between $35,311 and $44,126, prorated from August 23, 1983 to the actual date

of his reinstatement to the position of Assistant Superintendent, I **CONCLUDE** that Fischbach shall be so compensated. **IT IS SO ORDERED.**

The Fischbach petition transmitted to the Office of Administrative Law and assigned to Administrative Law Judge Springer (OAL DKT. NO. EDU 4678-84/AGY. NO. 153-5/84) sought "simple interest from December 29, 1983 at the rate of 12 per cent per annum." The Commissioner's Order, entered on December 29, 1983, in an affirmance of a previous Initial Decision rendered by Judge Springer (OAL DKT. NO. EDU 311-82), directed the Board to "forthwith reinstate Fischbach to the position of assistant superintendent in the district: and to "promptly pay to Fischbach the difference, if any, between the salary on the negotiated guide for a high school vice-principal and the amount actually earned by Fischbach for the period from June 15, 1979 to the date of reinstatement."

In Board of Education of the City of Newark v. Ruth Levitt and Esther E. Sasloe, (N. J. App. Div., Nov. 29, 1984, A-5614-82 T2) (unreported?), the Appellate Division rendered a per curiam decision wherein Fallon v. Scotch Plains -Fanwood Bd. of Ed., 185 N.J. Super. 142 (Law Div. 1982) was overruled in a determination that the Commissioner of Education possesses the authority to award prejudgment or post-judgment interest. The court also said "we are of the view that post-judgment interest cannot start to run until the precise amount of money damages is fixed." (unreported at 10).

Judge Springer found an entitlement of interest but denied it because of the Commissioner's position that he lacked the authority to make the award. This is no longer so.

It cannot be disputed that a consent order entered on October 29, 1984 fixed the precise amount of back pay due Fischbach from June 15, 1979 through August 25, 1983. See Fischbach (OAL DKT. NO. EDU 4678-84) at 2.

I **FIND** it reasonable to extend the back pay award from August 25, 1983 to the date of Fischbach's reinstatement as Assistant Superintendent by virtue of the

Commissioner's decision. I **FURTHER FIND** it reasonable to incorporate the award of interest for that same period of time due to the conduct of the Board in denying Fischbach the use of those funds.

I **CONCLUDE**, therefore, that Fischbach is entitled to simple interest at 12 per cent annum, and said compensation by the Board is hereby **ORDERED**. Newark, Fasolo v. Division of Pensions, 190 N.J. Super. 573 (App. Div. 1983); R. 4:42-11(a).

In summation, the Board is hereby **ORDERED** to:

1. Rescind its action abolishing the position of Assistant Superintendent for Personnel and Curriculum and reinstate Peter J. Fischbach in that position;

2. Reinstate Raymond P. Farley in his tenured position as high shcool principal;

3. Transfer Leo Gattoni, Jr. to the position as Supervisor of Instruction; and

4. Compensate Peter J. Fischbach for back pay consistent with the determination herein.

The modus operandi in North Bergen is worthy of mention.

It would appear that the Board secretary is the liaison between the mayor's office and the Board of Education. The testimony clearly established the secretary's role to be more than ministerial in North Bergen.

Faistl, the Board secretary, was apparently actively involved in the process of interviewing Helstoski as well as the initial Farley conference and the plan to rid the central office of Gattoni and Fischbach, and to create the vacancies at the high school to take care of Dalton and Dandorph. Faistl was granted a leave of absence by the Board to enable him to work in the mayor's office. (Tr. III, pp. 95-102).

Joseph Lepore's forthright and credible testimony as to how things work in North Bergen stands out like a beacon light as one reviews the official transcripts of the four days of hearing in this matter. The process perhaps is best characterized by a full implementation of the spoils system as the highest priority of a new municipal administration.

The official oath of Board members, pursuant to N.J.S.A. 41:1-3, appears to give the assurance of fidelity that said members "will faithfully, impartially and justly perform all the duties." [emphasis added]

I do not believe the Legislature ever intended that children in the North Bergen schools be pawns of public office holders as they play their games of political chairs. Providing the highest quality of educational opportunity for children within the economic means of a district must be given the highest priority by Board members and agents of the Board, and must be done faithfully, impartially and justly in fulfillment of their oath of office.

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

OAL DKT. NO. EDU 2691-84
OAL DKT. NO. EDU 2727-84
OAL DKT. NO. EDU 2728-84

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

28 December 1984
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

1/2/85
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 04 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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PETER FISCHBACH ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

The Board takes exceptions to the judge's determination that its actions regarding the abolishment of the assistant superintendent position and the filling of the supervisor of instruction position were improper, contending that a board of education is entitled to a presumption of correctness. It avows this matter constitutes a situation wherein the Board "is attempting to wrest itself away from its past and to steer its ship onto the course of sound fundamental education for its students." (Board's Exceptions, at pp. 2-3) It argues, inter alia, that after consultation with its attorney and the County Superintendent of Schools, it acted by proper resolution to establish the new position.

The Board strenuously questions the inconsistency of the judge determining, on the one hand, that the abolishment of the assistant superintendent position was improper, the new position constituting a distinction without a difference with that position and, on the other hand, determining the creation of the new position to be a proper exercise of its discretionary authority. It considers the inconsistency between the two findings glaring and unexplained.

In addition, the Board excepts to the finding that it abolished the assistant superintendent position to avoid compliance with the Commissioner's decision in a prior matter involving Petitioner Fischbach inasmuch as that decision was rendered four months after it resolved to abolish the position.

Further, the Board excepts to the determination that the responsibilities of the supervisor of instruction were readily assignable to the assistant superintendent for personnel and curriculum, viewing it erroneous as a matter of fact and a misapplication of law. It contends that, notwithstanding the transcript references cited in the initial decision, the record does not support that Petitioner Gattoni performed the supervisor of instruction duties.

The Board also excepts to (1) the determination that the abolishment of the assistant superintendent position did not achieve a real economy; (2) the great deal of focus allowed by the judge on the issue of the superintendent's problems in securing his certification; (3) the judge's refusal to permit the Board the opportunity and means to impeach Petitioner Farley's credibility through testimony and evidence directed toward his performance as principal; (4) the judicial notice given to the two prior cases cited involving the North Bergen Board of Education; and (5) the awarding of post-judgment interest to Petitioner Fischbach.

Reply exceptions received from petitioners affirm the initial decision rendered by the Office of Administrative Law. Petitioners reject the arguments put forth by the Board and urge the Commissioner to uphold the determinations in the initial decision in all respects.

After a thorough, comprehensive review of the record of this matter and a careful consideration of the exceptions, it is the determination of the Commissioner that the supervisor of instruction position created by the Board is substantially different from that of the assistant superintendent for personnel and curriculum and that the Board's action did not merely substitute one title for another. Heavy reliance was placed on Petitioner Gattoni's testimony by the Commissioner in reaching this conclusion; therefore, he deems it necessary to review at length that testimony at this juncture in order to clearly articulate the reasoning underlying his conclusion.

Although, Petitioner Gattoni considers the supervisor of instruction to be similar to the assistant superintendent except for the exclusion of personnel duties (Tr. II-100, 107), an item-by-item analysis of the testimony for the supervisor of instruction job description (J-2) does not support the contention that the positions are identical. The job description and testimony are summarized below.

Supervisor of Instruction
Job Description (J-2)

Responsibility	Testimony (Tr. II)
1. Direction of Educational Program K-12.	1. Some duties (at 100).
(a) Improvement of methods of teaching.	(a) No (at 100-101).
(b) Direction for creation and improvement of courses of study.	(b) Math curriculum on a limited basis; discussion with Mr. Lepore re: Social Studies curriculum (at 100).

(c) Development of instructional program and time allocation for subjects.	(c) No (at 100-101).
(d) Selection of instructional media, inclusive of text-books and supplemental materials.	(d) Recommended to superintendent discontinuance of Scott, Foresman and Co. reading series and adopting new series (at 101).
(e) Selection and planning of school trips, in coordinated progressive steps K-12.	(e) Discussion with superintendent re: approving or not approving certain field trips (at 102).
(f) Organization and direction of in-service training programs for teachers.	(f) Set up in-service courses according to teachers' union contract (at 102).
(g) Coordination of instructional programs among schools with principals, curriculum coordinators, and department chairs in high school.	(g) No; principals were under his direct supervision; at times curriculum coordinator reported to him; would deal with department chairs when hiring to fill a position (at 102).
2. Coordination with work of educational specialists serving elementary and secondary schools.	2. With department chairs on personnel selection at times (at 103).
(a) Language Arts, Music, Fine Arts, etc.	-----
(b) Creative Educational Dev't, Consultative Service.	(b) No (at 103).
3. Planning with principals their important contributory role and services, etc.	3. No; assumed superintendent planned with principals (at 103).
4. Supervision and direction of teachers in conjunction with principals with recommendations to superintendent.	4. Yes; met with principals and gave them directives going back to teachers (at 103).

5. Direction and supervision of Bilingual Education Program K-12.	5. Interview prospective candidates and check their certificates; Assistant Superintendent for Business in charge (at 103-104).
6. Direction and supervision of non-public services/ programs.	6. No (at 104).
7. Direction and supervision of K-12 Gifted and Talented Program.	7. On limited basis (at 105).
8. Direction and supervision of reading program (elementary and secondary).	8. "Just, as I said, I recommended getting rid of Scott Foresman"; reading supervisor reported to superintendent (at 105).
9. Planning K-12 program with supervisor of math curriculum.	9. No; last 2 or 3 years Dr. Sahagian handled; he reported to superintendent (at 106).
10. Other duties that superintendent and/or Board of Education may delegate.	10. Yes; for Board of Education a member may call and ask me to interview a prospective candidate for a job (at 106).
11. [Not addressed].	11. [Not addressed].
12. Attendance at Board of Education meetings (regular and committee) to provide expertise on the instructional program.	12. Yes; went to all Board meetings and caucuses (at 107).

On cross-examination Petitioner Gattoni acknowledged most of the job duties he performed were personnel duties and that his role in curriculum was minor. (Tr. II-110) Additional testimony summarizing his involvement is as follows:

> "Q. And correct me if I'm wrong, but that role was -- you gave me an example, gave us an example about the recommendations on the discontinuation of the Reading program with the particular publisher. That's an example of what you're talking about?

A. Yes, the Social Studies -- I mean the Math, the Reading, discontinuation of the Reading, and I contacted Mr. Lepore once on a Social Studies curriculum problem.

Q. Besides these events, did you have any other role with the Curriculum?

A. No." (Tr. II-110)

The creation of the position which emphasizes the supervision of curriculum and instruction as delineated in J-2 represents, in the Commissioner's judgment, the creation of a new position in North Bergen regardless of the presence of duties under the job description for the assistant superintendent which called for limited involvement by Petitioner Gattoni in such matters. The new position represents an entirely different, expanded focus and emphasis from that of the assistant superintendent position.

It was certainly within the discretionary power of the Board in this matter to determine if it desired to merely alter the existing focus of function and job description of the assistant superintendent position, just as it was within its discretionary power to determine to abolish that position and create another position at a different level as part of restructuring the administration of the district, N.J.S.A. 18A:28-9.

Whether this restructuring is accompanied by economic savings is not necessary to prove once it is determined that at least one of the criteria of this statute is met. The statute reads:

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

The next critical aspect of this matter to be examined is whether the legitimate restructuring of the district's administration and supervisory organization was motivated by bad faith or was otherwise arbitrary or capricious. Given the pendency of a Commissioner's decision in the litigation with Petitioner Fischbach during the period of time surrounding the abolishment of the assistant superintendent and the creation and filling of the new position, charges of ill-motivation were unquestionably bound to emerge.

After a most careful review of the record, the Commissioner is unable to find sufficient proof within the record that the abolishment of the assistant superintendent position was solely or primarily undertaken to avoid an existing or potential determination of the Commissioner to reinstate Petitioner Fischbach or that the creation of the supervisor of instruction position was created to meet any demands of or political obligation to Mr. Dalton. As early as September 1982 it was clear that the current Superintendent of Schools intended to recommend a Table of Organization to the Board which created a Department of Instruction with two supervisors and that the only assistant superintendent would be for business. (R-2; see also Tr. II-140-144.)

The fact that the Board attorney was consulted and gave advice regarding the abolishment of the one position and creation of the other, both with respect to the need for the new position to be separate and distinct from the assistant superintendent position and with respect to existing or potential litigation impacting on any decision to act on such an administrative restructuring does not, in the Commissioner's judgment, prove that the Board, therefore, was ill-motivated. Consultation with the Board attorney seeking legal advice appears a prudent action, particularly given the pendency of Petitioner Fischbach's case, just as meeting with the County Superintendent was prudent.

The Commissioner, upon careful review of both the Board attorney's and the Superintendent of School's entire testimony, is unpersuaded by Petitioner Fischbach's exceptions that such consultation and advice constitute an admission that the Board's actions in restructuring the administration were to avoid compliance with any directive to reinstate him or to avoid claims by existing employees such that ill-motivation is determined.

Notwithstanding the above, the Commissioner finds and determines that the filling of the newly-created position was fraught with irregularities and tainted by political motivation. He is in complete agreement with the judge that Petitioner Farley bore the burden of proof that, contrary to N.J.S.A. 18A:28-6, he did not give his consent to a transfer to the supervisor of instruction position. For the Board to argue otherwise is clearly not supported by the testimony of Petitioner Farley and Joseph Lepore, vice-principal and president of the administrators and supervisors' bargaining unit. The Superintendent's testimony is not credible that Petitioner Farley's removal from the principal's position was not motivated by the desire to place Vice-Principal Dalton into that position. Likewise, the Commissioner is in agreement with the judge that, given the fact that the Board acted to renew Petitioner Farley's contract for high school principal, thus enabling him to acquire tenure, and then promoted him to a highly responsible district-wide position, it should not be allowed to introduce testimony/evidence impugning his performance as principal. To argue that this constituted an unfair hearing is ludicrous in the Commissioner's opinion. That the Board could have acted in such a way as

to permit the tenuring of an individual whose performance it purports was less than desirable so as to promote him, without consent no less, is appalling.

It is the Commissioner's firm belief that the record contains ample support to sustain the allegation of bad faith in the sequence of actions resulting from the administrative restructuring with respect to the filling of the supervisor of instruction position. Clearly, from the Commissioner's review of the record, the vast majority of the testimony focused on this issue as opposed to the avoiding of compliance with Petitioner Fischbach's reinstatement. How and why the new position was filled is fraught with manipulations constituting bad faith which the Commissioner deplores, manipulations which reduced a legitimate, educationally sound administrative restructuring to further the ends of highly suspect political machinations.

Does this bad faith rise to the level of negating the legitimacy of the Board's actions in toto in this matter? After a most careful consideration of this vital question, it is the belief of the Commissioner that the bad faith associated with the filling of the supervisor of instruction position does not negate the legitimacy of abolishing the assistant superintendent position or the creation of the supervisory position itself. Rather, the bad faith renders null and void the Board's actions in filling the position.

Consequently, it is the determination of the Commissioner that Petitioner Farley is to be immediately reinstated as high school principal at the appropriate salary level as though he had served continuously as principal. If the Board is dissatisfied with his performance, it must follow whatever statutory remedy it deems necessary. The order to reinstate Petitioner Fischbach to the assistant superintendent position is reversed because it has been determined that the supervisor of instruction position is not a de facto and de jure assistant superintendent position with a change of title. The issue of interest is, therefore, moot; thus, the order for payment of interest is reversed. Petitioner Fischbach reverts to whatever position he may be entitled by virtue of his tenure and seniority in the district.

The Commissioner also reverses the determination that Petitioner Gattoni is entitled to the supervisor of instruction position. He has acquired tenure and seniority as assistant superintendent for personnel and curriculum, a category separate and distinct from the supervisory position. He, therefore, has no statutory entitlement to that position or any other supervisor of instruction position the Board may create in the future. Petitioner Gattoni, therefore, reverts to whatever position he may be entitled by virtue of his tenure and seniority in the district. The Commissioner is constrained to emphasize that the record substantiates the creation by the Board of only one supervisor of instruction position (J-12) and it acted to fill only one position (J-13).

Given the deplorable sequence of events that evolved in the filling of the supervisor of instruction position, the Commissioner orders that that position be reopened and that an open, highly professional process be employed to fill the position. He believes it appropriate that monitoring be ordered in this matter and, therefore, directs that the County Superintendent oversee the selection process for the position. If the Board is truly committed to "wrest itself away from its past and to steer its ship onto the course of sound fundamental education for its students" as stated in its exceptions, the Commissioner is sure it will acknowledge the necessity for and wisdom of the role of the County Superintendent in this matter.

COMMISSIONER OF EDUCATION

FEBRUARY 19, 1985

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4846-84
AGENCY DKT. NO. 221-6/84

ARLYNE K. LIEBESKIND,
Petitioner,
v.
BRADLEY BEACH BOROUGH BOARD OF EDUCATION,
Respondent.

Thomas W. Cavanagh, Jr., Esq., for petitioner (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys)

Robert H. Otten, Esq., for respondent (Crowell and Otten, attorneys)

Record Closed: November 27, 1984 Decided: January 10, 1985

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Arlyne K. Liebeskind (petitioner), employed by the Bradley Beach Borough Board of Education (Board) as a teacher for 18 years, alleges that the action taken by the Board on or about March 21, 1984 by which it denied her request for extended sick leave benefits is an arbitrary and capricious exercise of its discretionary authority by virtue of its asserted failure to consider her request on an individual basis which, it is claimed, resulted in an absence of reasons for it to deny her specific request. After the matter was transferred to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a hearing was scheduled and conducted on November 1, 1984 at the Little Silver Borough Hall, Little Silver. The record closed November 27, 1984 upon receipt of petitioner's letter memorandum.

BACKGROUND FACTS

At a prehearing conference conducted in the matter on August 10, 1984, the issues agreed upon for adjudication were stated as follows:

1. Whether the Board is obliged to consider applications for extended sick leave benefits under its policy 321[1] on an individual basis. Whether the Board is obliged to afford reasons why an application under the policy is denied.

2. Whether the Board's determination to deny petitioner's application is, in the circumstances, arbitrary, capricious or unreasonable.

Partial summary decision was granted petitioner, by written Order dated October 4, 1984 by which the Board was "* * * directed to forthwith advise petitioner, through petitioner's counsel, of the reasons why it denied her request for extended sick leave benefits under the terms of its own policy." Liebeskind v. Bradley Beach Borough Board of Education, OAL DKT. EDU 4846-84, Order, Partial Summary Decision (Oct. 4, 1984). Consequently, the second part of the first stated issue appears to have been already adjudicated in this forum. However, it shall be seen later that the Board's legal position is contrary; that is, it contends because extended sick leave benefits may be granted within its discretionary authority it need not afford reasons regarding whether it elects to exercise such discretion.

At hearing, the underlying facts of the matter were stipulated, except as otherwise noted, by the parties, as were 19 documents (J-1 through J-19).

The parties stipulate petitioner had a serious bona fide illness which caused her to submit a request for extended sick leave benefits during February 1984 under the terms of the Board's policy. It is stipulated that petitioner is an efficient, competent

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[1] The Board's extended sick leave policy is identified as "No. 321" or as "E-15". Both references refer to the same sick leave policy.

teacher and has been so in the Board's employ for the past 18 years. It is also stipulated that petitioner was recovering from major surgery, was absent from her teaching duties following major surgery to the extent her cumulative sick leave was exhausted, and that she planned to return to her employment by the end of February 1984. Petitioner did return to her teaching duties on February 27, 1984 (J-2). The documentary evidence stipulated by the parties shows that on February 5, 1984 petitioner requested, in writing through the superintendent, that "* * * the Board of Education consider restoring my regular salary for the month of February to ease the financial burden caused by my extended illness. * * *" (J-1). Petitioner stipulates that 16 days are at issue because she worked 2 days in February.

The Board's extended sick leave policy for its professional staff, No. 321, provides in full as follows:

> A teacher who has used the total cumulative days may apply to the Board to have the rate of a substitute teacher deducted from his/her salary, up to and including a terminal date established by the Board of Education.
>
> A written certification from an accredited practitioner for an illness over three (3) consecutive days may be requested by the Superintendent. After five (5) consecutive days, certification is required.
>
> (J-13)

The Board and the Bradley Beach Teachers' Association negotiated a contractual provision in respect of sick leave (J-13A) which parallels the legislative expression of sick leave allowable for, among other persons, public school teachers as set forth at N.J.S.A. 18A:30-2. The contractual provision need not be recited here because it is not relevant to this dispute.

The superintendent forwarded petitioner's request for her "regular salary for the month of February"[2] to the Board, which discussed the matter at a workshop meeting on February 21, 1984. (J-2). The Board apparently assigned its personnel committee

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[2] Petitioner's request for regular salary for 16 days in February 1984 without deduction of substitute pay, is clearly beyond the scope of the Board's extended sick leave policy (J-13) recited above.

chairperson the task of collecting information regarding its options, in light of petitioner's request. The chairperson prepared options based on "* * * research of the New Jersey Statutes Annotated and the Negotiation Agreement between the Bradley Beach Board of Education and the Bradley Beach Education Association." (J-2). The stated options, shared with the full membership of the Board by the chairperson on February 27, 1984, in anticipation of the full Board considering petitioner's request further at its workshop meeting scheduled for March 20, 1984, were stated as follows:

1. Full salary, with no differential deduction for substitute pay, for any number of days up to the 16 days of ineligible absences.

2. Salary, less the deduction of payment of the substitute, for any number of days up to 16 days of ineligible absences.

3. Granting of a specified number of extended benefit days in anticipation of future need for sick leave between the return date and the end of the school year, such days to be available for use if needed.

4. Any one or combination of items 1 - 3 above.

5. No salary benefits or extended benefit days in anticipation of future absence between the date of return and the end of the school year.

(J-2)

By March 20, 1984 the personnel committee apparently recommended against petitioner's request because on March 20, 1984 the Board determined to adopt the recommendation of its personnel committee "* * * that after considerable review and research, that no additional benefits be extended to [petitioner] beyond the three days given to her for the month of January 1984 * * *" (J-4).

It is noted that the "three days given to [petitioner] for the month of January 1984" was the result not of affirmative Board action, but of payroll considerations in light of the fact that the Board's business office prepares payrolls on a monthly basis.[3] There is no evidence to show petitioner requested extended sick leave benefits for any day in January 1984 and the Board would not have gratuitously granted extended sick leave

[3] Payroll checks are prepared once a month (see J-14). Because petitioner's check for January 1984 had already been drawn, the Board secretary did nothing to correct petitioner's salary amount for that period even though petitioner's sick leave expired with three working days left in January.

benefits beyond the scope of its own adopted policy. It has already been seen though, that the Board's policy on extended sick leave does not contemplate granting full pay for teachers absent from duty for legitimate reasons and who have exhausted accumulated sick leave available. Thus, I find petitioner was given the three days because to deduct three days' pay from petitioner's January salary would have caused the Board's business office greater bookkeeping effort then than simply balancing the three days' pay to which petitioner was not entitled at a time subsequent to petitioner's return to active employment. Thus, in terms of the Board's sick leave policy and petitioner's request thereunder, it cannot be said that the Board "granted" petitioner three days pay to which she was not entitled. It may be, that subsequent to petitioner making her initial request for extended sick leave benefits the Board may have, in its collective mind, traded the three January days for which petitioner was arguably indebted to it in exchange for no extended sick leave benefits but there is no evidence to show the Board consciously nor affirmatively considered a trade-off in response to petitioner's request.

The following day, March 21, 1984 petitioner was advised by the Board secretary that the Board considered her request the previous evening for salary in light of the fact she, petitioner, exhausted her accumulated sick leave days allowable. Petitioner was further advised that

> The Board of Education gave much thought to your request and has reviewed the request and all information pertinent to it which was provided prior to consideration of the request. The decision of the Board of Education is that no further benefits beyond the three days of full pay for the January pay period be granted.
>
> The Board of Education recognizes and appreciates your years of service and want you to know that their decision is made following full and careful consideration of the request. The Board of Education is pleased to hear of your return to active employment and extends sincere wishes for your continued good health.
>
> (J-5)

Petitioner, having received notification of the Board's response to her request, submitted the following writing to the Board on April 2, 1984:

> * * *
> In the alternative, I would like to apply for my salary less the cost of the substitute for that same period of time, pursuant to Board policy C-15 Re Sick Leave. It is my understanding that since the Board adopted the policy in 1974 all teachers applying for such relief have been granted it. Therefore, I anticipate a favorable decision * * *

The Board learned of petitioner's most recent request at an executive session conducted April 9, 1984. Though the matter was not then discussed, the Board did determine to address petitioner's request "* * * in Executive Session at the Regular Meeting tomorrow evening * * *" (J-7). When the Board did address the request the following evening, the minutes (J-8) of that Executive Session show the following:

> Mr. DeCapua [the superintendent] recommended that her [petitioner's] request be denied, based on the following facts:
>
> 1. Decision regarding extended benefits is solely at the discretion of the Board of Education which addresses each request on an individual basis.
>
> 2. The Board of Education considered the request in terms of options available, and in light of all factors known or provided through legal council (sic).
>
> 3. The general picture of staff attendance and the record of accumulated sick leave, with the potential for future absences and use of accumulated sick leave, in many cases, was a factor considered.
>
> 4. The Board of Education also considered the economic impact of granting full pay (first letter of request) where the difference between substitute's pay (second letter of request) for the days requested, in light of all information available.
>
> 5. Payment of two (2) days full pay, as granted to complete the January pay period, was determined by the Board of Education to be the extent of benefits granted to Mrs. Liekeskind [petitioner] at this time.
>
> The Board was in unanimous agreement that they would deny the request when the regular meeting resumes.
> (J-8)

Thereafter, on April 13, 1984, petitioner was advised by the Board secretary that "* * * the Board of Education's decision on your request is to deny any further extension of benefits beyond the two days already granted." (J-9).

Thereafter, some, if not all, faculty persons at the Bradley Beach school offered to have one day deducted from their accumulated sick leave in order to contribute that day to petitioner so that she would have received a total contribution of 23 sick days for February in order to recover her salary from the Board. The Board denied the proffered contribution by the faculty on the advice of its attorney. (J-10, J-11, J-12).

It is noted that the Board's policy (J-13) on extended sick leave benefits for its professional staff has been in existence, unchanged, since at least 1972. According to answers filed by the Board to interrogatories served by petitioner, no teacher has been denied extended sick leave benefits under the terms of that policy. (J-19, at p. 5). Specifically, the Board says one teacher applied in 1972 for extended sick leave benefits and received two days. However, the Board's own answer to Interrogatory 8 belies that assertion. What happened was that that teacher was absent during September 1972. The teacher's check for September 1972 had already been drawn and, as with petitioner, the bookkeeping work would have been greater then than if the Board deducted the two days after that teacher returned to his duties (J-14). There is no evidence to show that that teacher in 1972 ever requested extended sick leave benefits, nor is there evidence to show whether the Board ever recouped two days pay from him.

Next, the Board's answers to interrogatories show that in 1974, one teacher was granted seven days of extended sick leave benefits though that teacher sufficiently recovered so as not to have need to use any of the seven days. The fact remains, nonetheless, that the Board did grant that teacher in 1974 seven days of extended sick leave benefits under the terms of its policy. A second request was considered by the Board from a teacher in 1974 for extended sick leave benefits when that teacher protested her bi-monthly salary being docked for five days' absence. The Board immediately acted on her letter of protest to grant her five days extended sick leave benefits. In 1976, one teacher applied for benefits under the terms of the Board's policy and was granted three days of extended sick leave benefits.

This concludes a recitation of the underlying facts of the matter as stipulated by the parties and as can be discerned from the documents stipulated into evidence.

LEGAL POSITIONS OF THE PARTIES

Petitioner points out the fact she made a timely request for extended sick leave benefits under the Board's policy and that the Board did not, nor has it to this day, questioned the legitimacy of her request, nor has it questioned her need for extended sick leave benefits at that time. Petitioner also notes that she has been an unquestioned valuable employee of the Board for 18 years. Petitioner compares the established fact that the Board honored all prior requests by teachers for extended sick leave benefits but, for reasons unknown to her, the Board denied her request. Petitioner contends that the

absence of reasons given her by the Board for its refusal of her requests, renders the Board's denial an arbitrary and capricious action which must presently be corrected by this forum, and the Commissioner, awarding her 16 days of extended sick leave benefits, less the pay of a substitute, for February 1984. Although petitioner acknowledges the Board was earlier ordered to afford her reasons by the partial summary decision in her favor, she contends that at best those reasons, set forth by the superintendent at the Board's executive session on April 10, 1984 (J-8), are cryptic. Petitioner contends reasons 1, 2, and 5 are nothing more than conclusions, while reasons 3 and 4 are mere assertions made without evidence to support the "why" of the denial. In respect of the days in January for which she was paid, petitioner contends such days are not relevant to the dispute here because she received those days only because of bookkeeping difficulties.

The Board contends that the ruling in Bd. of Ed. Piscataway Tp. v. Piscataway Main, 152 N.J. Super. 235 (App. Div. 1977) is dispositive of this case in that the Piscataway court ruled that a contractual provision for extended total disability leaves exceeds the authority of a board of education and is, accordingly, invalid and unenforceable. The Board contends that the subsequent administrative case of Molina v. Bd. of Ed. of East Orange, OAL DKT. EDU 7276-82, aff'd Commissioner of Education (May 3, 1983) was decided in violation of the precepts established in Piscataway, supra, in that "reasons" for a discretionary action undertaken should not be required of a Board even when the result of such action is challenged. The Board seems to suggest that because N.J.S.A. 18A:30-6 grants it discretionary authority whether to grant extended sick leave benefits, it is under no obligation to afford reasons to affected persons why it chooses to deny requests such as herein.

Petitioner, in support of her position that reasons must be granted by the Board in these circumstances by which it denied her request for extended sick leave benefits under an existing policy, cites Monk v. New Jersey State Parole Board, 58 N.J. 238 (1971); Donaldson v. Bd. of Ed. of North Wildwood, 65 N.J. 236 (1974); In re Trenton Board of Education, 176 N.J. Super. 553 (App. Div. 1980), aff'd 86 N.J. 327 (1981); and Molina, supra.

DISCUSSION OF LAW AND CONCLUSIONS

N.J.S.A. 18A:30-2 provides that employees of public school districts must be given a minimum of ten sick leave days with full pay each school year. N.J.S.A. 18A:30-3 provides that sick leave days not utilized in a particular year may be accumulated to be

used, as needed, in subsequent years. N.J.S.A. 18A:30-7 provides that while a board of education is free to grant sick leave over and above the ten day minimum, no person shall be allowed to accumulate more than fifteen days of sick leave in any one year.

The statute which is central in this dispute is N.J.S.A. 18A:30-6 which provides, in pertinent part, as follows:

> When absence * * * exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the day of a substitute, if a substitute is employed or the estimated cost of employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary.

There is no serious dispute between the parties that a contractual provision purporting to grant extended sick leave benefits to all professional employees on a blanket basis is illegal and unenforceable. Piscataway Tp., 152 N.J. Super. at 246. Nor is there serious dispute between the parties that N.J.S.A. 18A:30-6 vests boards of education the authority to determine the appropriateness of granting sick leave beyond the minimum benefits prescribed by law. Each board of education may grant extended sick leave benefits to any person depending upon the circumstances "in each individual case." Consequently, there is no serious dispute between the parties that this Board has discretionary authority whether to grant requests for extended sick leave benefits. The issues are whether this Board considered petitioner's request as an "individual case", and whether the Board must state reasons when the exercise of its discretionary authority is challenged and, if so, did the Board afford such reasons in this case.

Monk, supra, and the Donaldson, supra, cases cited by petitioner in support of her demand for "reasons" for the Board's denial of her request, stands for the proposition that an administrative agency may not act in a way so as to deleteriously affect individuals without some rational basis. Monk was denied parole without being afforded reasons by the parole board for such denial. Donaldson was a probationary teacher whose employment was not renewed by the board without reasons being afforded by the board for such nonreemployment. In each case, the New Jersey Supreme Court held that some reason had to be afforded both Monk and Donaldson in order for Monk to learn to conform his conduct to the expectation of the parole board and for Donaldson to learn to improve her effectiveness as a teacher for future teaching positions she may hold.

The Commissioner of Education recognized in 1968 the evil of allowing a board of education to exercise discretionary authority without affording reasons, when challenged, for such action. In Mears, et al. v. Boonton Board of Education, 1968 S.L.D. 108, the request of a group of persons for the use of the Boonton High auditorium was denied by the board. The board asserted that the use of its auditorium was within its sound discretion and reasons for the exercise of its discretion need not be given to the group who sought the use of the auditorium. Though Molina, supra, and Matawan Regional Teachers Association, et al. v. Bd. of Ed. of Matawan-Aberdeen Regional School District, OAL DKT. EDU 8595-82, rev'd Commissioner of Education (Dec. 1, 1983) were factually similar to the present dispute in that both cases involved teachers' requests for extended sick leave benefits, the requests were denied either without consideration on an individual basis or without reasons for the denial, the ultimate result in each case was a remand to the Board for further consideration. Nevertheless, it is well to note the words of the Commissioner in the Mears case. Keeping in mind that the Mears case involved the board's denial, without reaons, of the use of the Boonton High School auditorium, the Commissioner, in words as relevant now as they were then, held as follows:

> The Commissioner was called upon to consider a similar matter in Seamans, et al. v. Bd. of Ed. of Woodbridge, supra. [1968 S.L.D. 1]. While certain procedural questions were raised in that case which do not appear in the instant matter, the basic issue is the same: May a board of education deny to a responsible civic organization the use of its facilities without making clear its reasons therefor? In the Seamans case, the Commissioner said:
>
> > "'New Jersey statute R.S. 18:5-22 now N.J.S. 18A:20-34'" authorize boards of education, 'subject to reasonable regulations to be adopted by such boards,' to permit the use of school facilities, when not in use for school purposes, for, inter alia:
> >
> > > "'* * * holding such social, civic and recreational meetings and entertainments and for such other purposes as may be approved by the board of education.
> > >
> > > "'Thus, a local board of education is endowed with broad discretionary power in granting the use of its facilities. But as in all matters wherein the use of discretion is authorized, such use must be found to be reasonable [citation omitted].
> > >
> > > "The Commissioner therefore conceives it his responsibility to examine not only the reasonableness of a board's regulations adopted pursuant to R.S. 18:5-22, but also the proper use of the board's discretion in the application of such regulations.

> In the instant matter it is as impossible for the Commissioner to examine respondent's reasons for its denial of petitioner's application as it was in Seamans, for no reasons are, or ever have been, effectively given * * * The Commissioner must therefore find, as he did in Seamans, supra, that respondent has acted arbitrarily and that its actions must therefore be set aside.
>
> The determination herein, as in Seamans, suggests the need for a word of caution to boards of education. The Commissioner does not contemplate that in every instance of a board's action in the application of its policies and rules the board will expressly formulate a statement of its reasons for such action. To be sure, in many instances, the reasons may clearly appear in the minutes of the board's deliberations or even, in some instances, in the language of a resolution. However, the 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 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 here, 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 manner, 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 action cannot be sustained. Neither in Seamans nor in the present matter could the Commissioner find such reasonable basis, and he therefore was impelled to the conclusion that the Board's action was unreasonable and arbitrary.
>
> 1968 S.L.D. at 110-11

This case does not concern itself with the issues of whether the Board's policy is generally applicable to all, or whether the Board grants automatic extended sick leave benefits to all who apply, nor is the issue presented that the policy is contrary to the provisions of N.J.S.A. 18A:30-6. Rather, this case concerns itself with the issues of whether a preponderance of credible evidence shows the Board considered petitioner's application on an individual basis and, if so, whether the Board, in refusing petitioner's request, "acted with reason and not in an arbitrary, capricious, unreasonable, or discriminatory manner" under the terms of the policy it adopted as early as 1972.

In regard to whether the Board considered petitioner's request on an individual basis, the record suggests that the application was individually considered because there is no evidence that simultaneous to petitioner's request other professional staff members

filed similar requests with the Board. The larger issue, however, is whether the Board considered the circumstances of petitioner's request whatever those circumstances may be. The evidence suggests that what the Board did consider was its personnel committee's chairperson's proffered options (J-2), ostensibly based on her research of the "New Jersey Statutes Annotated and the Negotiation Agreement between the * * * Board * * * and the * * * Association" (-2); the asserted "facts" represented to it by its superintendent at the executive meeting held April 10, 1984 (J-8) whereby the superintendent asserted that petitioner's request is a decision solely within the Board's discretion, that the Board considered the request in terms of the chairperons' proffered options, the general picture of staff attendance with the potential for future absences (but without regard to how such general picture of attendance and future absences apply to petitioner), the economic impact of granting petitioner's request for full pay or the difference between substitute's pay in light of the information available (but without regard to what that economic impact would be), and the then asserted fact, not proven in this record, that the Board already granted two full days to petitioner in January.

A review of the Board secretary's letter to petitioner on March 21, 1984 (J-5) by which her request for full pay was denied, discloses no reasons other than the cryptic assertion that the Board "gave much thought to your request and has reviewed the request and all information pertinent to it * * *". The Board secretary's letter of April 13, 1984 (J-9) by which petitioner's request for pay less substitute's pay was denied simply presents the statement that the Board denied her request, while asserting petitioner already received two days in January. Neither the chairperson's proffered options, the Board secretary's letter, nor the superintendent's asserted "facts" mention circumstances surrounding petitioner's request for extended sick leave benefits. Consequently, I find the Board did not consider individual circumstances surrounding petitioner's request. N.J.S.A. 18A:30-6; Piscataway Tp., supra.

I have searched this record in vain to find some reasonable basis for the Board's refusal of petitioner's second request. For the Board to have provided such a basis in support of its denial would have necessitated nothing more than the Board merely stating why it denied petitioner's request. This record does not disloose a reason why the Board denied petitioner's request. Once this Board adopted the policy (J-13) under N.J.S.A. 18A:11-1 and pursuant to N.J.S.A. 18A:30-6 it foreclosed even the remotest possibility that it could act lawfully by denying a teacher's request without reasons when requested, as here.

Keeping in mind that the record in this case is complete, and that the Board has already been directed to afford petitioner the reason why it denied her request, and in light of the fact this record still does not disclose reasons why the Board refused petitioner's request, it would be a mockery of fair play and administrative justice to remand the matter to the Board to now afford petitioner reasons why it denied her request. The Board had the opportunity to provide such reasons at the time it denied her request, at the time the petition was filed, and at the time petitioner was granted partial summary decision with an Order to the Board to provide her reasons why it denied her request. That the Board still has not provided reasons, even during the plenary hearing in the matter, leads me to conclude that the Board has no reasons to offer petitioner.

Consequently, I **CONCLUDE**, under the total circumstances in this case, that the Bradley Beach Board of Education has exercised its discretionary authority under the provisions of N.J.S.A. 18A:30-6 in an arbitrary, capricious, and unreasonable manner in respect of petitioner's request to it for extended sick leave benefits under the terms of its policy and, accordingly, has abused its discretion. The Board is accordingly **DIRECTED** to grant petitioner 16 days' salary, less the cost of a substitute, as petitioner requested in her letter to it on April 2, 1984 (J-6). While it is acknowledged that the Board has discretionary authority under N.J.S.A. 18A:30-6 whether to grant such requests, the Commissioner of Education has the duty to correct an abuse of discretionary authority by a board of education. Mears, supra. In this instance, the Bradley Beach Board of Education abused its authority and the relief granted petitioner is warranted under the circumstances.

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

OAL DKT. NO. EDU 4846-84

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

January 10, 1985
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

January 11, 1985
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 16 1985
DATE

Ronald L. Parker/phb
OFFICE OF ADMINISTRATIVE LAW

ARLYNE K. LIEBESKIND,

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF BRADLEY BEACH, MONMOUTH COUNTY, : DECISION

RESPONDENT. :

:

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

It is observed that timely exceptions to the initial decision were filed by the Board pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

In the Commissioner's judgment the judge's recommended findings and conclusions in the initial decision which reverse the Board's action in denying petitioner's request for extended sick leave salary benefits warrant a contrary finding and determination.

Initially, the Commissioner is constrained to comment upon the impact of the provisions of N.J.S.A. 18A:30-6 as it relates to the Board's discretionary authority to grant extended sick leave with pay for prolonged absence. The pertinent statutory language at issue herein is recited below for the purpose of further clarification by the Commissioner:

> "When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary." (N.J.S.A. 18A:30-6)

It is clear from reading the above provisions that employees who have exhausted their annual and accumulated sick leave may apply to the Board for extended sick leave salary benefits. However, there is no automatic right of entitlement to such benefits to be accorded to an affected employee by virtue of such request to the Board. To the contrary, the Board is required by law to consider each request individually on a case-by-case basis. It is apparent that, when an employee requests extended sick leave salary

benefits, the Board is already aware of the fact that he or she has legitimately exhausted all annual and accumulated sick leave salary benefits. Therefore, it is incumbent upon the individual employee to provide the Board with sufficient reason for requesting additional extended sick leave salary benefits so that the Board may take into consideration the extenuating circumstances which may or may not warrant a favorable determination to grant the request.

Local boards of education do not have access to an inexhaustable amount of funds to automatically give blanket approval in reviewing individual requests for extended sick leave salary benefits. Nor would a local board of education be representing the public interest of the local taxpayers or the community at large if it arbitrarily granted benefits to individual employees solely on the basis of their making such request because of illness.

The facts of this matter clearly reveal that petitioner in the first instance requested full salary for 16 days of extended sick leave benefits which was denied by the Board on March 20, 1984 inasmuch as it did not comply with its existing policy No. 321 (J-13, ante) for that purpose. Thereafter, on April 2, 1984 she submitted a second request for 16 days of extended sick leave salary benefits for those days in February 1984 not covered by her annual or accumulated sick leave which she had exhausted.

While it is undisputed that petitioner's request for extended sick leave salary benefits did in part allow the Board pursuant to its policy to consider such request on the basis of calculating as a deductible the salary of a substitute teacher (J-13), petitioner's reason for such request for extended sick leave salary benefits was based upon what she claimed was the Board's prior actions taken with other employees. Should the Board have acceded to the reasoning offered by petitioner, it would have been tantamount to granting blanket approval to requests for extended sick leave rather than having made a determination on an individual case basis as required by N.J.S.A. 18A:30-6.

The specific language of reference used in petitioner's second request of April 2, 1984, reads as follows:

> "***In the alternative, I would like to apply for my salary less the cost of the substitute for that same period of time, pursuant to Board Policy E-15 Re: Sick Leave. It is my understanding that since the Board adopted the policy in 1974 all teachers applying for such relief have been granted it. Therefore, I anticipate a favorable decision.***"
>
> (J-6) (Emphasis supplied.)

It is clear from a reading of petitioner's second request that she failed to supply to the Board any valid reason demonstrating why she wanted it to consider her individual request for extended sick leave salary benefits other than the fact that she was of the opinion that

the Board had granted such requests to other employees. The Board did, in fact, consider petitioner's second request (J-6) on an individual case basis as required by law on April 10, 1984 and it concluded that the reasons given by petitioner were insufficient to grant her request.

The Commissioner has reviewed the reasons of April 10, 1984 (J-8) given by the Board in light of petitioner's request (J-6), and finds and determines them to be entirely appropriate in view of the specific reason advanced by petitioner that she be granted 16 days of extended sick leave salary benefits. The Commissioner finds and determines that the Board was not required to justify its reasons for granting extended sick leave salary benefits to employees other than petitioner. In that regard the judge's decision to shift the burden of proof to the Board to establish justification for its action concerning the denial of petitioner's request is procedurally flawed and without merit.

Accordingly, for the reasons set forth above, the recommended findings and conclusions in the initial decision are reversed and the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

FEBRUARY 22, 1985

Pending State Board

INITIAL DECISION
OAL DKT. NO. EDU 4680-84
AGENCY DKT. NO. 182-5/84

GERARD GONSALVES and
SOUTH ORANGE-MAPLEWOOD
ASSOCIATION OF SUPERVISORS,
COUNSELORS and ADMINISTRATORS,
Petitioners,
v.
BOARD OF EDUCATION OF
SOUTH ORANGE-MAPLEWOOD,
Respondent.

Wayne J. Oppito, Esq., for petitioners

Sidney A. Sayovitz, Esq., for respondent (Greenwood and Sayovitz, attorneys)

Record Closed: December 3, 1984 Decided: January 10, 1985

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

Gerard Gonsalves, a tenured vice principal, (petitioner) and the South Orange-Maplewood Association of Supervisors, Counselors and Administrators (the Association) contend that the Board of Education of South Orange-Maplewood (Board) abolished the position of vice principal at Maplewood Middle School in bad faith, created the substantially similar position of supervisor, and violated the seniority rights of Gonsalves by failing to appoint him to the supervisor position. The petition, filed on May 17, 1984,

was transmitted to the Office of Administrative Law on June 27 for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

The case was preheard on August 9 and heard on November 13 and 14, 1984. The record closed with receipt of simultaneous briefs on December 3. A list of the exhibits entered into evidence is appended to this decision.

Factual Background of the Issues

In order to understand the claims of petitioners, a brief factual background is required. The following facts are undisputed. Gonsalves is a tenured vice principal, having been assigned to that position at the South Orange Middle School (SOMS) since January 1978. The district has two middle schools and a high school. Maplewood Middle School (MMS) also had a vice principal, Michael Cabot; he is tenured and more senior than Gonsalves.

In February 1984, the Board abolished the position of vice principal at the Maplewood Middle School, established a curriculum supervisor position and unit leader positions there and transferred the more senior vice principal to South Orange Middle School thus continuing a vice principal position in that school. The Board appointed a non-tenured person to the new curriculum supervisor position. Gonsalves was assigned to teach mathematics in the 1984-85 school year.

Petitioners claim that the abolishment of only one vice principal position and creation of a supervisor position in the same school was done in bad faith. In relation to this issue, petitioners initially argued that the Board may not abolish a position and distribute the duties among other positions and that the Board's action of abolishing only one of two vice principal positions in the district was arbitrary and unreasonable. The Board's position early on and throughout the case was that if petitioners were unable to prove that the Board acted in bad faith in accomplishing school reorganization, a conclusory finding to that effect would entirely resolve the issue and petitioners could not

be heard to question the managerial prerogative of the Board to distribute duties among new or old positions or to place a vice principal in one school and not the other. As will be seen below, petitioners were unable to prove bad faith and the Board's testimony fully supported a good faith reorganization, long-considered and rationally implemented. Petitioners' post-hearing brief did not touch upon the subissues relating to the reorganization they initially posited at prehearing, and I therefore consider them abandoned.

Petitioners' brief focused only on the remaining issue: whether or not the duties of the new position of curriculum supervisor are substantially the same as those of a vice principal such that it was a violation of Gonsalves' tenure and seniority rights pursuant to N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10 to deny him appointment to the new position. The facts to be found therefore are those which compare and contrast the two positions and which show how and why the reorganization was adopted and implemented by the Board.

Petitioners' Testimony

Petitioners called Michael Cabot, the more senior vice principal (since 1973) to testify concerning his duties as vice principal in each middle school (MS) and his knowledge of the reorganization at MMS which resulted in the establishment of the curriculum supervisor position there for which Joseph Priddy was hired. He confirmed that he performed the duties of a vice principal at MMS as listed on Exhibit P-1 but noted some difference from duties in his position at SOMS. At MMS, before July 1, 1984 Cabot as vice principal supervised science, social studies, industrial arts and home economics teachers and custodians and developed curriculum in the subject fields. Pre-1980, the school had department heads. After department head positions were abolished, Cabot and principal Bernard Ryan divided up the work and Ryan took the subject areas of English and mathematics. The vice principal job description (P-1) is not entirely accurate in that it does not reflect splitting up of the work by subject areas. P-2, prepared by MMS principal Ryan, contrasts duties of the two positions at MMS before July 1984. The two administrators took a team approach to evaluation. Sometimes an assistant superintendent replaced the principal on the two-person evaluative team.

Cabot noted that discipline and activity program development and implementation took up a lot of his time as MMS vice principal. He confirmed his duties as listed on P-2 and explained them more fully. He noted that the vice principal's duties listed on chart P-3 are not all inclusive since Cabot also supervised home economics and industrial arts. P-3 shows that secondary school department heads supervised in the subject areas not covered by Cabot and Ryan. Cabot as MMS vice principal also had two other duties unlisted on P-2: dealing with pupil emergencies two days a week in the absence of the school nurse, and district-wide committee work for grades 6 to 8, which involved attendance at meetings with high school science heads to integrate instruction in the field. He confirmed that P-4 also listed the MMS vice principal's duties in the left column.

Cabot noted that the assistant to the principal position and duties shown on the right side of P-4 showed many of the duties of the new curriculum coordinator, which are set forth more fully on Exhibit P-5. When initially presented to the county superintendent for approval, the curriculum supervisor position was to be entitled assistant to the principal. Cabot noted significant differences between his duties as vice principal and those of the supervisor. These are detailed in finding number one below.

Cabot learned of the proposed reorganization of MMS when he met with assistant superintendent Monson in March or April 1983. Monson told Cabot he would probably be assigned to SOMS and the plan described by Monson was similar to that which was adopted by the Board. Cabot read Monson to be saying that there was a perception in the district that Ryan and Cabot did not work well as a team. Ryan would remain at MMS. Cabot later received a letter from Monson telling him to attend an orientation meeting at SOMS in June, which was his first official indication of a transfer.

Cabot was aware that a committee of teachers had been studying MMS reorganization and had met in September or October 1983. Cabot was not a member of that committee but Dr. Ryan was. Cabot learned that the focus of that group was on where the duties being performed by the vice principal should be placed. Cabot felt that Monson's perception of his relationship with Ryan was not a valid one since they did work well together and had a cordial and respectful relationship although they did not always

agree. What Cabot was dissatisfied with was dealing with about 95% of the disciplinary problems in the school whereas he had understood the task was to be relatively equally divided between himself and MMS principal Ryan. Disciplinary duties took up so much of his time (over 50%) that he did not have enough time left to perform other tasks. Cabot estimated 20% of his time was spent on office work; 15% of his time was spent on club and activity programming, 5% on general operations of the building (custodians, security, supply ordering), 5% on miscellaneous duties and a considerable amount of paperwork was completed at home.

Monson mentioned to Cabot that one reason for the proposed MMS reorganization was strengthening curriculum. Cabot and Ryan had discussed curriculum development at the time they split the tasks of department heads between them in 1980 and subsequently. Both had been social studies teachers. Ryan had also worked with compensatory education which is why he chose English and math curriculum development, but he was not comfortable with the mathematics area, whereas Cabot felt that the science area was a problem for him. Cabot testified that more expertise was needed for curriculum development in specific subject fields, such as science, although he did function in such development by meeting monthly with social science and science teachers and chairing a joint middle school committee which analyzed curriculum in 1983-84. Cabot also did some workshop planning. In science, he felt fairly satisfied with his work on 8th grade curriculum; he worked to some extent with 7th grade but did not work at all with 6th grade. In neither subject area did Cabot originate curriculum; he worked to improve it.

MMS had six subject teaching team leaders each receiving a stipend in 1980. Team leaders were established after department head positions were abolished. They performed some administrative functions previously performed by department heads. The school had been changing since 1980 when it became a middle school which focused more on social and developmental progress; previously, as a junior high school, grades 7-8-9, there was more of an academic orientation. In 1980, 9th grade was transferred to the high school and MMS contained only grades 7 and 8 for one year. In 1981-1982 MMS picked up sixth grade. By 1982-1983, administrators began to perceive deficits in curriculum development and further changes were studied to meet the evolving needs of the school.

Everett Kline, chairman of social studies at the high school, testified that there was a major revision of the social studies curriculum, grades 7-12, when the 9th grade went to the high school (1980-81). At that time, SOMS had a department chairman but MMS did not. Kline therefore spoke to the department chairman at SOMS, but spoke to Cabot, the vice principal, concerning the social studies curriculum at MMS. Coordination of social studies curriculum in 1983-84 was addressed by a committee within which Cabot was the MMS representative.

George Goetz, vice principal at the high school and president of petitioners' association, related his concerns about MMS reorganization to assistant superintendent Monson: his concerns included the salary of a vice principal versus a supervisor ($43,000 versus $28,000), the purpose of a change and the placement of the teacher valuation function. Monson indicated the change would result in saving money since he expected they could hire someone out of a college for about $28,000. The curriculum supervisor is receiving $31,500, however, and Goetz expected that amount would rise after negotiations for 1984-85 are concluded. Goetz also spoke with the county superintendent, Dr. Scambia, who rejected the proposed new job title of assistant to the principal. The title was subsequently changed to curriculum supervisor and approved.

Petitioner Gonsalves testified that he was a vice principal for 13 years before being bumped back to a math teaching assignment; his change in salary was from over $39,000 to $35,6000, but if he had continued as a vice principal for 1984-85 his salary would have been $42,900. While vice principal at SOMS, he was also department chairman for special education, a function which is not shown among the duties of his position on Exhibit P-7. SOMS retains department heads. He had teacher evaluation functions, primarily in special education, but also to a certain extent in other departments. In specific cases, he "coached" certain teachers but he did not generally supervise teachers from other departments. He developed and implemented student activities. Supervision of custodians took up quite a bit of his time. He interviewed, hired and fired two or three. He had prime responsibility for student discipline which took up much time.

In 1983-84, SOMS began moving toward the teaming approach, an educational

methodology which had begun much earlier at MMS. SOMS had a committee studying reoganization but the faculty did not want a change and made this known. The principal at SOMS made a final report on this subject by June 1983. That summer, however, staff was told teaming would be organized for 7th and 8th grades. Sixth grade had teams already. The eighth grade at SOMS still does not have teaming (1984-85). Some 8th-grade faculty members continue to resist the concept.

Gonsalves admitted MMS and SOMS were organized and run differently and had been for years. He first heard talk of reorganization in September 1982 with respect to both schools; its purpose was to move into teaming. SOMS was lagging behind in implementing the concept in the 7th and 8th grades. SOMS continued to have department chairmen. The principal and vice principal there did not divide up evaluations, supervision and curriculum development based on subject matter as was done at MMS. Exhibit P-7 does not list curriculum development at all as a duty of the vice principal.

At the end of petitioners' case, the Board moved to dismiss. While I concluded that the facts educed were insufficient to show any bad faith in the reorganization of MMS, the picture was by no means completed with respect to the duties of the new curriculum supervisor and I had insufficient opportunity to study and compare the detailed documents introduced into evidence by petitioners. I therefore denied the motion without prejudice in favor of making a complete record of the Board's testimony.

The Board's Testimony

Dr. Robert Monson has been assistant supervisor of secondary education since January 1982. In addition to his doctorate in education, Monson held a post-doctorate fellowship at Harvard and administrative certifications from four other states besides New Jersey. He was employed as a principal in Chapel Hill, North Carolina prior to assuming higher administrative positions. By the spring of 1982, some elementary schools had been closed and Monson turned his attention to reorganizing the middle schools, investigating the concept of such schools and initiating a parent and teaching staff study committee. The group visited the schools and drafted a statement of philosophy in

November 1982. The principals were then asked to translate concept into proposed practices for individual schools.

The statement of philosophy rested upon a recognition that a middle school with eleven-year-olds (sixth graders) has a responsibility for academic achievement but also should be concerned with the individual's social and emotional development.

The implementation of the philosophy adopted included "teaming," which was initiated in 1980 in MMS. SOMS implemented teaming only partially, for sixth graders, when it was changed from a junior high to a middle school. SOMS retained the traditional departmental approach for 7th and 8th graders. In the teaming approach, teachers assigned to a team of about 125 sixth graders (out of 250 in that grade in one school) meet two to three times per week to review and coordinate the progress of individual students, giving attention to "whole child" development as seen across an academic subject area spectrum.

In January 1983, reorganization groups including parents and staff were formed in each school. At MMS,the group concluded that curriculum development at that school was not keeping pace with evolving needs. The sharing of curriculum work between Cabot and Ryan was not working. The MMS group wanted a full-time person for the function and rejected department head organization as not conducive to the middle school concept. The recommendation was to abolish the vice principal position. The SOMS group's recommendation in June 1983 differed: that group wanted to maintain the status quo with teaming only in the sixth grade and a departmental approach in seventh and eighth.

On January 17, 1984, Dr. Monson forwarded to the superintendent and through him, to the Board, recommendations for Phase II of K-12 administrative organization. This document (Exhibit R-1) sets forth the differences in the two middle schools, the rationale for changes and the changes proposed, including abolishment of the MMS vice principal's position and creation of unit-leader positions and a curriculum supervisor position, the proposed title of which was assistant to the principal. The duties of these positions were to include no teacher evaluation functions and the curriculum supervisor was to have no

disciplinarian function. The theory and organization of a teamed middle school administration is clearly apparent in this document.

When Dr. Monson met to discuss the reorganization with the county superintendent, Dr. Scambia, she indicated that the title assistant to the principal did not reflect the duties listed for the new position. The Board then revised the job title to read curriculum supervisor. Dr. Joseph Priddy was hired to fill the position and began work on July 1, 1984. Unit leaders took their positions in September 1984. Some teachers will also become subject leaders: they will have some subject oriented responsibilities such as ordering supplies. In 1984-85, two teams will be added in grade 7 in SOMS and activities will be planned to prepare the staff to implement teaming and a new administrative organization more like that at MMS.

Dr. Bernard Ryan, principal at MMS since 1972, testified concerning the evolution of that school. The facts he related were corroborative of prior testimony. He noted that prior to the establishment of teams, discipline consumed 70 to 80% of the vice principal's time, but that team leaders reduced that function to 50% before the vice principal position was abolished. He noted that "everything else" seemed to take precedence over departmental and curriculum work at MMS prior to reorganization. Unit leaders help cover the principal's tasks when he is out. The curriculum supervisor is not assigned to be in charge of the building in his absence as a vice principal would be. The principal now performs all the teacher evaluations and central office staff shares this work for non-tenured teachers. Ryan noted that the curriculum supervisor position would be undermined if he were used for regular administrative functions.

Dr. Joseph Priddy testified about his duties as curriculum supervisor since July 1984. Priddy was hired by the district in 1982-83 to direct a gifted and talented children program; thus he has not attained tenure in any position in the district. In coordinating a staff and curriculum development program, Priddy's activities are diverse: he consults with specialists to devise instructional strategies and travels to universities to attend workshops in specific subject areas such as math to bring back strategies to improve teacher effectiveness. Recent efforts in the related arts field led him to institute an

"artist for a day" program, providing a model for teachers of art. In a prior week, he worked on the application of computer services in the science area. His plans for the following week included a day with the anthropology staff and students at a nearby university. He has been asked to look at a renewal of the social sciences curriculum. He sometimes performs teacher "modeling" himself.

Priddy testified that in order for him to give the necessary curriculum support to staff, he does not get into either teacher evalution or pupil discipline. These functions are separated from teacher development and curriculum work because staff must feel free to seek help from the curriculum supervisor in improving their teaching effectiveness which they would not do if the supervisor were "grading" them or if they were calling upon him to solve disciplinary problems directly, since having disciplinary problems might, for example, reflect upon their abilities. The theory rests on a belief that teaching staff will not be free and open with a supervisor who has a duty to evaluate their effectiveness. If a child comes to Priddy with an interpersonal or disciplinary problem, Priddy brings the child to the unit leader. He carefully maintains separation of his functions from those of general administration.

FINDINGS OF FACT

1. The following listed duties of the curriculum supervisor were not performed by the MMS vice principal in 1983-84:

   a. Constructing master schedule.
   b. Coordinating unit leaders (none existed in 1983-84).
   c. Providing developmental supervision for all professional staff.
   d. Initiating grant development.
   e. Coordinating curriculum development in math and English.
   f. Developing in-service programs for all the above subject areas, not limited to science and social studies.

2. The curriculum supervisor does not deal directly with disciplinary problems, a duty which took up half the time of the MMS vice principal, nor does he have any responsibility for student activities; team teachers and unit leaders deal directly with discipline. The curriculum supervisor spends 90% of his time developing curriculum and teaching effectiveness.

3. Throughout the period 1979 to 1984, Maplewood Junior High School (grades 7-8-9) reorganized into a middle school (grades 6-7-8), passing through a year with 7th and 8th grade only, and evolving from an academically oriented secondary school with subject area department heads to a 6th, 7th and 8th grade middle school with teaming focusing on social and individual development.

4. By 1983, administration perceived a need for more intensive and organized curriculum development at MMS which could not be adequately performed through a principal-vice principal administrative organization, both because these administrators were administrative generalists and because much of their time had to be devoted to disciplinary, evaluation and student activity functions.

5. Under teamed organization of a middle school, teaching staff and students are divided into teams with roughly 100 to 125 students on a team, one unit leader and teaching staff from the grade level. Staff has regular meetings at which problems of individual student progress and group progress may be addressed. Discipline is addressed through the team structure and unit leader with the principal dealing only with suspensions, whereas discipline under the prior MMS organization was the task of the vice principal.

6. The two district middle schools evolved differently and have not had the same administrative organization for several years: SOMS still

retains a typical junior high school administrative structure with a disciplinarian vice principal, subject area department heads and by 1983, it had teaming only on the sixth grade level.

7. Central administration is committed to teaming and completing a reorganization which is intended to better fulfill the developmental needs of a middle school population.

8. While MMS was deemed ready for administrative reorganization, SOMS was not, principally because of staff resistance to teaming. Central administration believed that teaming might prove unsuccessful if imposed over the objections of staff which preferred to retain department heads and a disciplinarian vice principal.

9. While there is some overlap in duties as between the MMS former vice principal position and new curriculum supervisor position, there is less overlap between the duties of the existing SOMS vice principal and the curriculum supervisor at MMS: the differences in duties arise organically from differences in structure and teaming organization which evolved to serve the needs of a middle school as opposed to a junior high school population.

10. The differences between the duties of a curriculum supervisor and those of a vice principal are also firmly founded in educational and psychodynamic management theory: the supervisor helps teachers to develop their effectiveness and to keep the curriculum attuned to student needs. He seeks and brings back the best techniques and programs from centers of higher education or other intersystem sources and advises and assists teaching staff. To the end of open and free interaction with teachers, he never functions as their evaluator or the person looked to to solve their disciplinary problems, functions which are performed by a vice principal in the traditional non-teamed setting.

DISCUSSION and CONCLUSION

The findings leave no doubt whatsoever that the reorganization resulting in the elimination of a vice principal position at only one middle school of the two in the district, was rational, pursuant to sound educational theory and in good faith. I so **CONCLUDE.**

The testimony and findings also show very clearly that the position of curriculum supervisor is in no way either in fact or in theory designed to substitute for a vice principal position. **I FIND and CONCLUDE** they are different positions with different duties to serve different educational functions. There is no substantial similarity in the duties of these positions such as might invoke the rule of Quinlan v. Bd.of Ed. of North Bergen, 1960 S.L.D.. 113. The vice principal position held by Gonsalves in SOMS required a minimum of curriculum and teacher development work since SOMS had and has department heads. The vice principal at MMS was supposed to function in curriculum development to a greater extent than the SOMS vice principal but, in fact, its incumbent never was able to put the time into that work that he felt was needed. In any event, the inclusion of some of the duties of a petitioner's abolished position within those of a new position does not give petitioner a right to the new position. Jablonski v. Bd.of Ed. of Emerson, 1983 S.L.D. ____ (March 2, 1983), particularly when a petitioner's former position and the new position have different duties. This is not a situation where only nomenclature has changed.

N.J.S.A. 18A:28-9 says that nothing in the tenure law "shall be held to limit the right of any board of education to reduce . . . staff members. . . whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons . . . of change in the administrative or supervisory organization of the district or for other good cause . . .". I do not rest my determination on the economy achieved by the change, although it could be argued that some measure of economy was involved. **I CONCLUDE** that the changes here are clearly within the statutory reorganization rationale which permits a Board to abolish the position of a tenured employee. Further, since I found the position previously held by Gonsalves to have different duties from the new position, the Board was not obligated by tenure law and seniorty rule to offer Gonsalves the new position. The seniority categories

of supervisors and vice principals under N.J.A.C. 6:3-1.10 are separate and distinct both under the old and amended versions of that rule.

I **CONCLUDE** that the Board has not violated the tenure and seniority rights of petitioner Gonsalves by failing to appoint him to the position of curriculum supervisor and has violated no right of the Association by abolishing a vice principal position in a good faith reorganization which distributes some of its duties among different positions.

It is therefore **ORDERED** that the petition be **DISMISSED** with prejudice.

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

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

January 17, 1985
DATE

NAOMI DOWER-LaBASTILLE, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

Jan. 17, 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

jrp

GERARD GONSALVES AND THE SOUTH ORANGE-MAPLEWOOD ASSOCIATION OF SUPERVISORS, COUNSELORS AND ADMINISTRATORS,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision have been reviewed. Exceptions were filed by the parties within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

Petitioners' exceptions take the stance that the position of Curriculum Supervisor created by the Board is substantially the same, other than by title, as that of vice principal to which Petitioner Gonsalves is entitled by tenure and seniority rights.

The Board in reply exceptions argues otherwise, contending that there are substantial and significant differences between the position of vice principal and that of curriculum supervisor. A close inspection of the record and Judge LaBastille's thorough review of the facts clearly discloses to the Commissioner that the duties of the supervisor focus primarily on curriculum development rather than pupil discipline or teacher evaluation. A thorough comparison of the documents in evidence, job description of the vice principal (P-1) and job description of the curriculum supervisor (P-5) corroborates in detail the findings of the ALJ.

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

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

COMMISSIONER OF EDUCATION

FEBRUARY 22, 1985

INITIAL DECISION
OAL DKT. NO. EDU 5934-84
AGENCY DKT. NO. 294-7/84

GEORGE E. FALLIS,
Petitioner,
v.
SOUTH PLAINFIELD BOARD OF EDUCATION, MIDDLESEX COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Robert J. Cirafesi, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: December 4, 1984 Decided: January 16, 1985

BEFORE **BRUCE R. CAMPBELL,** ALJ:

Action for an order reinstating George E. Fallis to the position of Assistant High School Principal with back pay and appropriate emoluments.

This matter was opened by the filing of a petition of appeal before the Commissioner of Education by George E. Fallis (petitioner). The petition was answered by the South Plainfield Board of Education (Board) and the matter was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

Following a prehearing conference, the matter was submitted for disposition on cross-motions for summary judgment, there being no facts in dispute.

I.

Counsel submitted five joint exhibits and the following stipulation of facts:

1. That on July 21, 1981 Petitioner held the position of Assistant Principal, High School in accordance with the job description attached as [J-1], a position which he had held since the 1967-1968 school year.

2. That on July 21, 1981, in addition to Petitioner, there was another Assistant Principal at High School, Robert Jarrett, who had held his position since October 18, 1966.

3. That at its regular meeting held on July 21, 1981, Respondent resolved to eliminate an Assistant Principalship at the High School, effective September 1, 1981, because of unanticipated budgetary constraints and as part of an administrative reorganization wherein the then Principal of the High School was appointed to a position of Assistant Superintendent, the then Principal of the Middle School was appointed as High School Principal, the Assistant Principal at the Middle School was transferred to Guidance Counselor at the Middle School and Petitioner was transferred to the position of Assistant Principal, Middle School with no reduction in pay. These actions are reflected in the minutes [J-2].

4. That at its regular meeting on May 18, 1982, Respondent approved a job description for "High School Assistant Principal in Charge of Curriculum and Instruction, 9th Grade House Master and Coordinator of Alternative Programs" per minutes and job description [J-3] (item 13D (4)).

5. That at its regular meeting held on May 18, 1982 Respondent assigned Mr. Robert Jarrett to the position referred to in Paragrah 4 above. ([J-3], item 10E).

6. That effective June 30, 1984, Mr. Robert Jarrett retired from the position referred to in Paragraph 4.

7. That by his letter dated April 24, 1984, Petitioner, on the advice of counsel, asserted the "legal right" based upon "tenure seniority" to a position as High School Assistant Principal. Petitioner's letter of April 24, 1984 is attached as [J-4].

8. That by letter dated April 26, 1984 [J-5], Respondent, through its Assistant Superintendent, denied Petitioner's assertion of a legal right and invited Petitioner to apply for the vacant position. Petitioner did not apply for the vacant position preferring instead to rely upon his alleged legal right to the position from which Mr. Jarrett retired.

9. That to date, Respondent has not taken any action to reinstate the Assistant Principalship at the High School eliminated by its previous action on July 21, 1981; nor has Respondent taken any action to eliminate Petitioner's current position as Assistant Principal, Middle School.

II.

The petitioner maintains that he is entitled by tenure and seniority to the position of High School Assistant Principal. N.J.S.A. 18A:28-9 provides:

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

The seniority standards referred to in the quoted statute are found at N.J.A.C. 6:3-1.10. The underlying premise of the seniority rules is that seniority shall be determined according to the number of academic or calendar years of employment in a school district in specific categories. Subsection i of the regulation states:

> Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he or she is entitled by seniority. If he or she shall have insufficient seniority for employment in the same category, he or she shall revert to the category in which he or she held employment prior to his or her employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitles him or her.

It has been stipulated that the petitioner served in the category of High School Assistant Principal. This category is found at N.J.A.C. 6:3-1.10(l)11. He served in the category for 14 years. It has also been stipulated that because of unanticipated budgetary constraints, an administrative reorganization took place under which the petitioner lost his position of Assistant Principal as a result of its abolishment and, subsequently, was transferred to the Middle School Assistant Principalship. Finally, the stipulation shows that the individual who held the position of High School Assistant Principal subsequent to

July 1, 1981, by reason of greater seniority than petitioner, retired from the school district effective July 1, 1984.

The petitioner states that by claiming an entitlement to the vacant High School Assistant Principalship, he is merely exercising his right in accordance with N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10(i). In pertinent part, N.J.S.A. 18A:28-12 states:

> 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. . . .

This is reiterated in the Administrative Code at N.J.A.C. 6:3-1.10(i), above. Since there is no other individual in the respondent's school district who has seniority in the position of Assistant Principal at the high school, the petitioner has a seniority claim to this position.

Anticipating an argument by the Board, the petitioner refers to stipulation number 4, above, referring to adoption by the Board of a job description for High School Assistant Principal in Charge of Curriculum and Instruction, 9th Grade House Master and Coordinator of Alternative Programs. (See the minutes and job description attached as Exhibit J-3.) The petitioner insists that the Administrative Code is the preeminent authority upon which seniority is based and the Board may not argue that the assistant principalship in which the petitioner served is somehow distinct from the assistant principalship approved in J-3. A local board of education may not create a category which is not contained in N.J.A.C. 6:3-1.10.

The petitioner's seniority is in the position of High School Assistant Principal. Subsequent to July 1, 1981, Mr. Jarrett served in the position of High School Assistant Principal. The job description for the position was adopted on May 18, 1982 (J-3), almost a year after the administrative reorganization took place. What did not change, however, was the fact that the position of High School Assistant Principal remained in existence. While the seniority code as amended July 1, 1983, provides that each supervisory position requiring a supervisor's certificate be considered a separate category, only one category exists for the position of High School Vice Principal or Assistant Principal. Therefore, unlike a supervisor's position, the category of Assistant Principal at the high school is not

qualified by the type of job description under which a High School Assistant Principal operates. Service in one high school assistant principalship confers seniority in all high school assistant principalships. If this were not the case, the Commissioner would have been obligated to interject similar language qualifying seniority for the High School Assistant Principals as he did for the seniority of supervisors.

The petitioner notes that the current category of High School Assistant Principal, N.J.A.C. 6:3-1.10(l)11, supersedes the previous language, which stated that each vice principalship or assistant principalship in the previous paragraphs 14 through 21 of the same code provision were to be separate categories. In the petitioner's view, this only supports his position that there exists one category of High School Assistant Principal. Regardless of job description, by virtue of his seniority, petitioner maintains that he has an entitlement to the high school assistant principalship currently in existence in the respondent's school district.

III.

Conversely, the Board argues that the petitioner's transfer to the Middle School as an Assistant Principal on July 21, 1981, in no way affected his tenure status and, therefore, no seniority principles come into play which would entitle him to the high school assistant principalship recently vacated. The Board challenges the basic principles of the petitioner's argument, mainly, that his transfer to the middle school assistant principalship somehow called into play his tenure and, therefore, seniority rights. The petitioner's transfer to the Middle School in 1981 did not result in a dismissal or a reduction. It did not affect the petitioner's compensation or status. The Board is under no obligation to place the petitioner on a seniority list. The petitioner's transfer to the Middle School assistant principalship was within the Board's prerogatives and powers. It went unchallenged by the petitioner at the time and did not imply the seniority availability of the former position in the case of a future vacancy. In any event, there is no vacancy in the second assistant principalship at the South Plainfield High School since that abolished assistant principalship has never been reinstated by the Board.

The Board also argues that Williams v. Plainfield Bd. of Ed., 176 N.J. Super. 154 (App. Div. 1980), certif. den., 87 N.J. 306 (1981) determines the issue in this matter. In Williams, a transfer from High School Principal to Elementary School Principal was held not to violate Williams' tenure rights since at the time of the transfer there was no

reduction in compensation. The court upheld the Board's discretionary authority under N.J.S.A. 18A:25-1 to make that transfer even though, by virtue of the varying pay schedules of elementary and high school principals it would later mean that Williams would receive less compensation than if she had stayed as the high school principal. N.J.S.A. 18A:25-1 states:

> No teaching staff member shall be transferred, except by a recorded role call majority vote of the full membership of the Board of Education by which he is employed.

The Appellate Division held that a transfer of a principal from a high school to an elementary school was a proper transfer to a position of equivalent rank and did not affect or involve tenure rights.

At the State Board of Education level, that Board had ruled that "seniority rights . . . are irrelevant in determining whether a rank or comparable position is involved in a transfer. Seniority has relevance only where a reduction in the employment force is necessary and for no other purpose." 176 N.J. Super. at 158.

The Board reasons that in the instant case the reassignment of the petitioner from the assistant principalship at the high school to an assistant principalship at a middle school did not call into play any seniority rights. He was not reduced in compensation nor were his tenure rights otherwise involved. The Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 et seq., provides for tenure during good behavior and efficiency and requires only that a tenured teaching staff member "not be dismissed or reduced in compensation except for" certain specified reasons and then only in the manner prescribed.

N.J.S.A. 18:28-11 brings seniority standards into the picture only where there have been dismissals resulting from reductions in force. N.J.S.A. 18A:28-12, which treats of preferred eligible lists, also speaks in terms of dismissals.

Because the transfer of the petitioner in 1981 did not in any way result in a dismissal or reduction in pay, the Board was not obligated in 1981 to place him on any seniority eligibility list. Seniority is a product of tenure and comes into play if and only if tenure rights are reduced by way of dismissal or reduction in compensation.

Williams stands for the proposition that a transfer of an administrator-principal within a school district to another, similiar position without any immediate reduction in compensation does not in any way diminish or affect tenure rights. This case stands in contrast to cases in which petitioners were the subject of true reductions in force pursuant to N.J.S.A. 18A:28-9. See, e.g., Cohen et als. v. Piscataway Bd. of Ed., OAL DKT. EDU 2629-81 (Aug. 27, 1981) adopted, Comm'r of Ed. (Oct. 2, 1981) aff'd, St. Bd. of Ed. (Feb. 3, 1982).

In the alternative, the Board argues that if, contrary to its arguments above, the transfer of the petitioner to the middle school principalship in 1981 required the Board at that time to place the petitioner on a seniority list, the Board's failure to take any such action to create a seniority list should have been challenged by the petitioner at the time. The petitioner's claim now centers around the question as to whether such a seniority list should have been created in 1981.

Since the petitioner did not initiate any proceedings within 90 days of the Board's action in July 1981, it is the Board's position that the present action is barred by N.J.A.C. 6:24-1.2. That rule requires that claims challenging Board actions before the Commissioner of Education must be made within 90 days. Because the petitioner's primary claim here is based on the Board's failure to place him on such an eligibility list in July 1981, his claim now is time barred and for this reason alone it should be dismissed.

The Board last argues that even if the transfer of the petitioner from the high school assistant principalship to the middle school assistant principalship in 1981 somehow entitled him to be placed on a preferred eligibile list, the Board has never reinstated the second assistant principalship which had existed in 1981 and which the petitioner then held. Accordingly, the Board argues that it would only be in the eventuality of the recreation by the Board of the second assistant principalship at the high school that any seniority rights as the petitioner asserts would come into play. There is still only one assistant principalship at the high school. The petitioner never held that assistant principalship.

Moreover, by its action in May 1982, the Board considerably expanded the responsibilities of the high school assistant principalship then held by Mr. Jarrett by its adoption of a job description (J-3). At its meeting of May 18, 1982, the Board appointed Jarrett to the newly expanded position. It was from that position that Jarrett retired in

June 1984. Therefore, even if the petitioner could claim entitlement to the assistant principalship previously held by Jarrett, as a result of the Board's action expanding that assistant principalship, the assistant principalship previously held no longer existed. Accordingly, there was no position available to the petitioner as of June 1984.

IV.

N.J.S.A. 18A:28-1, the first statutory provision in the chapter entitled "Tenure," provides: "As used in this chapter the word "position" includes any office, position or employment." Every position must have a position title which is recognized in the Administrative Code. N.J.A.C. 6:11-3.6(a). The position title either corresponds to one of the enumerated endorsements, is specifically designated within the endorsement description or has been specifically approved by the county superintendent who has made a determination of the appropriate certification and title for the position. N.J.A.C. 6:11-3.6(b).

Tenure is a legislative status, not a contractual one. In order to be protected by the status, the teaching staff member must have met the precise conditions articulated in the statute. Zimmerman v. Bd. of Ed. of City of Newark, 38 N.J. 65 (1962), cert. den., 371 U.S. 956 (1963). In addition to holding an appropriate certificate for the position, issued by the State Board of Examiners, N.J.S.A. 18A:28-4, in order to acquire tenure in any position in the public schools in any district, the teaching staff member must hold employment in the district for:

(a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or

(b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or

(c) the equivalent of more than three academic years within a period of any four consecutive academic years. N.J.S.A. 18A:28-5

Since 1962, this statute has covered all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school

nurses and such other employees as are in positions which require them to hold appropriate certificates issued by the Board of Examiners.

That tenure is acquired in a particular position is made clear by the effect of N.J.S.A. 18A:28-6, also amended in 1962. That statute provides:

> 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 unless a shorter period is fixed by the employing board for such purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years;
>
> provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

Tenure protects an employee in a particular position, and having acquired tenure in a position, a teaching staff member may not be "dismissed or reduced in compensation" except for cause in accordance with N.J.S.A. 18A:28-5 (for inefficiency, incapacity, unbecoming conduct, or other just cause), N.J.S.A. 18A:6-10 (after certification of charges and a full due process hearing) or N.J.S.A. 18A:28-9 (as a result of a reduction in force).

"Transfer" refers to the rights of a local board to assign an employee within the scope of his certification as opposed to "seniority" which refers to an employee's bumping rights upon a reduction in force. The power of a board to transfer teachers is limited only to the extent provided by the tenure law. Childs v. Union Tp. Bd. of Ed.,

(N.J. App. Div., July 19, 1982, A-3603-80T1) (unreported). In Williams, above, the petitioner, a tenured principal, had been involuntarily transferred from high school principal to elementary school principal. The court held, among other things, that the transfer was not a violation of the petitioner's tenure rights since she was simply transferred from one principalship to another. 176 N.J. Super. at 163. Therefore, a tenured employee may be transferred to another assignment within his position, but may not be transferred involuntarily from one position to another.

Seniority is a concept which comes into play only when a reduction in force is necessary. N.J.S.A. 18A:28-9. The Legislature has further provided that dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion, or political affiliation but shall be made on the basis of seniority according to standards to be established by the Commissioner with the approval of the State Board (emphasis added). N.J.S.A. 18A:28-10.

Furthermore, N.J.S.A. 18A:28-13 provides:

> The Commissioner in establishing such standards shall classify insofar as practicable the fields or categories of administrative, supervisory, teaching or other educational services and the fields or categories of school nursing services which are being performed in the school districts of this State and may, in his discretion, determine seniority upon the basis of years of service and experience within such field or categories of service as well as in the school system as a whole, or both.

These standards are set forth at N.J.A.C. 6:3-1.10 et seq. As amended in September 1983, these rules provide, in pertinent part:

> (a) The word "employment" for purposes of these standards shall also be held to include "office" and "position."
>
> (b) Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. . . .
>
> . . . .

(h) Whenever a person shall move from or revert to a category, all periods of employment shall be credited towards his or her seniority in any or all categories in which he or she held employment.

(i) Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority. If he or she shall have insufficient seniority for employment in the same category, he or she shall revert to the category in which he or she held employment prior to his or her employment in the same category, and shall be placed and remain on the preferred eligible list of the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitles him or her.

. . . .

(k) In the event of his or her employment in some category to which he or she shall revert, he or she shall remain upon all the preferred eligible lists of the categories from which he or she shall have reverted, and shall be entitled to employment in any one or more of such categories whenever a vacancy occurs to which his or her seniority entitles him or her.

(l) The following shall be deemed to be specific categories but not necessarily numbered in order of precedence:

. . . .

11. High school vice-Principal or assistant principal;

12. Junior high school vice-principal or assistant principal;

13. Elementary school vice-principal or assistant principal;

14. Vocational school vice-principal or assistant principal;

. . . .

Prior to amendment in September 1983, this rule also stated that, "Each vice-principalship, assistant principalship, or assistant to the principalship . . . of this subsection shall be a separate category." Although that language has been deleted, it is clear that the vice-principalships and assistant principalships listed above are enumerated separately and, therefore, constitute specific categories.

V.

Bearing the foregoing in mind, I **FIND** that the petitioner was the subject of a reduction in force pursuant to N.J.S.A. 18A:28-9 based on unanticipated budgetary constraints and as part of an administrative reorganization (stipulation number 3). It has been stipulated that, as part of that reorganization, the then High School Principal was appointed to a position of Assistant Superintendent, the then Middle School Principal was appointed as High School Principal, a Middle School Assistant Principal was transferred to guidance counsellor at the Middle School and the petitioner was transferred to the position of Middle School Assistant Principal with no reduction in pay. Whether labled as such or not, these moves are consistent with the "bumping rights" required by N.J.A.C. 6:3-1.10. The petitioner was the less senior of two High School Assistant Principals in July 1981. Accordingly, it was he who was transferred to the middle school assistant principalship.

Since seniority only comes into play when there has been a reduction in force, the circumstances of this case require an inquiry into the petitioner's seniority status vis a vis the high school assistant principalship. It is first noted that, whether the Board created a preferred eligible list or not, the petitioner's seniority rights were fixed upon the reduction in force effected in July 1981. At that time, the petitioner had 13 years' seniority in the High School Assistant Principal position.

Subsection (i) of N.J.A.C. 6:3-1.10 provides that whenever a person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority. Here, the petitioner was moved from a high school assistant principalship to a middle school assistant principalship. Whether the middle school assistant principalship equates to a junior high school assistant principalship or a elementary school assistant principalship is immaterial. The fact remains that the petitioner was moved from one category to another. Subsection (h) of the same rule provides, "whenever a person shall move from or revert to a category, all periods of employment shall be credited towards his or her seniority in any and all categories in which he or she previously held employment." Therefore, the petitioner's service as a Middle School Assistant Principal is tacked on to his 13 years of service as High School Assistant Principal.

There now is a vacancy in a high school assistant principalship. The Board maintains that it is not the same assistant principalship from which the petitioner was moved in 1981. Subsection (i), above, states that whenever a person is moved from a category, he or she shall be placed and remain upon the preferred eligible list of the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitles him or her. In this case, the petitioner was a High School Assistant Principal. He was moved from that category to another. There is now a vacancy in the category of High School Assistant Principal.

In consideration of this, I **FIND** and **CONCLUDE** that the Board must consider the petitioner for the vacant high school assistant principalship before any and all other candidates. Unless the Board can show that the petitioner is unable to meet the requirements of the assistant principalship as now constituted, it must place him in that position in accordance with the statutes and regulations discussed above.

The petitioner also seeks back pay and appropriate emoluments for the period of time he served as a Middle School Assistant Principal. Inasmuch as the Board's placement of him in that category was lawful and proper pursuant to N.J.S.A. 18A:28-9, this claim cannot be recognized.

The South Plainfield Board of Education is **ORDERED** to place George E. Fallis in the position of Assistant High School Principal no later than the effective date of the final decision in this matter unless it can show to the satisfaction of the Commissioner of Education that the petitioner is not qualified for that position as presently constituted.

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

OAL DKT. NO. EDU 5934-84

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

16 JANUARY 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 21 1985
DATE

Ronald L. Tabor /phb
OFFICE OF ADMINISTRATIVE LAW

ml/E

GEORGE E. FALLIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATON
BOARD OF EDUCATION OF THE BOROUGH OF PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were received by the parties within the time prescribed by N.J.A.C. 1:1-16.4 a, b, and c.

The Board takes exception to the judge's principal reliance on N.J.S.A. 18A:28-9, believing he made a fallacious assumption that the statute must be read independently of the provisions in 18A which follow it. The Board avows that the judge erred in ruling that seniority rights come into play whenever there is a reduction in the number of teaching staff members accompanied by an abolishment of position. The Board argues that seniority only comes into play when a teaching staff member is "dismissed as a result of such reduction." As such, it contends that the action it took with respect to petitioner was not a reduction of force and that, even if it were, his seniority rights would not come into play unless he were dismissed or his compensation lowered, neither of which occurred.

More specifically, the Board argues that one cannot assume that every time a Board eliminates a position as part of administrative reorganization, a reduction in force occurs. It contends that such reorganization may result in dismissal or it may result simply in transfer. In the instant matter, it avows that petitioner was simply reassigned to the middle school position without loss or reduction of pay. The Board also takes exception to the judge's conclusions with respect to "bumping rights" required by N.J.A.C. 6:3-1.10, asserting that these rights do not come into play unless there is a reduction in force which results in dismissal or lowered compensation.

In addition, the Board contends (1) that the judge ignored the Appellate Court holding in Williams, supra; (2) that the initial decision rendered in this matter cannot stand together with Williams; and (3) that the judge ignored its argument that even if, arguendo, tenure and seniority right come into play herein, petitioner should have pressed his claim in 1981 when the Board failed to create a preferred eligibility list. Thus, petitioner is barred in his appeal because he is untimely under the ninety day rule of N.J.A.C. 6:24-1-2.

Although petitioner is in agreement with the order for his reinstatement and does not dispute the determination that he is not entitled to back pay and emoluments prior to July 1, 1984, he contends that he is entitled to them from the date on which he began to have a seniority entitlement to the high school assistant principalship.

The Commissioner has carefully considered the Board's arguments in this matter and is unpersuaded that the judge erred in his analysis of the seniority and "bumping" issues he addresses. Further, the Commissioner supports the judge's conclusion that petitioner is, in fact, entitled to the high school assistant principalship under dispute for the following reasons.

There is no question that a reduction in force occurred when the Board acted to abolish one of the two high school assistant principal positions. (J-2) The judge is correct when stating seniority comes into play when a reduction in force occurs. Since petitioner was clearly subject to abolishment of his position as part of a reduction in force for reasons of economy and administrative reorganization, his seniority rights pursuant to N.J.A.C. 6:3-1.10 became the controlling issue, irrespective of the fact he was neither dismissed nor reduced in salary. Subsection (i) of these regulations is quite explicit and unambiguous as to what occurs when a tenured staff member's position is abolished. It reads:

> "Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he or she is entitled by seniority. If he or she shall have insufficient seniority for employment in the same category, he or she shall revert to the category in which he or she held employment prior to his or her employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitles him or her."
>
> (Emphasis supplied.)

A vacancy occurred on July 1, 1984 in the category wherein petitioner has entitlement. The Board, by virtue of N.J.A.C. 6:3-1.10(i), could not fill that position with an individual who had less seniority than petitioner. Absent demonstration that petitioner is not qualified for the high school assistant principal position as presently constituted, petitioner had entitlement to the vacated position.

The Commissioner finds no merit in the Board's argument that the instant matter is a case dealing with a transfer rather

than one of reduction in force, therefore, Williams, supra, has no applicability herein. He is also unpersuaded that petitioner is barred from pressing his claim because he failed to act within 90 days of the Board's lack of action to create a preferred eligibility list when his position was abolished. Petitioner has statutory entitlement to the disputed position and, as such, the 90-day requirement does not bar him even if he did not act to challenge the Board's lack of a preferred eligibility list in 1981, because a new cause of action occurred as of July 1, 1984 when the Board failed to acknowledge his seniority rights. (See North Plainfield Education Association v. Board of Education of North Plainfield, 96 N.J. 587 (1984).) Petitioner met the 90 day timeline prescribed by N.J.A.C. 6:24-1.2 in relation to the Board's failure to appoint him to the vacant position when it became vacant in 1984.

Accordingly, the Commissioner affirms the findings and conclusion in the initial decision and orders that petitioner be placed in the position of assistant high school principal as recommended. Given the absence of showing that petitioner is unqualified for the position as it is presently constituted, the Board is ordered to place petitioner in the position effective as of the date of this decision. Further, the Commissioner is in agreement with petitioner's claim to entitlement to any differential in salary and emoluments that may exist from July 1, 1984 to the implementation of this decision. The judge was correct in determining that prior to that date no claim exists for the reasons stated in the initial decision.

Therefore, it is ordered that petitioner be provided any differential that may exist in salary and emoluments from July 1, 1984 to the implementation of this decision. Further, the Board is ordered to develop immediately pursuant to statute and regulations preferred eligibility list(s) and seniority determinations for all individuals affected by the Board's reorganization actions in July 1981.

COMMISSIONER OF EDUCATION

MARCH 4, 1985

GEORGE E. FALLIS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, March 4, 1985

For the Petitioner-Respondent, Robert M. Schwartz, Esq.

For the Respondent-Appellant, Wilentz, Goldman and Spitzer (Robert J. Cirafesi, Esq., of Counsel)

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

September 4, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6344-84
AGENCY DKT. NO. 368-8/84

R.H. AND E.H.,
Petitioners,
v.
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, and DR. H. VICTOR CRESPY, SUPERINTENDENT,
Respondents.

Dwight Ransom, Esq., for petitioners (Real, Ransom, Santaloci and Capron, attorneys)

James Collins, Esq., for respondents (Cerrato, O'Connor, Mehr and Saker, attorneys)

Record Closed: December 5, 1984 Decided: January 18, 1985

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

Petitioners, the parents and legal guardians of M.H., a minor pupil enrolled in and attending the Marine Academy of Science Technology (MAST), operated under the direction and control of the Board of Education of the Monmouth County Vocational-Technical School (V-T Board), request that the Commissioner of Education issue an Order to the Board of Education of the Freehold Regional High School District (Freehold Regional Board) to enroll M.H. in the MAST program on a full-time basis commencing September 24, 1984, and, further, an Order that the Freehold Regional Board pay the cost of full-time tuition and provide M.H. with transportation to and from MAST. Petitioners

allege, among other things, that the Freehold Board's denial of M.H.'s full-time enrollment at MAST is in violation of the statutory provisions as set forth at N.J.S.A. 18A:54C-1 et seq. By way of motion incorporated in its Petition of Appeal, petitioners seek temporary and permanent restraints against the Freehold Regional Board from preventing M.H.'s attendance at MAST other than on a full-time basis.

On August 27, 1984, absent the Freehold Board's Answer and without issues having been joined, the Commissioner transmitted the matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 54:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The instant matter was transmitted to the undersigned on September 10, 1984, and, pursuant to petitioners' application for temporary restraints, a telephonic oral argument was held on September 11, 1984. Subsequent thereto, on September 13, 1984, the undersigned issued an order granting, among other things, petitioners' request for interim relief pendente lite. Thereafter, a hearing was conducted on December 4, and 5, 1984, at the Wall Township Municipal Court and the record was closed on December 5, 1984.

As a consequence of a prehearing conference conducted on September 11, 1984, the issues to be determined by this tribunal were set forth as follows:

1. Whether, pursuant to N.J.S.A. 18A:54C-4, petitioner's son, M.H., is to be afforded a "full-time tuition program" and transportation at the Marine Academy of Science and Technology (MAST) operated by the Monmouth County Vocational-Technical School?;

   or,

2. Whether the Freehold Regional Board may, under its discretionary authority pursuant to N.J.S.A. 18A:1-1 et seq., provide M.H. with a shared-time program at the MAST and the resident school district, Freehold Regional?

STIPULATED FACTS

At hearing, the parties advanced the following stipulations on the record of the proceedings:

1. The MAST program is located in Monmouth County, New Jersey, pursuant to N.J.S.A. 18A:54C-1 et seq., under the

jurisdiction of the Board of Education of the Monmouth County Vocational-Technical School (See: Senate Education Committee Statement Assembly, No. 3805-L. 1983, c. 341).

2. That the enabling legislation is Assembly Bill No. 3805 (R-5, Approved September 8, 1983, Chapter 341, Laws of 1983).

3. That Freehold Regional High School is located in Monmouth County, New Jersey and petitioner is a bona fide resident of the school district.

4. That Freehold Regional High School offers a comparable academic program as that offered by MAST.

HISTORICAL ASPECTS AND PRELIMINARY FACTS

Based upon the testimony adduced at hearing, together with certain documents accepted into evidence, a brief history of the MAST program was presented and is considered here:

In or about the 1981-82 school year a marine science and technical program was in operation administered by the Monmouth County Educational Services Commission. In or about February 1982, operation and jurisdiction of the program were transferred to the Board of Education of the Matawan-Aberdeen Regional School District, a statutorily approved Area Vocational-Technical School, which continued to administer the program for the 1982-83 school year. Pupils accepted, admitted and enrolled in the program were, generally, Monmouth County residents.

The New Jersey Legislature authorized the establishment of MAST, effective September 28, 1982, through the passage of L. 1982, c. 146 (N.J.S.A. 18A:54C-1 through 18A:54C-3), the purpose of which is to provide "education to students throughout the State of New Jersey in the fields of marine sciences, marine trades, marine technologies and related courses, as well as academic courses." N.J.S.A. 18A:54C-1. Subsequently, in 1983, the Legislature enacted N.J.S.A. 18A:54C-4 through 7, effective September 8, 1983 (L. 1983, c. 341), to supplement N.J.S.A. 18A:54C-1 et seq. The New Jersey Senate Education Committee Statement and the statement attached to Assembly Bill No. 3805 provides as follows:

> This bill transfers the Marine Academy of Science and Technology to the Monmouth County Vocational Technical School and brings it under the full jurisdiction of the county vocational technical school

board. The academy is located at Sandy Hook and uses the facilities provided by the Department of Interior. It is the only school of its kind in the State of New Jersey and provides full-time instructional programs in the marine sciences and related technologies.

The MAST program commenced operation under the jurisdiction of the V-T Board on or about September 9, 1983. In the 1984-85 school year, the program enrolled 173 pupils in grades nine through twelve. The distribution of the pupils, by grades, is as follows:

Twelfth grade	25
Eleventh grade	35
Tenth grade	46
Ninth grade	67

Of the 173 total pupil population attending, 164 pupils are enrolled on a full-time basis while nine attend on a shared-time basis. Of the nine shared-time pupils, seven attend by their own choice while two pupils attend on a shared-time basis by decision of their resident local boards of education.

In addition to a full range of academic subjects, i.e., English, social studies, mathematics, foreign languages, the MAST course offerings include, but are not limited to, marine biology, marine ecology, oceanography, seamanship, photography, basic engineering, electronics, fishing trades, among others. A unique offering, and required of all pupils, is the Naval Reserve Officer Training Corps (ROTC). The ROTC program substitutes for the statutorily mandated health, safety and physical education course, pursuant to N.J.S.A. 18A:35-5 et seq.

The course offerings and instruction of the MAST program utilize the interdisciplinary approach. That is to say, the academic course of study, i.e., English, mathematics, the sciences, etc., are integrated into the marine vocational and technical studies. For example, each pupil is required to complete a major research paper in English each year, the purpose of which is to develop and improve research, writing, language and communication skills, among others. In achieving the English assignment goals, the subject matter of the research report crosses over into and involves the other disciplines of the program such as marine biology, oceanography, etc.

TESTIMONIAL EVIDENCE

The significant testimony in this matter revolved around the central issue as to whether the respondent Board may insist that its resident pupils enroll in its local school program for the academic courses of study while also enrolled in and attending the MAST program for the marine sciences and technologies on a shared-time basis. The testimony of the parties centered on the MAST enabling legislation and, in particular, the statutory provision is found at N.J.S.A. 18A:54C-4, which reads as follows:

> 18A:54C-4 Marine academy of science and technology; transfer to county vocational technical school board; continuance; payment of costs
>
> The assets of the Marine Academy of Science and Technology operating under the auspices of an area vocational technical school in a county of the fifth class having a population of not less than 450,000 shall be transferred to the county vocational technical school board and shall continue to operate as a full-time program as provided under P.L. 1982, c. 146 (C. 18A:54C-1 et seq.), except that the costs shall be paid as follows:
>
> a. Local districts shall pay tuition in an amount equal to the district's net current expense budget per pupil for each pupil attending plus any amount of any category of State aid payable to the district for that pupil but not to exceed an amount equal to the per pupil cost of the Marine Academy of Science and Technology; and
>
> b. If the costs of the program exceed the amounts raised by tuition, the additional costs shall be paid by the county vocational technical school except that if the additional costs, when calculated on an average per pupil basis, exceed the average tuition payment by $750.00, the county vocational technical school may assess the local district, for each pupil attending, an amount equal to the amount by which the additional costs exceed $750.00. L.1983, c. 341 §1, eff. Sept. 8, 1983. [emphasis added]

The focus of the testimony was the respective parties' interpretation of the statutory language to the effect that the MAST program was to "operate as a full-time program," together with its respective obligations, duties and/or liabilities. Conflicting testimony was proffered by agents of the New Jersey Department of Education as to the meaning of the statute and the intent of the Legislature in promulgating same.

Milton G. Hughes, Monmouth County Superintendent of Schools, testified, among other things, that as a representative of the Commissioner of Education he had the primary responsibility to supervise all of the public schools in Monmouth County, included among them the Monmouth County Vocational-Technical Schools and the Freehold Regional High School District of respondent. He asserted he was intimately familiar with the enabling legislation which transferred jurisdiction to the V-T Board because he had worked closely with members of the Legislature to achieve that end. A major force in the transfer of jurisdiction from the Board of Education of the Matawan-Aberdeen Regional School District to the V-T Board was due, in great measure, to the financial problems of the Matawan-Aberdeen Board in administering the MAST program. Another contributing factor in the legislative transfer involved interested parent groups who wanted the program to continue and who initiated contacts with area legislators to assure its continuance.

Superintendent Hughes asserted, among other things, that N.J.S.A. 18A:54C-4 was clear and unambiguous on its face wherein it set forth the legislative intent that the MAST program shall operate as a full-time program. He asserted that the "full-time" provision in the statute was incorporated, in part, because of the remote location of the educational facility. He contended that hardship would be visited upon those pupils whose local resident boards of education would require them to travel to MAST on a shared-time basis for the marine science and technology and then return to the resident school for instruction in the academic subjects. He asserted that legislative intent and the statutory language providing for a full-time program allowed no discretion on the part of a local board of education to determine whether the pupil attended MAST on a full-time or part-time basis. However, a parent could elect as to whether the pupil attended on a full-time or a part-time basis. The MAST program integrates the academic studies into the vocational and technological studies, together with military training. Therefore, contends Superintendent Hughes, the pupil who is deprived of the full-time program by board of education action is deprived of equal access to the totality of the program, which is contrary to the legislative intent and the statutory provision.

Dr. H. Victor Crespy, Superintendent of the Freehold Regional High School District, respondent, testified on his own behalf and on behalf of respondent Board. The essence of his testimony, as it relates to the central issue of the herein matter, concerned: (1) his interpretation of the statute and, (2) his belief and understanding that a

local board of education was authorized to determine whether a resident pupil could be approved to attend MAST on a part-time or a shared-time basis.

Superintendent Crespy testified, among other things, that he and the Freehold Regional Board supported the MAST program while under the direction of the Matawan-Aberdeen Board during the 1982-83 school year by authorizing the attendance of seven Freehold Regional pupils on a shared-time basis. The Freehold Regional Board authorized the agreed-upon tuition rate of $1,000 per pupil and transmitted $7,000 to the Matawan-Aberdeen Board in satisfaction of the costs for its seven pupils. He was aware that the Matawan-Aberdeen Board had difficulty funding the MAST program; however, he was unaware of the proposed legislation to transfer jurisdiction from the Matawan-Aberdeen Board to the V-T Board until the legislation was enacted in September 1983. He asserted he was surprised to learn, subsequent to the passage of N.J.S.A. 18A:54C-4 et seq., that the burden of funding for MAST would be placed on the local boards of education participating by allowing their resident pupils to attend. He further contended he believed the MAST program was to be a state-wide activity, opened to all pupils in the state, with adequate state education funds to support it.

Superintendent Crespy's review of the enacted statute left no doubt as to its intent to incorporate a full-time MAST program. It was his belief and understanding, moreover, that the program would include and provide for shared-time pupils. He asserted that the shared-time authorization was left unanswered, however, as a result of what he characterized as the ambiguity of the language set forth in the statute. As a consequence, he corresponded with the Freehold Regional Board members by way of memorandum dated September 14, 1983, setting forth his interpretation as follows:

> Dear Board Member:
>
> Attached please find relative [sic] information concerning the MAST program.
>
> In 1981-82 the program was administered by the Educational Services Commission and taken over by the Matawan-Aberdeen Regional School District in February of that year. Subsequently, the Board of Education approved the payment of tuition at the rate of $1,000 per student for a shared-time program. Transportation was provided to and from MAST for a half-day.
>
> In 1982-83 the program was completely administered by the Matawan-Aberdeen Regional School District who received a special vocational grant. We had two students on a shared-time basis

transported to and from MAST. There was no cost to the Board of Education. There were, however, a couple of students who requested that they be sent full-time. We indicated to them that that was an arrangement to be made with the Matawan-Aberdeen Regional School District and any transportation for that full-time status was to be provided by Matawan-Aberdeen. (I believe one or two students were in this category.)

For the current school year 1983-84, the status of the program has been up-in-the-air until most recently when the Governor signed the attached bill. This bill, surprisingly enough, provides no State funds for the program as originally requested, but puts the burden of MAST's financial support on local districts and the vocational school district. In addition to paying the district's net current expense budget per pupil (1/2 of $2,840) and any State aid payable to the district for that pupil (equalization aid-I would approximate 1/2 of $1,200), the law allows them to operate a full-time program. However, our relationship with the county has been on a shared-time basis and our relationship with MAST has been on a shared-time program.

It is obvious that the law does not distinguish between the shared-time and full-time as written. Various interpretations have been given to me concerning the law. The [sic] are as follows:

1. Local boards of education have the right to determine whether it should be full-time or shared-time.

2. Those in the program previously on a full-time basis can continue in it, while those new to the program may be determined by the board of education.

Parent interpretation is that they have the right to full-time without board of education approval.

Recommendation:

Since every student is required by State law to take courses in English, mathematics, physical education and social studies, my office sees no need to pay tuition to another institution or program when such can be offered in our own district. I, therefore, only recommend shared-time status for this program. [R-2]

Subsequently, on September 23, 1983, Superintendent Hughes convened a meeting of the local superintendent of schools of Monmouth County to discuss, among other things, the MAST statutes and its implications for the local boards of education (R-1). To assist the discussion and interpretation of the statute, Superintendent Hughes called upon Vincent Calabrese, Assistant Commissioner of Finance. The issue as to a local board's discretion to send a resident pupil to MAST on a shared-time basis was not resolved at the September 23, 1983 meeting. Assistant Commissioner Calabrese asserted,

moreover, that he would communicate an interpretation of the statute as to the meaning of "full-time" and "shared-time" to the local superintendents. That communication was forthcoming by way of letter, dated March 6, 1984, addressed to the Superintendent of the Monmouth County Vocational School District with a courtesy copy to Superintendent Hughes and Superintendent Crespy, among others (J-1). Assistant Commissioner Calabrese's letter stated the following:

> Re: Marine Academy of Science and Technology Admittance Procedures
>
> Dear Mr. Davey:
>
> You have asked certain questions regarding admittance of students into the Marine Academy of Science and Technology, pursuant to the provisions of Chapter 341, Laws of 1983.
>
> As in any vocational program, students have a right to attend the MAST program. This would apply to both in-county and out-of-county students, however, pursuant to the provisions of the law, out-of-county students should be admitted on an 'as facilities permit' basis. It is the responsibility of the Monmouth County Vocational School District to establish fair and equitable admittance procedures. Transportation to the MAST program would be the responsibility of the resident school district and would be treated as regular vocational transportation. The only case that would permit a resident school district to deny a student access to the program would be where the school district maintains a comparable program; comparability would mean an equivalent program viewed in its entirety.
>
> In a sending/receiving relationship, based upon Keyport Board of Education v. Boards of Education of Union Beach, Red Bank Regional and Matawan-Aberdeen Regional, October 17, 1983, it seems apparent that the sending district would be the district responsible for sending students to the MAST program.
>
> Under the provisions of the MAST law, all students requesting full-time enrollment, should be given the opportunities provided they meet admission criteria. A shared-time program may be operated. The decision concerning shared-time would rest with the resident district if they can establish that their academic program is comparable to the vocational program and that no undue hardship would be experienced by the student.
>
> Formula Aid will be paid as in any other sending/receiving relationship.

> I trust this letter addresses the major concerns regarding MAST admittance procedures that have been raised. Please feel free to call or write if you have any further questions regarding this issue. [J-1]

Based upon the Assistant Commissioner's interpretation of the statute, the Freehold Regional Board, on or about April 1, 1984, authorized Superintendent Crespy to allow four pupils attending MAST on a full-time basis during the 1983-84 school year to be "grandfathered" and continued in the program. The Board, moreover, advised Superintendent Crespy that all future pupil applications would be approved only for shared-time attendance of MAST. Superintendent Crespy admitted that the Freehold Regional Board took no formal action with regard to this advisory authorization for shared-time attendance. He asserted, however, that the Freehold Regional Board enunciated a blanket policy granting the Superintendent the discretion to authorize shared-time attendance. The Superintendent's decision to authorize a resident pupil to attend the MAST program on a shared-time basis was grounded, in part, upon his assertion that the Freehold Regional Board offered a "comparable" instructional program in the academic subject areas and that there was no need for the Freehold Board to be responsible for such tuition obligations.

By agreement with the Superintendent of the Monmouth County Vocational Technical School, Superintendent Crespy was to be advised of any and all pupils from the Freehold Regional school district who applied for admission to the MAST program. On or about May 9, 1984, Superintendent Crespy was so advised that M.H., the subject of this controverted matter, had applied and had been accepted to the MAST (P-1, P-3). Superintendent Crespy testified that M.H. was, during the 1983-84 school year, a pupil enrolled in the Howell Township Elementary Schools. He asserted that M.H. would, upon completion of the eighth grade, be a constituent resident pupil attending the Freehold Regional High School for the ninth grade commencing September 1984. However, because M.H. had not attended the Freehold Regional schools as of May 1984, the Board had no record of M.H.

In any event, by way of letter, dated May 9, 1984, Superintendent Crespy advised petitioners herein, among other things, that the Freehold Regional Board, ". . . has set forth a policy that any ninth grader in the 1984/85 school year and thereafter can only apply for [the MAST] program on a shared-time basis (half-time)" (P-3). M.H. was officially given notice of his acceptance by letter, dated May 14, 1984 (P-1). On May

18, 1984, the parents of M.H. protested and objected to the Freehold Regional Board's determination that M.H. attend MAST only on a shared-time basis (P-4).

Assistant Commissioner Calabrese testified, among other things, as to the genesis of the enabling legislation, N.J.S.A. 18A:54C-4 et seq., and to his participation in drafting Assembly Bill No. 3805. He asserted that where the resident board of education provided a comparable educational program and where there would be no undue hardship on the MAST pupil, the local resident board should have the discretion as to whether the pupil attend MAST on a full-time or part-time basis. The Assistant Commissioner admitted he was not competent to determine whether an educational program was comparable and that undue pupil hardship would have to be determined by the local superintendent of schools. He, nonetheless, asserted the local board's right to make the determination as to full-time/part-time attendance because of the board of education's obligation under the statute to pay the resident pupil's tuition at MAST. N.J.S.A. 18A:54C-4(a). He contended that the tuition provision of the statute was ambiguous, but it was his considered opinion that where a comparable educational program was offered by the resident board and absent undue hardship on the pupil, the resident board could make the determination as to full-time/part-time attendance.

DISCUSSION

It is clear that the legislature established the MAST program explicitly "for the purpose of providing education to students throughout the State of New Jersey in the fields of marine science, marine trades, marine technologies and related courses, as well as academic courses." N.J.S.A. 18A:54C-1. The words contained in this provision must be given their "ordinary and well understood meaning." Matter of Schedule of Rates for Barnett Memorial Hosp., 92 N.J. 31, 40 (1983). The key words, "as well as," strongly imply that accepted pupils should be offered "academic courses." However, the words cannot be understood to mean that in order for pupils to attend, such pupil must enroll in academic courses at MAST. The establishment of such a comprehensive program, nevertheless, indicates a legislative intent for pupils to be provided the opportunity to receive a vocational education integrated with academic subject matter, which can only be achieved on a full-time basis. By adopting this complete approach to vocational education for the pupil population, the legislature has made fruitful employment upon graduation the possibility more promising. See: Keyport Bd. of Ed. v. Bd. of Ed. of Union Beach, Red Bank Reg. H.S. and Matawan-Aberdeen, Monmouth Cty., OAL DKT. EDU 11064-82 at 8, aff'd by Commission's decision, Oct. 17, 1983.

Although the underlying statutory intent appears to be that a pupil attend on a full-time basis, the statute also admits to the interpretation that a pupil may take academic courses in the residential school district. Where more than one interpretation of a statute can be deduced, its legislative history must be considered. State v. Butler, 89 N.J. 220, 226 (1982). The legislative history must be used to reach a reasonable construction of the statute to serve the statute's apparent purpose. The statute should not be construed to reach an absurd or anomalous result. See: Albert F. Ruehl Co. v. Bd. of Trustee, Industrial Ed., 85 N.J. Super. 4, 13 (App. Div. 1964). See also: State v. Provenzano, 34 N.J. 318 (1961).

A statute's legislative history includes statements of legislative committees. It is recognized, however, that a committee's statement "cannot clothe it with a meaning not fairly within its words and purpose." N.J. Civil Service Ass'n v. State, 88 N.J. 605, 615 (1982). Furthermore, a committee's statement is not binding on a court. See: Bellinger v. Bellinger, 177 N.J. Super. 650 (Chan. Div. 1981). According to a statement by the Senate Education Committee, MAST is a "full-time instructional program in the marine sciences and related technologies." Senate Ed. Comm. Statement, Assembly Bill No. 3805 (1983). This language supports the view that the vocational training offered is to be linked to academic courses on a day-to-day basis. Otherwise, the committee would not have reasonably indicated that the program is full-time. Thus, the internal sense of the statute's purposes--to establish a full-time program--is expressed by the committee statement.

In addition, the committee's statement indicates the MAST program "is under the full jurisdiction" of the Monmouth County Vocational Technical School. Senate Ed. Comm. Statement Assembly Bill No. 3805 (1983). The committee's use of the words "full jurisdiction" cuts against the view that a residential board of education has authority over attendance policy. For this reason, a residential board of education should not be construed to have any role or discretion in attendance matters.

Notwithstanding legislative history, the Assistant Commissioner of Education has suggested a policy that residential school boards may dictate attendance policy. As stated in a letter from Vincent B. Calabrese, Assistant Commissioner of Education, to

Edward F. Davey, Superintendent of Monmouth County Vocational School (March 6, 1984), the policy enunciated is that:

> All students requesting full-time enrollment, should be given the opportunities provided they meet admission criteria. A shared-time program may be operated. The decision concerning shared-time would rest with the resident district if they can establish that their academic program is comparable to the vocational program and that no undue hardship would be experienced by the student. [emphasis added] [J-1]

The general rule is that an agency interpretation of a statute on a program that it administers must be accorded great weight unless it is plainly erroneous or inconsistent with the Legislature's intent. See: Matter of Lembo, 151 N.J. Super. 242, 249 (App. Div. 1977). The agency's interpretation must be accepted and considered proper when the statutory provision is ambiguous, or fairly admits to several interpretations, if it represents "long-continued usage and practice." Presbyterian Church v. Div. of Alcoholic Bev. Control, 53 N.J. Super. 271, 276 (App. Div. 1958); Marini v. Div. of Alcoholic Bev. Control, 1 N.J.A.R. 365, 370 (1980). These two cases involve agency policies that had a history of usage and acceptance, which is easily distinguished from the instant case.

In Presbyterian Church, a church appealed from a decision of the Director of the Division of Alcoholic Beverage Control granting a liquor license within close proximity to two houses of worship. A statute prohibited the issuance of license for sale of alcohol within 200 feet of a house of worship. The case centered on the application of a statutory rule of measurement that had been used in prior decisions. The court approved the rule of measurement by indicating that: "Where the language of a statutory provision fairly admits of several interpretations, the contemporaneous and long-continued usage and practice under it requires the construction thus put upon it to be accepted as the proper one." Presbyterian Church at 276. However, the court disagreed with the Director's application of the rule and overturned the agency decision.

In Marini, an Administrative Law Judge (ALJ) concluded that an internal memorandum of the Division of Alcoholic Beverage Control that disapproved of liquor licenses for spouses or other family members of a disqualified individual could not be the sole reason to deny a permit. Marini at 370. The ALJ's conclusion was based on a lack of evidence that indicated the memoranda represented policy "in long-continued usage and practice." Marini. On appeal, the Director of the Division overturned the ALJ's decision,

because the memorandum, in fact, represented policy followed for 45 years and applied in at least five recent adjudicated matters. Marini at 376, 377. The Director stated that, "The concept has continually permeated the operations of the Division." Marini at 377.

For these reasons, I reject the Assistant Commissioner's interpretation of N.J.S.A. 18A:54C-4.

With respect to the local resident school board's exercise of authority over the pupil attendance policy at MAST, our Supreme Court has observed on many occasions that "it is axiomatic that a municipality may not act in an area which the Legislature has preempted." Fair Lawn Ed. Assn. v. Fair Lawn Bd. of Ed., 79 N.J. 574, 586 (1979). In determining whether a particular activity has been preempted, "the Court must determine whether the Legislature intended its actions to preclude the exercise of local authority." Also, in assessing the legislative intent, it must be determined whether the local action adversely affects the legislative scheme "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Legislature. Fair Lawn at 586-587.

For the reasons explicated above, I **CONCLUDE** as follows:

1. The Legislature intended MAST to be a full-time vocational training program integrated with the academic subject matter and courses of study.

2. The resident school board's authority over the attendance of a pupil accepted at MAST on a full-time basis has been preempted by statute and, thus, the residential board of education is without jurisdiction over the MAST program.

I further **CONCLUDE** that the temporary restraints issued by this court against the Board of Education of the Freehold Regional High School District are hereby dissolved, and it is hereby **ORDERED** that the Board be permanently restrained from placing M.H. on a shared-time basis at MAST.

It is further **ORDERED** that the Board continue to provide M.H. with transportation to and from MAST, pursuant to N.J.S.A. 18A:54C-7.

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

18 January 1985
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

January 21, 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 23 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

ml/EE

R.H. AND E.H.	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT AND DR. H. VICTOR CRESPY, SUPERINTENDENT, MONMOUTH COUNTY	:	DECISION
RESPONDENTS.	:	

The record and initial decision have been reviewed. No exceptions were filed within the time prescribed by N.J.A.C. 1:1-16.4 a and b.

Upon careful consideration and review of the record in this matter, the Commissioner accepts the recommended decision of the Office of Administrative Law and adopts it as his own for the following reasons.

The enabling legislation enacted relative to the Marine Academy of Science and Technology (MAST) is clear and unambiguous in its intent to establish a full-time instructional program available to New Jersey pupils. Admission procedures and operation of the MAST program fall under the jurisdiction of the Monmouth County Vocational-Technical School. Hence, there is no statutory authorization in N.J.S.A. 18A:54C-1 et seq. granting local boards the power to establish their own admission/attendance policies for those pupils in their districts who desire to attend this unique educational program.

A board policy which would serve to unilaterally restrict pupils' attendance merely to a shared-time program would contravene clear legislative intent to have a full-time program available to New Jersey's pupils. If such a policy were allowed to be enacted by the Freehold Regional High School Board of Education or other boards of education, it would unquestionably undermine the legislative intent and purpose for a full-time instructional program to be operated, a program which by statute is to include not only specialized vocational courses but academic courses as well. A board policy which prevents access to the MAST program on a full-time basis would serve to deprive those pupils of a statutory entitlement created by N.J.S.A. 18A:54C-1 et seq. Therefore, it is determined that any policy of the Freehold Regional Board restricting a pupil's attendance in the MAST program to shared-time is hereby declared null and void.

Petitioner's son was accepted for full-time attendance in the MAST program. (P-1) Therefore, there can be no impediment

raised by the Board which precludes his right to attend a full-time educational program established by legislation, irrespective of how cost effective the rationale may be from the Board's perspective.

Accordingly, it is ordered that the Board be permanently restrained from restricting M.H.'s attendance to a shared-time program at MAST. Transportation is to be provided pursuant to N.J.S.A. 18A:54C-7.

MARCH 7, 1985 COMMISSIONER OF EDUCATION

R.H. AND E.H.,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY AND DR. H. VICTOR CRESPY, SUPERINTENDENT,	:	DECISION
RESPONDENTS-APPELLANTS.	:	

Decided by the Commissioner of Education, March 7, 1985

For the Petitioners-Respondents, Real, Ransom, Santaloci and Capron (Dwight Ransom, Esq., of Counsel)

For the Respondents-Appellants, Cerrato, O'Connor, Saker and Collins (James E. Collins, Esq., of Counsel)

For the Amicus Curiae Monmouth County Vocational School District, Dawes and Brown (Sanford D. Brown, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons set forth therein. We emphasize, however, that even though a local board is not authorized to determine whether a student attends M.A.S.T. on a full or shared-time basis, this does not preclude the student, with the agreement of M.A.S.T., from choosing to attend on a shared-time basis.

November 6, 1985

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6535-84
AGENCY DKT. NO. 346-8/84

EFTHIMIA N. CHRISTIE,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,
Respondent.

Wayne J. Oppito, Esq., for petitioner

Melvin C. Randall, Esq., for respondent
(Love & Randall, attorneys)

Record Closed: January 4, 1985 Decided: January 18, 1985

BEFORE **ROBERT T. PICKETT**, ALJ:

PROCEDURAL HISTORY

This is an appeal by the petitioner, Efthimia Christie, contesting her termination and removal from her position as Curriculum Supervisor of Bilingual/ESL with the respondent on June 4, 1984, contending, inter alia, that her removal from the position violated her tenure rights under N.J.S.A. 18A:28-6(c). The petitioner filed a petition with

the Commissioner of Education on August 1, 1984. Thereafter, on August 30, 1984, the Commissioner of Education transferred the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 30, 1984. A hearing was held on December 13, 1984 and the record closed on January 4, 1985 to allow submission of memorandum of law by the parties. For the reasons which follow, the petitioner must be reinstated to her former position on a permanent basis and compensated for any loss of salary.

UNDISPUTED FACTS

All of the material facts are undisputed, except the nature of the job duties of a Supervisor of Bilingual/ESL (English as a Second Language) and Supervisor of Bilingual/ESL and Foreign Languages. From the stipulation of the parties, exhibits and uncontradicted testimony at the hearing, I hereby **FIND** the following as undisputed **FACTS.**

The petitioner commenced employment with the respondent school district in December 1977. She held an appropriate certificate as a teacher and was assigned to teach bilingual students. On October 4, 1978, the petitioner was promoted to the position of Coordinator of Bilingual/ESL* and remained in that position until September 1, 1979. On September 1, 1979, the petitioner was again promoted to the position of Curriculum Supervisor. There were four Curriculum Supervisors, each assigned to a specific subject matter area. The petitioner was assigned to the subject matter area of Bilingual/ESL.

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*It is important to note that N.J.A.C. 6:3-1.10 states: "(g) . . . whenever the title of any employment shall not be found in the certification rules or in these rules, the holder of the employment shall be classified as nearly as may be according to the duties performed." The title of Coordinator is not found in the rules. The closest category to Coordinator as set forth in the subject job description is Supervisor to which she was promoted in September 1977.

In a notification dated April 23, 1984 and a contract dated April 28, 1984, petitioner was informed that she would be employed in the East Orange School District for the 1984-85 school year.

At its meeting on June 4, 1984, the East Orange Board of Education voted to abolish, among other positions, three ten-month Curriculum Supervisor positions and create corresponding 12-month supervisory positions, Supervisor of Reading, Supervisor of English/Language Arts, and Supervisor of Performing Arts, Music, Art/Social Studies/Humanities.

The three ten-month Curriculum Supervisors were given the option of accepting the 12-month Supervisor positions in their respective disciplines. All three acepted and are currently employed in those positions.

At the same June 4, 1984 meeting, the East Orange Board of Education also voted to abolish the ten-month position of Supervisor of Bilingual/ESL and create a 12-month position of Supervisor of Bilingual/ESL and Foreign Languages.

The duties and responsibilities of the abolished ten-month Supervisor position and the new 12-month Supervisor position are the same in the areas of bilingual education and ESL.

Efthimia Christie was notified by the Superintendent of Schools in a letter, dated June 5, 1984, that her employment in the East Orange School District was terminated. In a letter, dated June 6, 1984, Efthimia Christie requested that the Superintendent provide reasons for her termination.

The Superintendent responded to that request in a letter dated June 14, 1984.

On or about June 12, 1984, the East Orange School District posted a Notice of Positions Available which included the position of Supervisor of Bilingual/ESL and Foreign Languages.

In a letter dated August 7, 1984 to Assistant Superintendent Dr. Kenneth King, Efthimia Christie requested her employment status for the 1984-85 school year. Dr. King responded in a letter dated August 17, 1984.

Dr. King sent another letter, dated September 21, 1984, informing Efthimia Christie of the action of the East Orange Board of Education at its September 18, 1984 meeting.

Efthimia Christie is currently employed as a teacher of Spanish in the Mt. Olive School District at a salary of $26,700.

Efthimia Christie would be earning $34,193 as the Supervisor of Bilingual/ESL and Foreign Languages in the East Orange School District.

The parties have stipulated that the duties performed by the petitioner as the Curriculum Supervisor for Bilingual/ESL are the same as the duties outlined for the 12-month Supervisor for Bilingual/ESL and Foreign Languages position.

DISPUTED FACTS

The critical dispute herein is to what extent were the foreign language supervisory duties a part of the 10-month curriculum supervisor position held by the petitioner. The petitioner, of course, contends that as part of her job she had supervisory responsibility for foreign language curriculum development in the school system. Petitioner testified that no other Curriculum Supervisor had district-wide responsibility for foreign language supervision and indicated that all the job duties described for the Superivisor of Bilingual/ESL and Foreign Languages position were performed by her as Curriculum Supervisor.

The respondent presented Antoinette Lamb, the Director of Curriculum, and Dr. Kenneth D. King, Assistant Superintendent for Personnel and Labor Relations, in support of its position. Ms. Lamb testified that in her view the petitioner's job duties

as Curriculum Supervisor for Bilingual/ESL are distinctly different from job duties specified for Supervisor for Bilingual/ESL and Foreign Language. When asked to detail the differences between the two positions, Ms. Lamb only cited three differences: (1) the new position requires responsibility for curriculum mapping, (2) the new position requires that supervisors be responsible for being aware of research in the area and (3) the new position requires that the supervisor utilize research findings in order to develop new curriculum programs (see Exhibit J-12, Items 13, 20 and 23).

Ms. Lamb admitted that the previous job descriptions for curriculum supervisor were more general than the new job descriptions for supervisors. The new descriptions provided the employees with more specificity as to their job duties and make them more accountable and responsible in their positions. Ms. Lamb stressed that again in her view the petitioner held no foreign language supervisory duties and that her major focus was Bilingual/ESL.

Ms. Lamb testified that the other curriculum supervisor positions were retained and given new titles in specific subject matter areas as opposed to the general and broad category of curriculum supervisor. Each of the Curriculum Supervisor positions in reading, English, Performing Arts, Music, Art, Social Studies/Humanities were changed to 12-month positions.

Dr. King corroborated much of the testimony offered by Ms. Lamb. However, he did provide more detail with respect to the appointment process. Dr. King testified that it was his opinion that the addition of the foreign language component to the supervisor position of Bilingual/ESL was sufficiently new to make the position a "new" position.

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, this court **CONCLUDES** that the petitioner acquired tenure in the position of Curriculum Supervisor and in the new position, Supervisor of Bilingual/ESL and Foreign Language, essentially the same positions.

Notwithstanding the different job titles, the petitioner was appointed to a ten-month Curriculum Supervisor position and assigned to Bilingual/ESL on September 1, 1979 until the creation of the new position, Supervisor of Bilingual/ESL and Foreign Languages, was created. Any position which has a supervisory component is a position covered by the teacher tenure statute and, therefore, a position within which tenure can be obtained. See N.J.S.A. 18A:16-1.1.

Tenure is a statutory right which belongs to all teaching staff members who meet the conditions of the statute. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 77 (1982); Zimmerman v. Bd. of Ed. of Newark, 38 N.J. 65, 72 (1962), cert. den. 371 U.S. 956 (1963). Generally, tenure is available to teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years. N.J.S.A. 18A:28-5. Spiewak at 81. N.J.S.A. 18A:28-6(c), the statute on which the petitioner relies in support of his tenure claim, provides that:

> 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 . . . shall not obtain tenure in his new position until after:
>
> (c) employment in the new position within a period of three consecutive academic years, for the equivalent of more than two academic years.

As defined by N.J.S.A. 18A:1-1, the term "academic year" means "the period between the time school opens . . . after the general summer vacation until the next succeeding summer vacation." The academic year in the respondent's school district was comprised of 180 days. Therefore, it would seem that the petitioner qualified for tenure in the Curriculum Supervisor position by working in excess of two calendar years (the equivalent of more than two academic years during the academic years 1979-80 and 1980-81 and the court so **FINDS.**

The respondent would like this court to view the position of Supervisor of Bilingual/ESL and Foreign Languages as a "new position" and argues that petitioner has no

rights to the new position. That view, however, is not consistent with the evidence adduced at the hearing on this issue. It is clear to the court that the job duties specified for Curriculum Supervisor for Bilingual/ESL are the same as those of Supervisor for Bilingual/ESL and Foreign Languages. The reporting relationships are the same and the core of the job duties are the same as well. The only difference between the two positions is the addition to the title of "Foreign Languages." This court is satisfied based on the testimony and numerous exhibits offered by the petitioner that she performed the "foreign language" component of the new position in her former position as Curriculum Supervisor. This view of the evidence is further buttressed by the fact that three other curriculum supervisors in other subject matter areas were permitted to continue their supervisory duties in the 12-month positions. The petitioner was never given the same opportunity. Therefore, this court **FINDS** and **CONCLUDES** that the job duties for the "new position" of Supervisor for Bilingual/ESL and Foreign Languages are the same, including the foreign language component, as the duties performed by the petitioner as Curriculum Supervisor for Bilingual/ESL.

Petitioner, nonetheless, was removed based on respondent's view of the "new position." That removal, given this court's finding that she had indeed acquired tenure in his supervisory position, violated provisions contained in N.J.S.A. 18A:6-10. N.J.S.A. 18A:6-10 requires that a person under tenure of office, position or employment during good behavior and efficiency shall not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing . . . after written charge or charges, of the cause or causes of the complaint shall have been preferred against such person. . ." None of that was done in this instance.

ORDER

It is therefore **ORDERED** that the respondent Board of Education of the City of East Orange reinstate the petitioner to her position as Curriculum Supervisor or an equivalent position.

It is further **ORDERED** that the respondent, Board of Education of the City of East Orange, pay to the petitioner any amount of salary loss from July 1, 1984 to the date of her reinstatement.

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

January 18, 1985
DATE

ROBERT T. PICKETT, ALJ

Receipt Acknowledged:

Jan. 23, 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 24 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

al

EFTHIMIA N. CHRISTIE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were received from the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

The Board contends in its exceptions that the judge missed the critical difference between the positions of Supervisor of Bilingual/ESL and Supervisor of Bilingual/ESL and Foreign Languages and erred in determining the two positions as equivalent. It argues inter alia that, in order to reach his decision, the judge had to reject the clear and precise testimony of the Board's witnesses that the two positions are different and that in so doing he substituted his own judgment. Such substitution is contrary to case law which determines that the Commissioner is not to substitute his judgment for that of a local board on matters which are statutorily delegated to it.

Further, the Board alleges that petitioner should be estopped from any claim because she abandoned her position when refusing to accept a teaching position in East Orange upon abolishment of her position.

It is unquestioned that a board of education has the right to abolish a position whenever in its judgment it is advisable for reasons of economy, reduction in the number of pupils, change in the administrative or supervisory organization of the district or other good cause. N.J.S.A. 18A:28-9 The central issue in this matter evolves around whether petitioner has entitlement, by virtue of tenure and seniority, to the allegedly newly-constituted Supervisor of Bilingual/ESL and Foreign Languages position.

In determining an individual's tenure and seniority rights, it has been clearly established that the employment must be viewed in terms of the actual duties performed under the certificate required. Thus, the duties performed, rather than the title of the position or the job description, are controlling; one must look to the substance rather than the form. Beute v. Board of Education of the Borough of North Arlington, decided by the Commissioner September 14, 1981, aff'd State Board February 3, 1982

In the instant matter, the job description for petitioner's position as a curriculum supervisor in the East Orange School District (J-11) is so vague as to be virtually useless in rendering a determination as to her entitlement to the "new" supervisory position. This should serve as a warning to boards of education of problems which can arise when a supervisor's job description is so vague that it fails to reflect specific responsibilities and duties in the curriculum area assigned. Had the East Orange Board revised the job description in accordance with and upon the imple- mentation of N.J.A.C. 6:3-1.10 in September 1983, it is conceivable that litigation might have been avoided in this matter.

Upon careful, thorough review of the record, the Commissioner determines that petitioner has been able to demonstrate that her duties were not restricted to those of bilingual/ESL and that she did perform duties in the foreign languages area. Inter alia, Exhibits P-36 through P-38 clearly establish that she performed formal evaluations of staff members teaching French and Spanish in addition to those teaching in bilingual programs. (P-39) Exhibit P-40, an evaluation of petitioner's own performance, addresses not only bilingual/ESL duties but foreign language related ones as well. Exhibit P-40 states in part:

> "***She continues to work cooperatively with building supervisors and staff by providing in-service assistance to foreign language teachers.***
>
> PROFESSIONAL IMPROVEMENT PLAN
>
> It is recommended that Mrs. Christie continue the excellent work she is doing with particular emphasis upon:
>
> 1 increasing the articulation between Bilingual/ESL and regular school programs, particularly Foreign Language, Business Education and Related Arts.
>
> 2 acquainting herself with available microcomputer software in the areas of Bilingual/ ESL and Foreign Language.
>
> 3 increasing to the maximum extent possible her participation in all district sponsored inservice training or professional development activities as well as other related meetings or sessions at which her presence can be reasonably expected.***" (P-40, at pp. 2-3)

Hence, two of the three items listed within the Professional Improvement Plan section of the evaluation deal with foreign language as well as bilingual/ESL.

There is nothing in the evidential record to substantiate the Board's contention that petitioner had no foreign language duties. Nor is there anything in the evidential record to refute petitioner's allegation that no other curriculum supervisor had district-wide supervisory responsibility for foreign languages. Where conflicting evidence is offered in a case, the individual who hears the conflicting testimony is given the charge to judge the credibility of the testimony. Paternoster v. Leonia, decided by the Commissioner November 9, 1982, rev'd State Board March 7, 1984 While the Commissioner has the power to amend or reject an initial decision, where conflicting testimony exists the Commissioner must give deference to the trier of fact. The Commissioner determined the following in Campanile v. Board of Education of Middletown, decided by the Commissioner March 2, 1982:

> "[W]here conflicting evidence is offered on any issue and there is sufficient evidence contained in the record to reasonably support the findings made, the Commissioner will defer to the judgment of the hearer on questions of credibility since he/she had the opportunity to hear and observe the witnesses and so was in a better position to assess credibility. Cf. Close v. Kordulak Brothers, 44 N.J. 589, 599 (165); Parker v. Dornbierer, 140 N.J. Super. 185, 188 (App. Div. 1976).***" (Slip Opinion, at pp. 19-20)

The Commissioner concludes that there is sufficient evidence contained in the record to reasonably support the findings determined by the judge, and defers to his judgment on the question of credibility for the reasons cited above.

The Commissioner is unpersuaded by the Board's argument that petitioner's claim is barred due to abandonment of position. On June 5, 1984 she was notified by the Board that employment would not be offered to her for the 1984-85 school year. Despite the fact that petitioner had acquired tenure in the East Orange District not only as a curriculum supervisor but as a Bilingual teacher, the Board dragged its feet in offering her employment in that capacity until September 21, 1984, nearly two months after the filing of her petition with the Commissioner and after she had been offered a teaching position in the Mt. Olive School District.

Having determined that petitioner was improperly deprived of the supervisory position for Bilingual/ESL and Foreign Languages, the Commissioner adopts the recommended decision rendered by the Office of Administrative Law as the final decision in this matter. Petitioner is to be reinstated to the supervisory position immediately and to be paid all salary, emoluments and benefits lost during the period of her improper dismissal, less any monies earned during that time.

MARCH 11, 1985 COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3494-84
AGENCY DKT. NO. 130-4/84

YVONNE MELI,
Petitioner,
v.
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL-TECHNICAL SCHOOL, BURLINGTON COUNTY,
Respondent.

Douglas B. Lang, Esq., for petitioner (Katzenbach, Gildea & Rudner, attorneys)

John E. Queenan, Jr., Esq., for respondent

Record Closed: December 10, 1984 Decided: January 24, 1985

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

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Burlington County Vocational-Technical School (Board), alleges, among other things, that the Board's withholding of three days' salary for her absence from work as a result of her appearance at an administrative hearing conducted by the Office of Administrative Law on December 1, 5 and 9, 1983, was arbitrary, capricious and unreasonable and in violation of the terms and conditions of the Collective Bargaining Agreement between the Board and the Burlington County Vocational-Technical Education Association (Association). The Board denies the allegations asserting, among other things, that it had a reasonable basis for its actions and, therefore, requests that the herein Petition of Appeal be dismissed.

Petitioner filed her Verified Petition of Appeal before the Commissioner of Education on April 19, 1984, pursuant to N.J.S.A. 18A:6-9. On May 14, 1984, the Board filed its Answer and on May 16, 1984, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on July 11, 1984, while the matter was pending a determination in nonbinding arbitration. As a consequence of the pending arbitration proceedings, the parties requested that a hearing before the Office of Administrative Law be postponed until November 1, 1984, and the request was granted. A limited hearing was conducted on November 1, 1984, and the parties were granted leave to submit posthearing memoranda of law. The last submission was received on December 10, 1984, which constituted the closing date in this matter.

ISSUES

The issues agreed upon by the parties to be determined by this tribunal are as follows:

1. Whether the Board's withholding of petitioner's pay for her court appearance was in retaliation for petitioner's legitimate redress of grievances against the Board and was in violation of petitioner's rights of the First and Fourteenth Amendments to the Constitution of the United States and comparable New Jersey State Constitution provisions.

2. Whether the Board's withholding of petitioner's pay for three days for her court appearance was an arbitrary, capricious and unreasonable act by the Board.

UNCONTESTED FACTS

Petitioner is a teaching staff member with a tenure status in the Board's employ. On April 18, 1983, the Board acted to withhold petitioner's employment and adjustment salary increment for the 1983-84 school year grounded upon the Board's allegation that her absence from duty was excessive during the 1982-83 school year. Thereafter, petitioner appealed the Board's action to the Commissioner, pursuant to N.J.S.A. 18A:29-14, and the matter was subsequently transmitted to the Office of Administrative Law for determination as a contested case. A hearing was conducted by an administrative law judge on December 1, 5 and 9, 1983, at which petitioner was in attendance. A further hearing was conducted on January 3, 1984, which proceeded in petitioner's absence.

Prior to the above-referenced proceedings, the Board and Association entered into a Collective Bargaining Agreement (Agreement) which contained, among other things, the following provisions:

> Article XII D. Court Appearance
>
> 1. Any employee who is required to be present by a court of law through no fault of his/her own, and who exhausts his/her personal days will receive full pay minus substitute pay for the day(s) involved.
>
> 2. Time necessary, with full pay, for appearance in any proceeding connected with the employee's employment or with the school system will be granted, if the employee is required by law to attend and not an improper act of the employee.
>
> Article XIX Miscellaneous Provisions
>
> B. Nothing contained herein shall be construed to deny or restrict to any person such rights as he/she may have under any statute in the State of New Jersey, including Title 18A Education of the New Jersey Statutes, or other applicable statutes and regulations.

On or about November 11 and 29, 1983, petitioner submitted requests for three personal days to attend the administrative hearings scheduled on December 1, 5 and 9, 1983, all of which were approved. On December 2, 1983, petitioner changed her requests from three days' personal leave to three days' absence for court appearance leave, pursuant to Article XII, §D. 2. Petitioner's request was approved by her building principal. Subsequently, on December 6, 1983, the Superintendent of Schools denied petitioner's request for court appearance leave.

Thereafter, on March 12, 1984, petitioner filed a grievance seeking reinstatement of payments withheld from her salary for the three days she appeared at the administrative hearings. Petitioner's requested relief was denied by the Board. As a consequence of the Board's denial for the requested relief, the Association sought arbitration on petitioner's behalf. The arbitrator, duly selected in accordance with the Agreement, issued an award in favor of petitioner on July 20, 1984. The Board has failed and/or refused to honor the arbitrator's determination and award to reimburse petitioner for the three days' salary withheld.

TESTIMONIAL EVIDENCE

Limited testimony was proffered by the Superintendent, among other things, as to his interpretation of Article XII in the Agreement and his reasons for denying petitioner's request for court appearance leave time. He asserted that it was he who is authorized to make the decision as to whom is afforded court appearance leave with pay. In the event the Superintendent determines the requested court leave is inappropriate, he is also authorized to withhold the employee's salary for the time the employee is absent from duty for a court appearance.

The Superintendent testified that he determined that petitioner was ineligible for court leave time because it was petitioner who brought the action against the Board and challenged the Board's action to withhold petitioner's annual salary increment and adjustment for the 1983-84 school year. He further asserted that petitioner's challenge did not relate to petitioner's employment and, therefore, under the terms and conditions of Article XII, petitioner was ineligible for the paid court leave time.

DISCUSSION

The instant matter arose out of a controversy wherein petitioner challenged the Board's action to withhold her 1983-84 salary increment and adjustment, and the Board's subsequent action to deny petitioner's request to be absent from duty in order to prosecute her challenge. It is necessary, at this juncture, to consider the statutory provision which grants a local board of education the authority to withhold salary increments to determine whether, in so doing, it incurs any additional duties and/or liabilities. The controlling statute is found at N.J.S.A. 18A:29-14, and provides in pertinent part, as follows:

> Withholding increments; causes; notice of appeals
>
> 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, 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.
> Amended by L. 1968, c. 295 § 13, eff. Sept. 9, 1968. [emphasis added]

It is apparent from the statute that the herein Board is vested with the discretionary authority, grounded upon inefficiency or other good cause, to withhold petitioner's employment increment, or the adjustment increment, or both. It is equally apparent that the affected employee may, at his/her choosing, appeal the Board's determination to the Commissioner, pursuant to the statute and administrative regulations promulgated by the State Board of Education as found at N.J.A.C. 6:24-1.1 et seq. Petitioner's right to challenge the Board's action to withhold her salary increment is thus protected by the express and unambiguous language of the statute. In the event the affected employee determines to challenge the board of education decision to withhold, as petitioner herein so determined, the appropriate Petition of Appeal is filed pursuant to Administrative Regulations within the time constraints found therein. The Board is compelled to answer the petition, thus joining issue in the controverted matter, with the parties given the opportunity for a full plenary hearing before an impartial tribunal. Subsequent to an analysis of the evidence presented together with the applicable law, the Commissioner, by statute, "shall either affirm the action of the board of education or direct that the increment or increments be paid." The Commissioner has in numerous instances been called upon, in this quasi-judicial capacity, to make determinations regarding the reasonableness of the actions of local boards of education in the exercise of their discretionary powers. McCabe v. Bd. of Ed. of the Tp. of Brick, Ocean Cty., 1974 S.L.D. 299, aff'd, State Bd. of Ed. 315, aff'd, N.J. App. Div., April 2, 1975, A-3192-73 (1975 S.L.D. 1073). Where the Commissioner has found the action of the local board of education to be reasonable, he has sustained the action. Thomas v. Morris Tp. Bd. of Ed., 89 N.J. 327 (App. Div. 1965), aff'd, 46 N.J. 581 (1966). Similarly, where the Commissioner has determined the board of education's action to be arbitrary, capricious or unreasonable, he has applied his quasi-judicial authority to overturn such action. Fanella v. Bd. of Ed. of Washington Tp., et als., Morris Cty., 1977 S.L.D. 383; Cf. Kopera v. West Orange Bd. of Ed., 60 N.J. Super., 288 (App. Div. 1960).

Petitioner's rights to challenge the herein Board's action to withhold her increments are further protected under the rubric of N.J.S.A. 18A:6-9 (the Commissioner's jurisdiction to hear and determine, without costs to the parties, all

controversies and disputes arising under school laws) where, at N.J.S.A. 18A:6-20, it provides, in pertinent part, that:

> Any party to any dispute or controversy or charged therein, may be represented by counsel at any hearing held in or concerning the same and shall have the right to testify, and produce witnesses to testify on his behalf and to cross-examine witnesses produced against him, and to have compulsory process by subpoena to compel the attendance of witnesses to testify and to produce books and documents in such hearing. . . .

Accordingly, petitioner's right to challenge the Board's action, coupled with her concomitant right to a full plenary hearing on the merits of the challenged action, is protected by statute under the education laws.

The herein action arises out of the Board's refusal to reimburse petitioner for the days she was absent from duty while prosecuting her claim for reinstatement of her withheld salary increments for the 1983-84 school years. Petitioner claims entitlement for salary reimbursement on the days she appeared at hearing under the Board's policy, Article XII, § D.2. The Board counters petitioner's claim by asserting, among other things, that: (1) the administrative law judge and the Commissioner sustained the Board's action to withhold petitioner's salary increments; and, (2) petitioner does not meet the criteria of Article XII, § D.2, that she was required to be present by a court of law through no fault of her own. The Board contends that while it cannot prevent petitioner from taking time off from her assigned duties to attend the administrative law hearings, the Board is not required to pay petitioner's salary for days during which she did not work for these reasons. The Board further asserts, through its Superintendent, that petitioner was ineligible for court leave time because it was she who brought the action against the Board and that her challenge was not related to petitioner's employment.

As a consequence of the Board's denial and refusal to reimburse petitioner for the days' absence with regard to her litigation, petitioner sought and was granted an award through advisory arbitration. The arbitrator found, among other things, that the Board violated its policy, Article XII, § D.2., and awarded a salary reimbursement to petitioner for the three days' absence caused by her attending the administrative proceedings (P-1). This court admitted the arbitrator's report into evidence in accordance with the criteria set forth in Thorton v. Potamkin Chevrolet 94 N.J. 1 (1983). The Board has failed and/or refused to comply with the arbitrator's findings and award.

I **FIND** the Board's reasons to deny petitioner's requested reimbursement for salary withheld as a consequence of her attending the administrative proceedings to be without merit. This finding is grounded, in part, upon the foregoing discussion and, in part, upon the clear and unambiguous language of the Board's policy found at Article XII, § D.2. The Commissioner and our courts have stated that it is clear that a policy of a board of education must be reasonable. It follows that the interpretation and implementation of that policy must also be reasonable. The Commissioner, relying upon court dicta, has established guidelines for the interpretation of board of education policy where he said in the matter of Harry A. Romeo, Jr. v. Bd. of Ed. of the Tp. of Madison, Middlesex Co., 1973 S.L.D. 102, 106, as follows:

> ***In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. Lane v. Holderman, 23 N.J. 304 (1957). Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. Duke Power Company, Inc. v. Edward J. Patten, Secretary of State, et al., 20 N.J. 42, 49 (1955); Zietko v. New Jersey Manufacturers Casualty Insurance Co., 132 N.J.L. 206, 211 (E. & A. 1974); Bass v. Allen Home Development Company, 8 N.J. 219, 226 (1951); Sperry and Hutchinson Co. v. Margetts, 15 N.J. 203, 209 (1954); 2 Sutherland Statutes and Statutory Construction (3rd ed 1943), Section 4502.

Similarly, the Court held in Newark Publisher's Assn. v. Newark Typographical Union, 22 N.J. 419, 427 (1956) that:

> ***We are not at liberty to introduce and effectuate some supposed unrevealed intention. The actual intent of the parties is ineffective unless made known in some way in the writing. It is not the real intent but the intent expressed or apparent in the writing that controls ****

See also: In the Matter of the Tenure Hearing of William Lavin, School District of the Lower Camden Cty. Reg. District High School Number One, Camden Cty., 1976 S.L.D. 796.

The courts of this state have consistently held that statutes should not be given a meaning that may lead to absurd, unjust or contradictory results; nor should a statute be construed to permit its purpose to be defeated by evasion. In re Jersey City, 23 N.J. Misc. 311 (1945); Grogan v. De Sapio, 11 N.J. 308 (1953). This clear maxim applies equally to local board of education policies.

Accordingly, I **CONCLUDE** that under the Board's stated policy, Article XII, S D.2., petitioner herein is eligible for full pay for her absence from work as a consequence of her appearance at the administrative proceedings on December 1, 5 and 9, 1983.

ORDER

Having arrived at the above conclusion, I therefore, **ORDER** that the Board of Education of the Burlington County Vocational-Technical School reimburse petitioner for her absence, and at the rate of pay due her, on December 1, 5 and 9, 1983.

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

24 January 1985
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

January 24, 1985
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

FEB 13 1985
DATE

Mailed To Parties:
Ronald L. Parker jpm
OFFICE OF ADMINISTRATIVE LAW

bc/e

YVONNE MELI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL-TECHNICAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed by the parties in a timely fashion pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

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

Accordingly the Board of Education herein shall reimburse petitioner for the three days contested.

COMMISSIONER OF EDUCATION

MARCH 11, 1985

INITIAL DECISION

OAL DKT. NO. EDU 4085-82

AGENCY DKT. NO. 79-3/81A

BOARD OF EDUCATION OF THE BOROUGH OF MERCHANTVILLE, CAMDEN COUNTY,

Petitioner,

v.

JOAN R. NOLAN,

Respondent.

Paul Mainardi, Esq., for the petitioner (Brown, Connery, Kulp, Wille, Purnell and Greene, attorneys)

John L. White, Esq., for the respondent (White & Uzdavinis, attorneys)

Record Closed: December 12, 1984 Decided: January 24, 1985

BEFORE **AUGUST E. THOMAS**, ALJ:

Joan R. Nolan, respondent, was employed as the Board Secretary/Business Administrator for the Board of Education of the Borough of Merchantville (Board) when she was suspended without pay on February 10, 1981. The Board certified tenure charges against Nolan to the Commissioner of Education on March 23, 1981, alleging that she unlawfully caused payment to herself of $1,548 without its approval.

Nolan denies that she has acted improperly or unlawfully, stating that she followed procedural advice from a New Jersey State official and that she obtained approval by the Board before her payment was approved.

The Commissioner transferred this matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted on July 23, 1981, and on July 30, 1981, a Prehearing Order was signed regarding the procedural aspects of the case.

On September 9, 1981, Joan Nolan filed a motion seeking payment of salary during the period for which she was suspended. Specifically, the motion sought compensation for the period prior to the date of certification of tenure charges and for a period subsequent to 120 days after certification of those tenure charges.

A decision and Order Granting Partial Salary Reimbursement for the period prior to certification of tenure charges was entered on November 10, 1981.

The initial day of hearings was conducted on December 2, 1981, in the Merchantville Borough Municipal Building, Merchantville, New Jersey. At that time, Joan Nolan submitted a Motion to Enforce Partial Salary Reimbursement Order because the Board had not paid her as ordered. On December 9, 1981, I entered an Order compelling compliance with the Order of November 10, 1981.

The hearings on the tenure charge proceedings were conducted as scheduled for the first two of three days of scheduled hearings on December 2, 1981 and December 14, 1981.

At the conclusion of the second day of hearing, respondent presented an oral motion to dismiss the tenure charges based on the testimony of the Superintendent and the Board's records, which demonstrated that the Board never acted in public session to certify the tenure charges to the Commissioner.

After oral argument I advised counsel that I was prepared to grant the motion but would hold decision on the motion to allow for briefing of the relevant statutes (N.J.S.A. 18A:6-11 and N.J.S.A. 10:4-6 et seq.).

On February 9, 1982, I entered an order for payment of salary beginning 121 days after suspension. The order reserved for consideration the issue of the extent to which Joan Nolan's entitlement to resumption of salary payments beginning 121 days after suspension and certification of tenure charges would be affected by the Doctrine of

Mitigation of Damages. On February 11, 1982, the third day of three days of hearings, a hearing was conducted on the issue of mitigation of damages. No order was entered concerning the mitigation issue because the parties subsequently agreed to a Consent Order of Settlement.

Before settlement, however, and also on February 11, 1982, further proofs were offered by the Board in connection with its case. That hearing was adjourned to reconvene on February 22, 1982.

Subsequently, as a result of conferences among the Administrative Law Judge (ALJ) and both counsel and consultations between counsel for the litigants, the parties entered an agreement to resolve the tenure charge litigation. That agreement was incorporated in the Initial Decision and Order concluding the case with attached Consent Order dismissing the tenure charges dated March 11, 1982.

The Initial Decision was forwarded to the Commissioner of Education. However, on April 22, 1982, the Commissioner issued his decision rejecting the settlement reached by the parties and formalized by the ALJ and remanded the matter for plenary hearing.

The Board submitted to the Commissioner of Education a written request for reconsideration dated May 12, 1982. Counsel for Joan Nolan submitted a letter to the Commissioner dated May 19, 1982, which stated that she no longer wished to abide by the terms of the agreement.

On May 21, 1982, Joan Nolan filed a Verified Complaint and obtained an Order to Show Cause in the Superior Court of New Jersey, Chancery Division, Camden County, regarding her demand for salary payments pursuant to N.J.S.A. 18A:6-14.

On May 26, 1982, the Board appealed to the State Board of Education both the Commissioner's Decision dated April 22, 1982, rejecting the parties' settlement and Consent Order, and the earlier Orders of the ALJ concerning Joan Nolan's entitlement to salary payments. On June 21, 1982, the Superior Court of New Jersey entered its Order denyingthe relief sought by Joan Nolan as set forth in the Order to Show Cause, dated May 21, 1982.

On July 26, 1982, the New Jersey School Boards Association filed a Motion before the State Board of Education to appear as amicus curiae. The State Board of Education granted the Motion on August 4, 1982 and on April 6, 1983, the State Board of Education entered its Decision in this matter, which affirmed the Commissioner's Decision.

A Notice of Appeal to the Appellate Division of the Superior Court was filed on behalf of the Board on May 19, 1983. On August 30, 1983, Judge Deighan entered an Order transferring the Chancery Division matter before him to the Appellate Division for consolidation with the related matter of the tenure charge proceedings then pending unheard before the Appellate Division. The Appellate Division consolidated the salary and tenure matters.

The Appellate Division concluded that the order to pay Joan Nolan's "salary remains in full force and effect;" however, it affirmed the action of the Commissioner and the State Board remanding this matter for hearing and dismissed the action instituted in the Chancery Division.

In accordance with the remand, the final two days of hearing were conducted on August 28 and 29, 1984, in the Merchantville Municipal Building. Nine witnesses testified and twenty-seven documents were admitted as evidence.

The Board's charges are reproduced in full as follows:

TENURE CHARGES

The following charges of incapacity and unbecoming and illegal conduct are hereby made against Joan Nolan, Board Secretary and a tenured employee of the Board of Education of the Borough of Merchantville pursuant to N.J.S.A. 18A:6-11:

1. That Joan Nolan, Board secretary and business administrator, knowingly acted contrary to law to cause the sum of $1,548.00 to be paid to herself during the 1979-1980 school year directly from ESEA Title I funds and without the approval or authorization of the Board of Education, actual or apparent.

2. That said unlawful act was in direct disregard of prior oral instructions from the Board auditor to Mrs. Nolan on two separate occasions.

3. That notwithstanding said unlawful act, Mrs. Nolan intentionally withheld disclosure of said payment and another prior unauthorized payment of same nature from members of the Board of Education during relevant discussions and negotiations concerning Mrs. Nolan's employment contract, including salary terms.

4. That notwithstanding said unlawful act, Mrs. Nolan subsequently acted to attempt to conceal or disguise said unlawful act by falsely representing to the Board of Education that the State had approved that the indirect cost portion of ESEA Title I funds be paid to the Board secretary.

5. That notwithstanding said unlawful act, Mrs. Nolan subsequently attempted to conceal or disguise said unlawful act by falsely representing to the Board of Education that a "Personnel Summary Sheet" for 1980-81 for the Board secretary had, in fact, been included as part of the current Title I application on behalf of the Board of Education.

Dated: February 23, 1981 [signed] A. Bayley Hoeflich
[Board member]

Although the Board has enumerated five separate charges they are so interrelated that they must be discussed together since the proofs of each charge depend on findings in the other charges.

DISCUSSION

The record shows that during the 1979-80 school year, Joan Nolan caused school district payroll checks to be issued to herself in the sum of $1,548 beyond her salary. That sum represents the sum budgeted as "indirect costs" under the school district's application for ESEA Title I funding which the Board submitted and the State had approved for the 1979-80 school year. However, the charge represents that Joan Nolan knowingly acted contrary to law when she caused these monies to be paid to herself.

Respondent was first employed as a Board secretary in Merchantville in 1973 and held that position until her suspension in 1981. During the 1977-78 school year, she became involved with the Title I Program. A teacher in the district, Christian Swanson, was the Title I Program coordinator who prepared the annual Title I applications and he reported to his immediate supervisor, Ernest Barlow, Superintendent. Mr. Barlow was ultimately responsible for the Title I Program as a superintendent is responsible to any board of education for the entire educational program of a school district.

Joan Nolan's responsibilities and duties regarding the Title I Program included preparing payroll for Title I employees, purchasing supplies, keeping inventory for supplies, performing the necessary bookkeeping or accounting and handling personal references. These duties caused an increase in the time needed to complete her Title I responsibilities and Nolan devoted an additional two to three hours per week above her normal work week hours attending to Title I matters. As compensation for her additional time spent on Title I, Joan Nolan was paid from the indirect cost allocations under the Title I Program.

The Board's auditor testified that he discussed the matter of extra payments from Title I indirect costs with Joan Nolan on two separate occasions prior to the 1979-80 school year. He stated that he advised Nolan that such payments were improper and that salary payments should not be made from Title I indirect costs funds and that any additional salary payments would require prior consideration and authorization by the Board. He testified that the first Title I indirect cost rate refund of $50 was obtained by Merchantville for the 1976-77 school year and was paid to Nolan during the 1977-78 school year. He spoke to Nolan about this payment upon completion of the 1977-78 audit but he did not comment on the matter in his written audit report because of the "insignificant" amount involved ($50). The auditor testified that at the completion of his audit for the 1978-79 school year, he found that two years of indirect cost funds were paid directly to Joan Nolan in the amount of $350 each for 1977-78 and 1978-79. He asserts that he then advised Nolan for the second time that she could not pay direct salary costs out of indirect cost funds.

The Board auditor testified that during his audit for the 1979-80 school year, he noticed that respondent had again paid herself the indirect cost funds of the Title I Program and that the amount in question was $1,548. Believing this to be a significant amount of money, the auditor determined to place a comment in his audit report for the 1979-80 school year, indicating that the extra duty salary paid to Joan Nolan was not approved in Board minutes. The precise language of that recommendation reads as follows: "Extra duty salaries paid to the Board Secretary, Program Coordinator, and teachers for special projects were not approved in the minutes." This language may be found in the audit report dated July 1, 1979 to June 30, 1980 (P-1 at 6); near the end of the document prefaced by a page reading general comments and recommendations. It is interesting to note at this juncture that the comment refers not only to the Board Secretary, but to the program coordinator and teachers for special projects.

It was this comment in the audit by the Board's auditor which brought this matter here in litigation to the attention of the Board members according to the statement of evidence attached to the charges.

After its review of the auditor's comment an ad hoc committee of the Board (four members) met at 3:30 p.m. on February 10, 1981, and consulted Joan Nolan. Later, the Board convened an emergency session of the entire Board at 5:00 p.m. on the same day at which time Joan Nolan was suspended without pay. Those Board minutes contain no statement of compliance with N.J.S.A. 10:4-10. If this was a public meeting, it is not so stated in the Board minutes. (See Board minutes attached as Exhibit A to respondent's Brief in Support of Motion to Dismiss filed in the Office of Administrative Law on February 4, 1982.)

For the purpose of this discussion, it will be assumed that the Board did not comply with the Open Public Meetings Act by its failure to ratify in public session its action certifying tenure charges against Joan Nolan to the Commissioner. However, a dismissal of the charges on those grounds would most probably result in the Board's recertifying the tenure charges after their ratification in public session. Given the extended procedural history in this matter, the fact that the litigation is now four years old, and the further fact that certain aspects of this case have already been decided and remanded by the Commissioner, the State Board, and the Appellate Division, I **CONCLUDE** that it is in the public interest as well as the interest of all parties involved to have this matter finally determined on its merits and not on an alleged violation of the Open Public Meetings Act. Consequently, Joan Nolan's Motion to Dismiss for a violation of the Open Public Meetings Act is **DENIED.**

The charges by the Board that Joan Nolan knowingly paid herself extra monies without its authorization is not supported by a preponderance of the credible evidence.

Joan Nolan asserts that the Board's vote to authorize the submission of an application for Title I funding for the 1979-80 school year was authorization for the Board Secretary/Financial Officer to implement additional payment to herself for additional salary for her Title I responsibilities (R-13). She supports this assertion with P-4, P-5 and P-6, applications for Title I funding, which contain her signature together with the signature of the Superintendent who authorized submission of the Title I applications to the State officials. Nolan submitted documents R-1 and R-1(a), which are Payroll

Earnings Check Register printouts, that show her name listed as having received extra year-to-date pay. These documents show that her payments were approved because of the signatures of the respective Board presidents and the Superintendent. Additionally, documents R-12 and R-13 were submitted in evidence to show that Joan Nolan was spending extra hours each week beyond her normal work week in the Title I Program and that she was being compensated extra salary from indirect costs for that service. Documents R-12 and R-13 are job descriptions which were submitted to the Board in October 1980.

Nolan testified that these documents were submitted to the State officials who ultimately approved the funding for the Title I application; however, the testimony of the Board witnesses is that their check with State officials shows that Nolan did not submit documents R-12 and R-13 with the Title I application (See: P-4, P-5, P-6). These documents are copies of the original and revised Title I applications dated July 16, 1979. Although they include job descriptions for the teachers, no such job description is included for Joan Nolan; however, these applications do include salaries for "Administration" in the budget breakdown and the application as revised was approved at a public meeting of the Board on December 18, 1980. The supervisor's (Administration) salary is exactly the same as shown on documents R-12 and R-13.

The record shows in the direct testimony and the cross examination of the coordinator that documents R-12 and/or R-13 may have been reviewed by the State officials irrespective of the testimony of Board members that those forms were not submitted and were not a part of documents P-4, P-5 or P-6.

The coordinator of the program testified that he knew Nolan was receiving extra pay for her Title I duties and asserted that the auditor, who allegedly warned Nolan to have such payments approved by the Board, advised him that additional salary payments could be paid Nolan from Title I indirect costs.

Although the testimony of some Board members is that the Board was unaware of any extra payments to Joan Nolan, the record clearly shows otherwise. The following **FACTS** and **CONCLUSIONS** based thereon constitute evidence in the record of the Board's knowledge of extra payments to Joan Nolan:

1. The auditor was aware of Nolan's extra pay from Title I indirect costs in the 1977-78 school year and he did not comment in the audit because it was an insignificant amount.

2. The auditor observed extra pay from Title I indirect costs to Nolan in the 1978-79 year, but acted only after her receipt of extra pay from indirect costs in the 1979-80 year. His action was limited to a general comment in the audit report, which concerned several staff members including Nolan.

3. Board member A. Bailey Hoeflich signed the tenure charges against Nolan and also submitted a statement of evidence under oath concerning her alleged concealment of the fact that she was receiving extra pay. Although he testified against Nolan he conceded that there was no attempt by Nolan to conceal or disguise the extra payments she was receiving.

   This concession was made with the knowledge that all of Nolan's checks were signed by the Board President and the Superintendent. Nevertheless, Hoeflich testified that Nolan attempted to alter background information given to the Board in order to justify her receipt of these extra monies.

4. The Board stipulated that there was no written policy regarding a requirement that extra duty payments be approved by the Board.

   Although other staff members were paid extra monies without affirmative Board approval at a public meeting, no Board action was taken because "the others had no part in paying themselves."

5. The Board President testified that he could not recall ever seeing P-4, P-5 and P-6, which are the Board's applications for Title I funding signed by the Superintendent; however, he believed that the Superintendent had Board approval to prepare and file the applications.

6. The Board President testified that he had not seen R-1 and R-1(a), the computer printouts which he and the Superintendent had signed, authorizing Joan Nolan's extra pay. His explanation was that the volume of tasks he was required to do made it impossible to review all the documents; consequently, he signed them without knowing their contents.

7. Christian Swanson, the teacher who was Coordinator of the Title I program, testified, significantly, that he clearly knew that Joan Nolan was receiving extra pay monies from Title I indirect cost funds. This is further evidence to show that the payments were not concealed. The record shows that Swanson was advised by the auditor that salary payments could be paid from Title I indirect cost funds.

   Swanson also testified that State officials also told him that the Board secretary could be compensated from indirect costs. Although he knew Nolan was receiving extra compensation he testified that he believed all extra monies had been approved by the Board. Swanson also testified that he and the Superintendent discussed the payment of Nolan's extra pay from indirect costs, particularly in regard to the increase in indirect costs.

   The extent to which he knew or believed the Board had to take specific action to approve her extra pay is not relevant since he is not a school administrator or a Board member.

8. Joan Nolan specifically denied ever being told by the auditor that she could not use indirect costs from Title I funds as reimbursement to herself except for the 1979-80 audit when such a recommendation was made. She also testified that the Title I program was audited by the State and that the program was monitored in 1979-80. No problems were identified.

9. There is substantial corroboration for Joan Nolan's testimony that the following persons knew she was receiving extra compensation for her Title I duties:

A. Christian Swanson (Coordinator), who testified that he knew.

B. The Superintendent denied such knowledge; nevertheless, he signed all of Joan Nolan's extra pay checks and also signed the Payroll Earnings Check Register showing her extra compensation. These are clear, uncluttered sheets which also contained the Superintendent's name, and his own salary is listed.

C. The Board President also denied any knowledge of Nolan's extra pay; however, he also signed the Payroll Earnings Check Register.

D. Mabel N. Bergey - former Board member - according to Nolan's uncontroverted testimony.

E. Ada Barber - former Board member between the years 1975 through 1980 - testified that she was aware of the fact that Joan Nolan was receiving Title I funding money under the indirect cost allocations. When the Board asked Nolan specifically the purpose for indirect costs in the Title I Program application, Barber recalled being present at a Board meeting where Nolan explained that the indirect costs in the Title I Program "was for her part in controlling the books." Ada Barber named John Finlinson, a former Chairman of the Finance Committee, Fran Milano, a former Board President, and Joe Taylor, who was also a Chairman of the Finance Committee, as persons she believed were aware of Nolan's compensation from the indirect costs of the Title I Program. She concluded by stating that "any Board member who was doing his homework and reading the budgets and reading the things that should have been done would have known about it." Ada Barber testified also that she was never under any pressure to sign the Payroll Earnings Check Register in a hurry or without any chance to review it. This statement is in contradiction to that by Joseph Taylor, Board President, who testified that he hurriedly signed these Payroll Earnings Check Registers without having a chance to scan them.

F. Barbara Warner was a member of the Board from 1972 until her resignation in 1977. Her testimony is similar to that of Ada Barber in that she was aware that Joan Nolan was being paid extra compensation for secretarial, bookkeeping and other duties related to the Title I Program, which monies were over and above her contracted salary with the Board.

10. The Superintendent testified that he signed the Payroll Earnings Check Register each month and Joan Nolan's name appears clearly on these registers that he admittedly signed (R-1, R-1a). Significantly, Joan Nolan's name and the name of one other staff member are the only names appearing on these documents who earned extra pay; consequently, they are easily identifiable as recipients of extra pay. As stated earlier, the Superintendent's salary is included on these documents.

CONCLUSION

The charge that Nolan attempted to disguise and/or conceal the fact that she was receiving extra compensation is grounded on the Board's assertion that R-12 and R-13 are undated and that they were not submitted to the State as part of the Title I application. This allegation of concealment is also grounded on the Board agenda of October 21, 1980, where the Superintendent's report at V-B, 7 states as follows:

> Recommend the approval of a salary payment to the Financial Officer of the ESEA Title I Project, Joan R. Nolan, in the amount of $1,215. As an Indirect Cost reimbursement. The State has approved $1,090 as of September 1, 1980 for the basic program and anticipates approving $125.00 from Concentration funds on January 1, 1981. Disbursements of $125.00 will not take place until the second approval is received. The amounts are paid from ESEA Title I funds. The details for the services provided is outlined in the Board Secretary's report.

Included in the packet of materials attached to the Board agenda is the Presentation of Audit (at 17), which describes extra duty salaries. This explanation states that extra payments either by direct or indirect costs should be approved by the Board; however, neither this explanation nor the comment provided by the audit report state that salaries may not be paid through indirect costs. At page 18 of the same document, an explanation of indirect costs, as prepared by Nolan, is attached.

It appears that these are the documents on which the Board relies to support its charge that Nolan attempted to disguise or conceal the fact that she was receiving extra pay from Title I funds without its approval. However, a fair reading of these documents together with the other documentation in evidence and the testimony of the witnesses leads to the conclusion that Nolan clearly knew that the audit would recommend Board approval of all salaries paid for extra compensation. Consequently, this document appears to be no more than an explanation of the past practice of the Board and her recommendation for future action by the Board in accordance with the recommendation of its auditor.

Based on the foregoing testimony and the documents in evidence, I **CONCLUDE** as follows:

1. Joan Nolan was authorized by the Board to receive extra duty compensation in the sum of $1,548 for her extra duties performed under the Title I Program.

2. Joan Nolan did not conceal, disguise or falsely represent that she was receiving extra duty compensation from indirect costs under the Title I Program.

3. Joan Nolan did not withhold disclosure to the members of the Board that she was receiving extra duty compensation from indirect costs under the Title I Program.

Accordingly, the Board has failed to sustain its burden of proof by the preponderance of the credible evidence that the charges it has certified are true in fact (N.J.A.C. 1:1-15.1). The tenure statute applicable to teaching staff members requires that no person under tenure shall be dismissed except for inefficiency, incapacity, unbecoming conduct or other just cause (N.J.S.A. 18A:6-10).

Specifically, the Board has failed to show that Joan Nolan was in receipt of $1,548 without its approval; that her receipt of these monies was an unlawful act in disregard of the oral instructions from the Board auditor; that she intentionally withheld disclosure of her receipt of this money during negotiations concerning her employment contract; that she attempted to conceal or disguise her receipt of these monies by falsely

representing to the Board that the State had approved that the indirect cost portion of Title I funds be paid to her; or that she falsely represented to the Board through a "Personnel Summary Sheet" that her salary had been included as part of the Board's Title I application.

Having determined that the Board has failed to sustain its burden of proof that the tenure charges are true in fact, the tenure charges are hereby **DISMISSED WITH PREJUDICE.**

It is **ORDERED**, therefore, that Joan R. Nolan be reinstated as Secretary/Business Administrator for the Board of Education of the Borough of Merchantville effective as of the date of this decision and that she be afforded all back pay and emoluments to which she would have been entitled had the suspension not occurred.

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

January 24, 1985
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 29 1985
DATE

Ronald L. Parker
OFFICE OF ADMINISTRATIVE LAW

ij/ee

IN THE MATTER OF THE TENURE	:	
HEARING OF JOAN R. NOLAN, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION ON REMAND
MERCHANTVILLE, CAMDEN COUNTY.	:	
_____	:	

The record and initial decision have been reviewed. Exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

Respondent excepts to the denial of her Motion to Dismiss for violation by the Board of the Open Public Meetings Act.

The Board in reply exceptions refutes respondent's arguments and affirms the action of the judge herewith set down in pertinent part:

> "***For the purpose of this discussion, it will be assumed that the Board did not comply with the Open Pubic Meetings Act by its failure to ratify in public session its action certifying tenure charges against Joan Nolan to the Commissioner. However, a dismissal of the charges on those grounds would most probably result in the Board's recertifying the tenure charges after their ratification in public session. Given the extended procedural history in this matter, the fact that the litigation is now four years old, and the further fact that certain aspects of this case have already been decided and remanded by the Commissioner, the State Board, and the Appellate Division, I CONCLUDE that it is in the public interest as well as the interest of all parties involved to have this matter finally determined on its merits and not on an alleged violation of the Open Public Meetings Act. Consequently, Joan Nolan's Motion to Dismiss for a violation of the Open Public Meetings Act is DENIED." (Initial Decision, ante)

Petitioning Board in extensive primary exceptions argues that the judge erred in concluding that it failed to sustain its burden of proof by the preponderance of the credible evidence that the charges the Board certified are true in fact. The Board claims that the judge failed to comprehend the significance of the applicable standard of conduct of the Board Secretary. The Commissioner cannot agree; a thorough reading of the record convinces him that the judge properly considered the testimony of witnesses and the evidence as presented in reaching his conclusions.

For purposes of clarity the Commissioner sets down in its entirety the statutory prescription thereto as amended:

> "18A:6-11 Written charges; written statement of evidence; filing; statement of position by employee; certification of determination; notice
>
> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination. Provided, however, that if the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency. The consideration and actions of the board as to any charge shall not take place at a public meeting."

The Board cites Cirangle v. Maywood Bd. of Ed., 164 N.J. Super. 595, 601 (Law Div. 1978) in which the Court held that the specific language of N.J.S.A. 18A:6-11 was to be given priority over the "sweeping" application of the Open Public Meetings Act. The Board also recalls that the resolution of the Board in private

session finding probable cause to credit the evidence in support of the tenure charges against respondent contained a separate paragraph as follows:

> "That the official Minutes of this closed session concerning tenure charges against Joan R. Nolan are not to be made public or otherwise disclosed except upon order of the Commissioner of Education or Courts of this State."

In the opinion of the Commissioner the intent of the Legislature is clear, "the consideration and actions of the board as to any charge shall not take place at a public meeting." The Commissioner can only view such language by the Legislature as an expression of its intent that the employee be totally insulated from the public when matters of potential censure are being discussed and acted upon, as in a finding of probable cause to credit the evidence in support of tenure charges or the board's resolution to certify such charges to the Commissioner of Education. All discussion and action of the board shall not take place at a public meeting, but must be held in private session. The Commissioner so holds. The action of the judge in denying Nolan's Motion to Dismiss for a violation of the Open Public Meetings Act was a proper one. The Board acted properly by not certifying the charges to the Commissioner at a public meeting. This determination, however, does not change the fact that the Board failed in its burden of proof that the tenure charges are true in fact; the tenure charges are dismissed with prejudice. The Commissioner is aware that Nolan received extra duty compensation for her extra duties performed under the Title I Program. The Commissioner is also aware that such payment was fully known by the coordinator of the program, the school auditor and should have been known by the Superintendent of Schools and the Board President who both signed the Payroll Earnings Check Register by which Nolan was paid. In the opinion of the Commissioner no subterfuge was manifested by Nolan, but the Commissioner finds and determines that such payment should only be authorized by a board of education that endorses the concept of extra pay for extra work and only after full consultation with its counsel and auditor as to the source of such finding and its propitiousness. In the opinion of the Commissioner Title I funds may be used as such a funding source if properly anticipated, programmed and authorized by the board, based upon documentation that such additional work was above and beyond the normal duties of the individual. The Commissioner affirms Nolan's reinstatement as determined by the judge herein.

COMMISSIONER OF EDUCATION

MARCH 11, 1985

INITIAL DECISION
OAL DKT. NO. EDU 4515-84
AGENCY DKT. NO. 189-5/84

YVONNE MELI,
Petitioner,
v.
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL-TECHNICAL SCHOOLS, BURLINGTON COUNTY,
Respondent.

Douglas B. Lang, Esq., for petitioner (Katzenbach, Gildea & Rudner, attorneys)

John E. Queenan, Jr., Esq., for respondent

Record Closed: December 11, 1984 Decided: January 28, 1985

BEFORE LILLARD E. LAW, ALJ:

Petitioner, a teaching staff member with tenure status in the employ of the Board of Education of the Burlington County Vocational-Technical Schools (Board), contests its action to withhold her salary adjustment and increment for the 1984-85 school year alleging, among other things, that such action was arbitrary, capricious and unreasonable. Petitioner requests that the Commissioner of Education (Commissioner) direct and compel respondent Board to restore her salary adjustment and increment unjustly and unlawfully withheld. The Board answers the Petition of Appeal, admitting and denying so much of petitioner's allegations, asserting that its reasons were grounded, in part, upon petitioner's unsatisfactory attendance record.

The Commissioner transmitted this matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A hearing was held on November 2, 1984, subsequent to which the parties submitted post-hearing memoranda with the record considered closed on December 11, 1984.

ISSUE

The single issue to be determined by this tribunal is whether the Board had a reasonable basis upon which to withhold petitioner's salary adjustment and increment for the 1984-85 school year.

UNCONTESTED FACTS

Petitioner is a tenured teaching staff member of business studies in the Board's employ since September 1971. Petitioner's salary adjustment and increment were withheld by the Board for the 1983-84 school year; petitioner contested the withholding and brought an action against the Board before the Commissioner. Subsequent to a four-day hearing, Administrative Law Judge August E. Thomas issued an Initial Decision setting forth findings of fact and conclusions of law dismissing petitioner's Petition of Appeal. The Commissioner sustained and adopted Judge Thomas' decision. Yvonne Meli v. Bd. of Ed. of the Burlington Co. Vo-Tech Schools, OAL DKT. EDU 6361-83, (April 6, 1984) (R-7).

With regard to the herein matter, the Board voted on April 24, 1984, to withhold petitioner's salary adjustment and increment for the 1984-85 school year (P-3). On April 25, 1984, the Superintendent of Schools advised petitioner that the reason for the withholding was grounded upon petitioner's absenteeism (P-4).

SUMMARY OF THE TESTIMONIAL EVIDENCE

Petitioner did not appear at hearing and, therefore, did not testify on her own behalf. Instead, petitioner's counsel called to testify the Board's principal of the Mount Holly campus school and the Superintendent of Schools. The Board offered no witnesses.

The principal testified, among other things, that it was his responsibility to evaluate the teaching staff members of his school under his direction and control. Subsequent to such teacher evaluation, he is then required to recommend to the Superintendent whether to grant or withhold the teacher's annual salary increment and adjustment. A part of the principal's evaluation is a review of the teacher's attendance record or, alternatively, the teacher's absentee record. The principal asserted he had considered petitioner's absenteeism when, in February 1984, he recommended that she be granted her salary adjustment and increment for the 1984-85 school year.

On cross-examination, the principal testified, among other things, that it was the Board's policy that teachers appear for duty every day. He was aware of petitioner's prior absentee record of 30 days' absence for the 1982-83 school year; however, petitioner had not been absent prior to December 1983 during the 1983-84 school year. Subsequent to his recommendation that petitioner be granted her salary adjustment and increment for the 1984-85 school year, the principal directed a memorandum to petitioner, dated February 29, 1984, advising petitioner she had been absent ten school days for the 1983-84 school year (R-2).

The principal asserted that based upon petitioner's absentee record to the end of the 1983-84 school year, he would not have recommended granting petitioner's salary increment. On May 2, 1984, he advised petitioner she had been absent a total of 14 days for the 1983-84 school year (R-3). He testified as to petitioner's absence asserting that the school had been closed through January 2, 1984, for the Christmas and New Year holidays. Petitioner was absent on January 3, 1984, taking a "carry over" personal day, and was also absent January 4, 5 and 6, 1984, using regular sick days. Petitioner's absentee record is set forth at Exhibit R-1 to which the principal testified, in part, as demonstrating the following for the 1983-84 school year.

DATE	SICK LEAVE	PERSONAL	OTHER
12/1/83			1 Court day
12/5/83			1 Court day
12/9/83			1 Court day
1/3/84		1 (carry over)	
1/4/84	1		
1/5/84	1		

DATE	SICK LEAVE	PERSONAL	OTHER
1/6/84	1		
1/27/84	1		
2/21/84	1		
2/24/84		1	
3/19/84	1		
3/29/84		1	
4/12/84	1		
4/13/84	1		
5/17/84	1		
6/18/84	1		

The record shows that petitioner had exhausted all of her previous sick time, therefore, she had no balance to carry forward at the commencement of the 1983-84 school year. The record also shows that on June 18, 1984, that petitioner had exhausted the ten days' sick leave granted to her for the 1983-84 school year, pursuant to N.J.S.A. 18A:30-1 et seq. (R-1). The record further demonstrates that petitioner presented doctor's notes for six absences to the Board's administration (R-3).

The Superintendent testified and admitted that by way of letter, dated March 12, 1984, he advised petitioner that it was his plan to recommend to the Board that petitioner's "salary for 1984-85 should be increased one step from where it had been 'frozen' " (P-1). On March 29, 1984, the Superintendent forwarded a memorandum to petitioner asserting he had, in fact, recommended to the Board on March 27, 1984, that petitioner should be granted her 1984-85 salary adjustment and increment (P-2) and that the Board would make its decision on April 24, 1984. The Superintendent asserted that on March 27, 1984, he was not aware of how many days petitioner had been absent from duty for that portion of the 1983-84 school year. He contended he made the recommendation to the Board based, in part, upon the principal's recommendtion and he did not believe that petitioner's absenteeism was excessive at the time. The Board, however, discussed petitioner's absentee record at the March 27, 1984 meeting at which time petitioner's absences in January, February and March 1984 were brought to his attention. This was the first time, subsequent to the principal's recommendation, the Superintendent received information suggesting there was a problem with petitioner's attendance for the 1983-84

school year. As a consequence of this new information regarding petitioner's absenteeism, he testified that he was not certain his recommendation to the Board to grant petitioner's salary increment was "on target."

In any event, the Superintendent admitted he did not submit to the Board, in writing, a change in his position to recommend petitioner's salary increment increase for the 1984-85 school year. Nor did the Superintendent subsequently advise petitioner of the alleged "problem" which arose at the March 27, 1984 Board meeting concerning her attendance record or that her increment approval was in jeopardy.

The testimony shows that it was the Board's practice to determine the employment status of its teaching staff members prior to April 30 of each year. On April 24, 1984, the Board, by duly executed resolutions, withheld the employment increment and adjustment increment of five teaching staff members for the 1984-85 school year; one of whom was petitioner (P-3). The Superintendent asserted the Board also took appropriate action to non-renew four non-tenured teacher contracts for the 1984-85 school year grounded, in part, upon their excessive absenteeism (R-6). With regard to petitioner's status, the Superintendent asserted that the number of petitioner's absences was the sole consideration by the Board in making its determination to withhold. There was no discussion, nor was evidence produced, that petitioner's absences caused a discontinuity of instruction or that such absences had a negative impact upon petitioner's pupils.

FINDINGS OF FACT

Having carefully reviewed and considered the entire record in this matter, including the testimony and exhibits affixed, and having given fair weight thereto, I **FIND** the following **FACTS:**

1. Those uncontested facts set forth hereinbefore are hereby adopted, by reference, as findings of fact.

2. In or about February 1984, petitioner's principal recommended to the Superintendent that petitioner be granted a salary adjustment and increment for the 1984-85 school year.

3. Prior to December 1983, petitioner had not been absent from duty for the 1983-84 school year for any reason.

4. On February 29, 1984, the principal advised petitioner she had been absent from duty for ten days for the 1983-84 school year. A copy of the memorandum was received by the Superintendent's office on March 2, 1984 (R-2).

5. On March 12, 1984, the Superintendent advised petitioner that it was his plan to recommend to the Board to increase petitioner's salary one step from where it had been "frozen" in the 1983-84 school year for the 1984-85 school year (P-2).

6. On March 27, 1984, the Superintendent recommended to the Board that petitioner's salary for the 1984-85 school year should be increased one step with the granting of petitioner's salary adjustment and increment increase.

7. On March 27, 1984, when the Superintendent recommended petitioner's salary increment, petitioner had been absent from duty on 11 days for the 1983-84 school year.

8. The Board, on March 27, 1984, deferred decision on the Superintendent's recommendation to grant petitioner's salary increment until April 24, 1984.

9. On April 24, 1984, the Board, by way of duly executed resolutions, withheld the salary adjustment and increment for the 1984-85 school year from five tenured teaching staff members, one of whom was petitioner herein (P-3).

10. On April 24, 1984, the Board's resolutions to withhold did not set forth the reasons for the withholding but, rather, asserted that the teaching staff member "shall be furnished the reasons for same in writing."

11. On April 25, 1984, the Superintendent, by way of written memorandum, advised petitioner of the Board's action on April 24, 1984, to withhold petitioner's salary adjustment and increment indicating the reason for the Board's action was petitioner's absenteeism (P-4).

12. On April 24, 1984, the Board took action to non-renew four non-tenured teacher contracts for the 1984-85 school year based, in part, upon the non-tenured teachers' absenteeism. (R-6).

13. Petitioner, having been employed by the Board for 12 years at the commencement of the 1983-84 school year, had exhausted her sick leave with no balance of days brought forward for the 1983-84 school year.

14. On June 18, 1984, petitioner had exhausted the ten days' sick leave to which she was eligible for the 1983-84 school year.

15. Petitioner was not absent from duty in excess of any sick leave days, personal days, or other days to which she was eligible for the 1983-84 school year (R-1).

LEGAL ARGUMENTS OF THE PARTIES

The controlling statute in this matter is found at N.J.S.A. 18A:29-14, which provides, in pertinent part, 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 . . . .

Petitioner argues that under N.J.S.A. 18A:29-14, a board of education has good cause to withhold an increment based on absenteeism only if it determines that the teacher's absences have had an adverse impact on his/her performance; i.e., where teacher effectiveness is diminished or a discontinuity of the instruction process results in a negative impact on the students' developmental growth. Trautwein v. Bd. of Ed. of

Borough of Bound Brook, (N.J. App. Div., April 8, 1980, A-2773-78) (unreported) certif. den. 84 N.J. 469 (1980); Angelucci v. Bd. of Ed. of the Town of West Orange, 1980 S.L.D. 1066, aff'd, State Bd. of Ed. (February 4, 1981). Moreover, a school board's decision to withhold a salary increment based only on the number of teaching staff member's absences, without considering the particular circumstances for the absences, is not good cause as required by N.J.S.A. 18A:29-14. Petitioner concedes, however, that the State Board of Education has determined that excessive absenteeism may be sufficient grounds for disciplinary action by a board of education even with the existence of a legitimate medical excuse. Montville Tp. Ed. Assn. v. Montville Tp. Bd. of Ed., 1984 S.L.D. ____, decided, State Bd. of Ed. (Nov. 8, 1984).

Petitioner asserts that the sole issue before this tribunal is whether the Board had reason—on the basis of the information before it—to support its determination that good cause existed to withhold petitioner's employment and adjustment increments based only on her absences. Colavita v. Bd. of Ed. of the Township of Hillsborough, 1983 S.L.D. ____, decided, Comm. of Ed. (Nov. 3, 1983) at 10.

Petitioner contends that in an increment proceeding, petitioner has the burden of proof to show that: (1) the underlying facts were not as claimed by the Board; and, (2) it was unreasonable for the Board to conclude to withhold her increment based on those facts. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960); Trautwein v. Bd. of Ed. of Bound Brook. Here, petitioner has met her burden of proof by showing that: (1) the Board's attendance evaluation policy based only on the number of days absent was unreasonable; and, (2) the Board had no reasonable basis to reject the favorable recommendations of Principal Don Schreiber and Superintendent Verdile. The Board failed to proffer any evidence showing discontinuity of instruction or consideration of the particular circumstances for her absences in its case to rebut petitioner's evidence.

Petitioner argues that a board of education is required to consider the particular circumstances for the teacher's absences prior to withholding a teaching staff member's increment. In Marilyn Kuehn v. Bd. of Ed. of the Township of Teaneck, 1983 S.L.D. ____, decided, State Bd. of Ed (Feb. 1, 1983), the State Board stated:

> For the Teaneck Board to determine that petitioner's absence exceeding 90 days, in and of itself, is sufficient reason for the withholding of increment, without consideration of the particular

> circumstances for the absence, is arbitrary and without any demonstrated rational basis. [Id. at 4]

Most recently, in Montville Tp. Ed. Assn. v. Montville Tp. Bd. of Ed., the State Board reaffirmed its holding in Kuehn, stating:

> However, under the standards established by Kuehn, disciplinary action may not be based solely on the number of absences because to permit such a practice would contravene the statutory guarantees of N.J.S.A. 18A:30-1 and -3, which grant an entitlement to annual and accumulated sick leave. [Id. at 4]

Petitioner contends that the Board never considered the particular circumstances for petitioner's absences. The Board's failure to comply with Montville and Kuehn, therefore, requires the Commissioner to reverse the local Board's decision to withhold petitioner's increment.

Petitioner argues that prior to withholding a teaching staff member's increment for absenteeism, the Board must affirmatively determine that petitioner's absences have led to a discontinuity of instruction. Trautwein; Michael Law v. Bd. of Ed. of the Tp. of Parsippany-Troy Hills, 1982 S.L.D. ___, decided, State Bd. of Ed. (Aug. 4, 1982); accord, Ronald S. Kulik v. Bd. of Ed. of the Town of Montclair, 1983 S.L.D. ___, decided, Comm. of Ed. (Oct. 3, 1983). The Superintendent testified that he did not consider petitioner's 12 absences to be of a sufficient frequency to have an adverse impact on the students' developmental growth and, therefore, he recommended that petitioner receive her increment at the March 27, 1984 Board meeting. At its April 24, 1984 meeting, no evidence was presented to the Board concerning the possible negative effect on the students of petitioner's absences. It follows necessarily that the Board's determination could not have been based on such a finding. The Board's total failure to consider whether the number of petitioner's absences had a negative impact on her students and on her performance mandates that the Board's determination be found unreasonable. Trautwein. This invariably follows since petitioner established that her absences were legitimate and did not exceed statutory and contractual entitlements.

Petitioner observes that while it is indisputable that the Board alone has the authority to withhold increments pursuant to N.J.S.A. 18A:29-14, its action must be reasonable. Kopera. In determining whether to withhold a teaching staff member's increment, it may properly override the recommendations of its Superintendent and

principal if it shows sufficient grounds for so doing. Cf. Law v. Bd. of Ed. of the Township of Parsippany-Troy Hills where the State Board recognized that although a principal may properly override recommendations of those who actually observe teachers, the principal must show sufficient grounds for so doing.

Petitioner asserts that both the principal and Superintendent determined that frequency and number of petitioner's absences did not warrant the withholding of her increment. The Board failed to submit any evidence to refute its agents' recommendations and to justify its determination to withhold petitioner's increment. Here, the total absence of any evidence supporting the Board's determination requires the Commissioner to reverse the Board's decision to withhold petitioner's increment.

Petitioner argues that she had no prior notice that the Board was concerned with her 1983-84 attendance record nor prior notice of its decision to withhold her 1984-85 salary increment. In J. Michael Fitzpatrick v. Bd. of Ed. of the Borough of Montvale, 1969 S.L.D. 4, the Commissioner states:

> An employee has a basic right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment. Without such knowledge the employee has no opportunity either to rectify his deficiencies or to convince the superior that his judgment is erroneous. [Id. at 7]

This notice requirement has been applied by the Commissioner to situations where a teacher's attendance was deficient. See e.g., Mary Ricketts and Joyce Pierce v. Bd. of Ed. of the Borough of Haddonfield, 1984 S.L.D. ____, decided, Comm. of Ed. (Dec. 17, 1984) and cases cited therein. This lack of prior notice was an unreasonable use of the Board's discretionary authority.

Finally, petitioner asserts that her use of sick leave for proper purposes may not be subject to penalty. See, Dunellen Ed. Assoc., et al. v. Bd. of Ed. of the Borough of Dunellen, 1983 S.L.D. ____, decided, State Bd. of Ed. (Oct. 16, 1983) at 3. Similarly, respondent may not penalize petitioner for her use of personal days and court appearance days which are allowed by the collective bargaining agreement between the parties. To permit the Board to withhold petitioner's increment for the 1984-85 school year based upon proper use of sick leave and contractually provided leave is arbitrary and

unreasonable. Therefore, the Commissioner should order the Board to restore petitioner's increment.

The Board asserts that the standard for review of a local board's action pursuant to the statute is set forth in Kopera, where the court said that "the scope of the Commissioner's review is . . . not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions" (at 296). According to Kopera, there are only two determinations to be made when reviewing a board's determination to withhold a teacher's increment: (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did based upon those facts. The burden of proving unreasonableness is upon petitioner.

The Board observes that the discussion of salary increments by the Supreme Court in Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Assoc., 79 N.J. 311 (1979) provides additional guidance concerning the withholding of salary increments. In its review of N.J.S.A. 18A:29-14, the Supreme Court stated in part as follows:

> [T] he decision to withhold an increment . . . is . . . dependent upon an evaluation of the quality of the services which the teacher has rendered. The purpose of the statute is thus to reward only those who have contributed to the educational process thereby encouraging high standards of performance. In determining whether to withhold a salary increment, a local board is therefore making a judgment concerning the quality of the educational system. It is reasonable to assume that an adversely affected teacher will strive to eliminate the causes or bases of "inefficiency." The decision to withhold an increment is therefore a matter of essential managerial prerogative which has been delegated by the Legislature to the Board [of education] . . . [citations omitted] [at 321]

The Board asserts that Angelucci v. Bd. of Ed. of the Town of W. Orange, 1980 S.L.D. ___, decided, Comm. of Ed. (September 15, 1980); Virgil v. Bd. of Ed. of the Town of W. Orange, 1981 S.L.D. ___, decided, Comm. of Ed. (January 2, 1981); and In the Matter of the Tenure Hearing of Catherine Reilly, Sch. Dist. of the City of Jersey City, 1977 S.L.D. 403, 414, support the proposition that a board of education may decide to withhold a salary increment based solely on the number of absences incurred by a teaching staff member irrespective of the reason for those absences. In Trautwein the Supreme Court reaffirmed the rationale used in Kopera. In Trautwein, the Appellate Division

concluded that it was not unreasonable for a board of education to conclude that absenteeism can diminish a teacher's effectiveness. In Kulik the Commissioner affirmed the opinion of Administrative Law Judge Moses holding that "frequent absences are more harmful than one long absence, due to the difficulty of finding a competent substitute and the resulting lack of continuity in a class."

The Board contends that pupils are required to be in regular attendance in the public schools. No less a requirement should be made upon the teachers who are to serve the pupils required to be in attendance pursuant to the compulsory education statutes of this state. The vocational schools, in particular, have more of a responsibility to teach good work habits for students who are being certified to be competent in a trade upon their graduation. One of the most important ingredients that a prospective employer looks for is attendance and punctuality at work. The teacher not only instructs her students from books, but sets an example for students through her work habits and performances. The Board's action should be sustained as it was a reasonable exercise of its managerial prerogative and an adequate basis was established for the withholding of petitioner's increment.

DISCUSSION AND CONCLUSIONS

This matter clearly demonstrates the clash between the Board's statutory discretionary authority and petitioner's protected statutory and contractual rights. On the one hand, petitioner is granted, by statute, "sick leave with full pay for a minimum of 10 school days in any school year." N.J.S.A. 18A:30-2. Additionally, pursuant to the Board's policy adopted by agreement as a consequence of collective bargaining, petitioner is eligible for personal days of absences and court appearance days. On the other hand, the Board may, pursuant to N.J.S.A. 18A:29-14, penalize petitioner by withholding her annual employment increment or adjustment increment, or both, "for inefficiency or other good cause." Other good cause has been found to include absenteeism, among other things. Angelucci; Virgil; Reilly.

The herein record shows that the Board, by a prior action, withheld petitioner's salary adjustment and increment for the 1983-84 school year. Meli. The herein record demonstates that the principal and the superintendent were aware of petitioner's prior record of absenteeism when, in February 1984, the principal recommended to the

Superintendent that the Board grant petitioner her increment, and, when on March 12, 1984, the Superintendent advised petitioner of his plan to so recommend.

The principal has the primary responsibility for evaluating the teaching staff members under his direction and control. One of many evaluation criteria is the teaching staff member's attendance record during a given school year, coupled with the teacher's performance in the instructional program. It is apparent from the herein record that the principal's evaluation was favorably disposed of petitioner's performance and attendance record based upon his recommendation to the Superintendent. There was no testimony by the principal or the Superintendent that petitioner had abused her leave time to which she was eligible for the 1983-84 school year. Nor was there any assertion that her effectiveness was diminished or that there was evidence of discontinuity of the instructional process which had a negative impact upon petitioner's pupils' development and growth as a consequence of her absence.

The facts demonstrate the Superintendent recommended to the Board on March 27, 1984, that it grant her 1984-85 increment. There was no showing that the Superintendent reversed or modified this recommendation prior to April 24, 1984. It may be reasonably inferred, therefore, that the Superintendent's recommendation to grant petitioner's increment was appropriately before the Board for its affirmance when, contrary to the recommendation, the Board unilaterally withheld petitioner's increment.

This tribunal is ever mindful of our courts' admonition that it may not substitute its judgment for that of a duly authorized decision-maker. Kopera. It is also mindful of the guidance given by our Supreme Court concerning the withholding of salary increments as stated in Bernards Tp. as noted above (see p. 11).

Notwithstanding the court's observation that the withholding of an increment is an "essential managerial prerogative delegated by the Legislature" to the Board, it also enunciates the essential element and obligation of the Board that such a withholding is "dependent upon an evaluation of the quality of service in which the teacher has rendered." Bernards Tp., supra. There is nothing in this record which articulates that the Board, in fact, evaluated or considered the quality of service, or lack thereof, by petitioner prior to making its determination to withhold. Absent such an articulated evaluation, it may be reasonably inferred the Board misapplied its managerial prerogative by its action to withhold. Law.

CONCLUSIONS

Based upon the facts adduced at hearing together with the foregoing discussion, I **CONCLUDE** that the Board's action to withhold petitioner's 1984-85 salary adjustment and increment grounded upon petitioner's absence from duty for days to which she was eligible during the 1983-84 school year was unreasonable.

I, therefore, **CONCLUDE** that petitioner has met her burden of proof by a preponderance of the reliable and credible evidence and that the Board's action was unreasonable and, thus, must be **REVERSED.**

ORDER

Accordingly, it is hereby **ORDERED** that the Board of Education of the Burlington County Vocational-Technical Schools forthwith restore to petitioner the salary adjustment and increment withheld from her for the 1984-85 school year.

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

OAL DKT. NO. EDU 4515-84

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

28 January 1985
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 31 1985
DATE

Ronald L. Tabor /pad
OFFICE OF ADMINISTRATIVE LAW

ij/ee

YVONNE MELI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL-TECHNICAL SCHOOLS, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision have been reviewed. No exceptions were filed in a timely fashion pursuant to N.J.A.C. 1:1-16.4a, b and c.

This matter essentially pivots on whether petitioner's unsatisfactory attendance record may be considered by the Board as grounds for the withholding of her salary adjustment and increment for the 1984-85 school year under N.J.S.A. 18A:29-14.

The judge concludes in part:

> "This matter clearly demonstrates the clash between the Board's statutory discretionary authority and petitioner's protected statutory and contractual rights. On the one hand, petitioner is granted, by statute, 'sick leave with full pay for a minimum of 10 school days in any school year.' N.J.S.A. 18A:30-2. Additionally, pursuant to the Board's policy adopted by agreement as a consequence of collective bargaining, petitioner is eligible for personal days of absences and court appearance days. On the other hand, the Board may, pursuant to N.J.S.A. 18A:29-14, penalize petitioner by withholding her annual employment increment or adjustment increment, or both, 'for inefficiency or other good cause.' Other good cause has been found to include absenteeism, among other things. Angelucci; Virgil; Reilly."
>
> (Initial Decision, ante)

The judge concludes further:

> "Notwithstanding the court's observation that the withholding of an increment is an 'essential managerial prerogative delegated by the Legisla-

> ture' to the Board, it also enunciates the essential element and obligation of the Board that such a withholding is 'dependent upon an evaluation of the quality of service in (sic) which the teacher has rendered.' Bernards Tp., supra. There is nothing in this record which articulates that the Board, in fact, evaluated or considered the quality of service, or lack thereof, by petitioner prior to making its determination to withhold. Absent such an articulated evaluation, it may be reasonably inferred the Board misapplied its managerial prerogative by its action to withhold." (Id., ante)

The Commissioner cannot agree, finding as he does that the decision in Trautwein, supra, is controlling herein. As was said by the State Board of Education in Montville Tp. Ed. Assn., decided by the Commissioner April 16, 1984:

> "It is well established that a teacher's attendance record may be considered when evaluating his overall performance and that high absenteeism may be sufficient grounds for disciplinary action even where legitimate medical excuse exists. Trautwein v. Board of Education of Bound Brook, 1978 S.L.D. 445, aff'd with modification State Board, 1979 S.L.D. 876, rev'd New Jersey Superior Court, Appellate Division, 1980 S.L.D. 1539, 1542, cert. denied 84 N.J. 469 (1980); Robert S. Kulik v. Bd. of Ed. of Town of Montclair, decided by the Commissioner October 3, 1983; Angelucci v. Bd. of Ed. of the Town of West Orange, 1980 S.L.D. 1066, aff'd State Board February 4, 1981." (Slip Opinion, at p.4)

In Trautwein the Court said:

> "Here, however, the underlying fact of Mrs. Trautwein's record of absenteeism over the years was not controverted. It is evident, moreover, that nowhere in the chain of administrative review is there disagreement with the general proposition that a teacher's excessive absences may constitute good cause for the local board's withholding of a salary increment. While the hearing officer voiced a reservation as to the board's use of the teacher's past absenteeism in light of her current satisfactory attendance record, and the commissioner held that the board should not have taken into account the teacher's absences during the preceding school year, the rejection of this narrow view by both the legal committee and the State Board, and the holding

that past conduct over a reasonably relevant period of time may properly be considered by the local board, removed one of the underpinnings of the commissioner's decision. Another was the commissioner's finding that 'no prima facie showing was made that her performance was lessened,' but this improperly placed the burden of proof on the board rather than on the teacher, where it belonged. In any event, these deficiencies in the commissioner's decision may be disregarded, since neither the reports of the legal committee nor the final determination of the State Board was based upon those findings. The ultimate ruling, as noted earlier, was that while Mrs. Trautwein's absences preceding the board's action were 'unusually numerous and should be considered material,' nevertheless, because of their legitimacy, coupled with 'other relevant circumstances,' they 'were not so numerous as to justify the withholding of her increment for the ensuing school year.'

"It is clear to us that we have here no more than a difference of opinion between the local board and the State Board on whether, in the circumstances, the teacher's absences, despite the State Board's acknowledgment that they were 'unusually numerous' and were to be considered 'material,' warranted the withholding of the increment. Such divergence, in our view, is an insufficient basis for affirming the commissioner's reversal of the local board's decision. There was no determination that the board's decision was arbitrary or unreasonable or in any way constituted an abuse of the board's legislatively vested discretion in the matter. In fact, the conflicting reports submitted by the legal committee, as well as the closeness of the votes taken by the State Board, would tend to negate any conclusion that the local board acted unreasonably in withholding the increment.

"As for the procedural defects asserted by petitioner and found by the commissioner, on which the State Board's decision is silent, we are in complete agreement with the view expressed in the second report of the legal committee that the statute had been substantially complied with and no prejudice inured to petitioner.

"The decisions of the commissioner and the State Board are reversed. We affirm the determination of the local board to withhold petitioner's increment." (1980 S.L.D. 1542)

For all the foregoing reasons the Commissioner finds the local Board acted properly to withhold petitioner's increment. Accordingly, the decision of the judge is set aside; the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

MARCH 15, 1985

YVONNE MELI,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL-TECHNICAL SCHOOLS, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 15, 1985

For the Petitioner-Appellant, Katzenbach, Gildea & Rudner (Douglas B. Lang, Esq., of Counsel)

For the Respondent-Respondent, John E. Queenan, Esq.

This case arose from the action of the Burlington County Vocational and Technical High School Board of Education to withhold Yvonne Meli's salary and adjustment increments for the 1984-85 school year because of "absenteeism." When the Board made its decision on April 24, 1984, Ms. Meli had been absent fourteen days - eight days' sick leave, three personal days, including one carry-over personal day, and three court days. R-1, in evidence. Although the Superintendent had recommended to the Board on March 27, 1984, when Ms. Meli had eleven absences, see R-1, in evidence, that her salary be increased one step for the next school year, P-2, in evidence, the Board deferred action until its meeting on April 24. At that time, the Board adopted a resolution withholding the increments of five teaching staff members and, although not specifying the reasons, resolving that each member would be furnished with the reasons in writing within 10 days. P-3, in evidence. By letter dated April 25, Ms. Meli was informed that her increment had been withheld because of "absenteeism." P-4, in evidence. Ms. Meli challenged the Board's action by filing a petition with the Commissioner, asserting that the action was arbitrary, capricious and unreasonable.

In his initial decision, the Administrative Law Judge (ALJ) found that this case reflected the clash between the Board's statutory authority to withhold an increment and the Petitioner's statutory and contractual rights. He found that both the Principal and Superintendent were aware of Ms. Meli's prior record of absenteeism[1] when they recommended in March that the Board grant her

[1]The Board had withheld Ms. Meli's increment for 1983-84 because of her absences in 1982-83 considered in light of her prior attendance record. See Meli v. Bd. of Ed. of the Burlington Co. Vo-Tech Schools, decided by the Commissioner, May 21, 1984, aff'd by the State Board, October 3, 1984.

increment for 1984-85. Further, there was no testimony that Ms. Meli had abused her leave time for 1983-84, nor any assertion that her effectiveness was diminished or any evidence of discontinuity in instruction. Since there was no showing that the Superintendent had modified his recommendation, the ALJ concluded that his positive recommendation was before the Board when it acted to withhold Ms. Meli's increment. The ALJ further determined that there was nothing in the record to show that the Board evaluated orconsidered the quality of Ms. Meli's service before making its decision to withhold her increment. He concluded that absent "such articulated evaluation", Initial Decision, at 13, the Board had misused its managerial prerogative and that its action was unreasonable.

The Commissioner set aside the ALJ's determination. Relying on the State Board's decision in Montville Twp. Ed. Assn. v. Bd. of Ed. of the Twp. of Montville, decided by the State Board, November 7, 1984, and the Appellate Division's decision in Trautwein v. Bound Brook Bd. of Ed., 1980 S.L.D. 1539, cert. denied 84 N.J. 469 (1980), he instead concluded that the Board had acted properly to withhold Ms. Meli's increment. For the reasons that follow, we reverse the decision of the Commissioner.

N.J.S.A. 18A:29-14 provides that a board of education may withhold for inefficiency or other good cause the employment and/or adjustment increments of any teaching staff member in any year. The standard for reviewing a board's action taken pursuant to this provision was set forth in Kopera v. West Orange Bd. of Ed., in which the court stated that "...the scope of the Commissioner's review is ... to determine only whether [those who made the evaluations] had a reasonable basis for their conclusions." 60 N.J. Super. 288, 296 (App. Div. 1960). In reviewing the Board's action in this case, we therefore may examine only 1) whether the underlying facts were as those who made the evaluation claimed and 2) whether it was unreasonable for them to conclude as they did based upon those facts. Id. at 296-297.

The reasonableness of the Board's action must be evaluated in the context of the relevant law. In Kuehn v. Bd. of Ed. of the Twp. of Teaneck, decided by the State Board, February 1, 1983, the State Board considered a case in which the board, acting pursuant to an unwritten board policy, withheld a teacher's increment because, using her annual and accumulated sick leave, the teacher had been absent more than 90 days during the school year. The State Board emphasized that the teacher, who had been seriously ill, was statutorily entitled to use her annual and accumulated sick leave under N.J.S.A. 18A:30-1 and 18A:30-3 and that withholding her increment solely on the basis of the number of her absences obviated that statutory right. Accordingly, the State Board concluded that because the board had not considered the particular circumstances of the absences, its action was arbitrary and without rational basis.

The requirement that a board consider the circumstances of a teacher's absences, as well as the number, before acting to withhold an increment was reaffirmed by the State Board in Montville

Twp. Ed. Assn v. Bd. of Ed. of the Twp. of Montville, supra. In that case, the State Board, although reiterating that high absenteeism could be grounds for disciplinary action even where legitimate medical excuse existed, held that disciplinary action could not be based solely on the number of absences because to so act would contravene the statutory guarantees of N.J.S.A. 18A:30-1 and -3. Therefore, while upholding the board's guidelines in the case before it, the State Board cautioned the local board that before taking disciplinary action based on the guidelines, it was required to consider the circumstances of the absences in each case.

In the instant case, the Board, acting contrary to the Superintendent's positive recommendation, withheld Ms. Meli's increment because of "absenteeism". P-4, in evidence. Although she was absent on three occasions between the time the Superintendent made his recommendation and the date the Board made its decision, see R-1, in evidence, there is no indication in the record that the Board considered the circumstances of any of her absences when it made its decision to withhold the increment. To the contrary, in his testimony, the Superintendent asserted that the number of absences was the sole consideration by the Board in making the decision. Initial Decision, at 5. We emphasize that while a board may withhold an increment because of unsatisfactory attendance even where there is legitimate medical excuse, it is required to consider the circumstances of the absences, as well as the number. The Board in this case failed to fulfill this obligation and we therefore conclude that its decision was arbitrary.

Moreover, the record in this case demonstrates that Ms. Meli's absences during 1983-84 were legitimate and within the limits established by statute and contract. See R-2, in evidence. Since Ms. Meli had utilized all of her accumulated sick leave during previous years, her legitimate use of sick leave during 1983-84 was within the minimum authorized for a given year by N.J.S.A. 18A:30-2. Further, nothing in the record reveals circumstances indicating that her absences in that year disrupted the educational process. We, therefore, can only conclude that the circumstances of Ms. Meli's absences during 1983-84 did not justify withholding her increment based on her absences in that year.

Examination of the Board's determination in light of Ms. Meli's past attendance record does not alter our conclusion that the Board's decision was arbitrary and unreasonable. In Trautwein v. Bd. of Ed. of the Borough of Bound Brook, the Appellate Division held that a board of education properly could consider past conduct over a reasonably relevant period of time when it acts to withhold an increment. 1980 S.L.D. 1539. However, the board in Trautwein had not previously withheld the petitioner's increment because of her attendance. In contrast, the Board here withheld Ms. Meli's increment for 1983-84 because of her absences in 1982-83 and her past attendance record. See Meli v. Bd. of Ed. of the Burlington County Vo-Tech Schools, decided by the Commissioner, May 21, 1984, aff'd by the State Board, October 3, 1984. We note that the

withholding of Ms. Meli's increment for 1983-84 was permanent and that it will affect Ms. Meli throughout her career with the District unless the Board acts affirmatively to restore the increment. See North Plainfield Ed. Ass'n. v. Bd. of Ed. of the Borough of North Plainfield, 96 N.J. 587 (1984).

We conclude that where, as here, an increment already has been withheld because of unsatisfactory attendance during a particular period, the board is not excused from its obligation to meet the standards established by Kuehn when acting to withhold an increment in a subsequent year. To hold otherwise would permit boards of education to repeatedly withhold an employee's increments because of his absences in prior years, for which he had already been penalized. As set forth above, the Board in this case failed to consider the circumstances of Ms. Meli's absences as required by Kuehn and we, therefore, find that its decision was arbitrary and unreasonable.

For the reasons set forth above, the State Board reverses the decision of the Commissioner of Education and restores Petitioner-Appellant to her proper place on the salary guide, with compensation for all moneys withheld as a result of the Board's action.

S. David Brandt, Alice A. Holzapfel and James M. Seabrook opposed.

December 4, 1985

Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3356-84
AGENCY DKT. NO. 148-3/84

PATRICIA L. VOGT,
Petitioner,
v.
DR. CROSBY COPELAND, SUPERINTENDENT OF SCHOOLS OF THE CITY OF TRENTON; DAVID SHAFTER, ASSISTANT SECRETARY/PAYROLL OF THE BOARD OF EDUCATION OF THE CITY OF TRENTON; AND THE BOARD OF EDUCATION OF THE CITY OF TRENTON,
Respondents.

Ezra D. Rosenberg, Esq., for the petitioner (Katzenbach, Gildea & Rudner, attorneys)

Robert B. Rottkamp, Jr., Esq., for the respondents (Merlino, Rottkamp & Flacks, attorneys)

Record Closed: December 18, 1984 Decided: January 31, 1985

BEFORE **AUGUST E. THOMAS,** ALJ:

Petitioner appeals the action of the Board of Education of the City of Trenton (Board) rescinding a resolution it earlier adopted which awarded her $12,000.

This matter was originally filed in the Superior Court of New Jersey, Law Division, on January 5, 1984. On January 27, 1984, the Honorable Paul G. Levy, J.S.C., issued an Order transferring the matter to the Commissioner of Education in accordance with R. 1:13-4(a). The Commissioner transferred this matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq., and a prehearing conference was held in the Office of Administrative Law, Trenton, on June 8, 1984. In accordance with the prehearing Order, petitioner amended her petition and respondent answered the amendment prior to the matter being heard on October 1, 1984 in the Uptown Building, Trenton.

The record shows that the Board adopted a resolution at its regular meeting of December 20, 1983, awarding a salary adjustment to petitioner in the amount of $12,000. Agents of the Board refused to pay petitioner the money award and the Board on January 12, 1984, rescinded its resolution of December 20, 1983 (P-28; see also Exhibit A attached to respondent's reply brief now C-1 in evidence pursuant to my Order dated November 13, 1984).

DISCUSSION

Petitioner is a secretary employed by the Board and she holds a tenured status. She was initially employed on June 27, 1957, and has worked for the Board in various secretarial capacities since that time (P-1). At a meeting of the Board on October 14, 1969, the Board changed petitioner's title to Secretary to the Assistant Superintendent for Curriculum and approved her new annual salary at $7,750 (P-2). Later on September 29, 1970 petitioner was advised by the Assistant Superintendent that her classification had been changed to Administrative Secretary III (P-3). Petitioner filed a grievance challenging the change in classification and on July 15, 1971, an arbitrator rendered a decision stating that her claim was not arbitrable because she was not within a unit covered by any collective bargaining agreement (P-4).

On March 21, 1972 and in accordance with the arbitrator's decision, the Board approved petitioner's transfer and change of classification for the 1971-72 school year "from Secretary to the Assistant Superintendent of Curriculum to Secretary to the Medical Department, Administrative Secretary III, effective September 1, 1971, at "no change or loss of pay. . ." (P-5, P-6).

Petitioner interpreted the phrase no change or loss of pay to mean that her salary would continue through the years to be the salary which she would have received had she remained in the classification of Secretary to the Assistant Superintendent for Curriculum. She believed that a change in classification would not affect her salary in the future.

Petitioner testified that she learned during the mid 1970s that her salary as Administrative Secretary III was less than that she would have received as Secretary to the Assistant Superintendent. In support of this assertion, petitioner testified that she communicated with an Assistant Superintendent, William D. Walker, who wrote to her giving his opinion that the statement in (P-9) "without loss of pay" set no time limit on her salary. (The Board asserts that William D. Walker had retired from his employment at the time he gave this opinion to petitioner on February 27, 1980). After receipt of Walker's opinion, petitioner asked the Board's PER Committee to make a formal determination on her claim (P-10). The matter appeared on the Board's agenda on July 29, 1980, but was withdrawn without action for a period of at least 30 days (P-11). Six months later, petitioner wrote to the Office of the Monitor General of the State Department of Education requesting that her request again be placed on the Board agenda. The Monitor General declined to intervene in the matter (P-13, P-14).

On February 26, 1981, petitioner's claim was again placed on the Board agenda and was again withdrawn. A later request to have it again considered on its agenda was declined (P-15, P-16, P-17). On May 1, 1981, petitioner requested an appointment before the Board's PER Committee regarding her claim for salary adjustment; however, her request was rejected. Petitioner then requested that her claim for salary adjustment be placed on the May agenda (P-18, P-19, P-20). On January 25, 1982, petitioner pursued her claim through the Board's chairman of its PER Committee who advised her that her request had been transmitted to an assistant superintendent for administrative review (P-21, P-22). Petitioner testified that during this review, she requested an appearance before the PER Committee (P-23, P-24). Later, on November 30, 1983, petitioner's claim for salary adjustment was again withdrawn from the Board's agenda (P-25).

At its meeting on December 8, 1983, the Board pulled the item concerning petitioner's claim from its agenda pending the receipt of further information from petitioner (P-26). On December 12, 1983, petitioner provided the Board with additional information which is her own calculation as the amount of her claim (P-27). Petitioner

calculated that the Board owed her $24,297 which represented the difference between the amount she would have received as Secretary to the Assistant Superintendent and the amount she was actually paid (P-27).

Admitted in evidence are minutes of the Board's meeting of December 20, 1983 which show that the Board recessed into executive session to discuss several items including petitioner's claim for a salary adjustment. The minutes of that executive session show that petitioner's salary adjustment was discussed from the time of her initial transfer to the Office of the Medical Director. Those minutes include the following sentence:

> During the discussion it was learned that the request of Mrs. P. Vogt had been reduced from $25,000 to the figure of $12,000. (P-28).

Petitioner testified that Board member Richard Lloyd discussed with her the possibility reducing her claim and that she had agreed to modify her request.

The Board then returned to its public session and acted affirmatively to grant petitioner's claim in the amount of $12,000 (P-29). Thereafter, petitioner attempted to obtain the money voted to her by the Board and she met with the Board secretary who advised her to see the Superintendent. Petitioner testified that the Superintendent refused to pay her until he received further authorization.

Two Board members testified that they voted to award petitioner the $12,000 on December 20, 1983, and that they also voted to rescind that award at the Board's meeting of January 12, 1984. The Board's reasons for its rescinding action are set forth in full in the January 12, 1984 minutes as follows:

(1) The Board members had obvious confusion in regards to the resolution itself.

(2) There was also confusion in regards to the merits of the case.

(3) The effect of a possible change in the title and placement of the title in the proper unit and the confusion on the amount of money.

(4) The misunderstanding of the grievance procedure in regards to the timeliness and also the steps of the contract and also in regards to the recommendations made by the Board attorney.

The two Board witnesses testified that they changed their vote to rescind the December 20, 1983 action because they didn't fully understand the situation and that there was much confusion and they were concerned about other cases. Board member Conti testified that there was a heated confrontation by Board members after the December 20, 1983 meeting, and that she consulted the Board attorney. Ms. Conti learned the next day that "something had been amiss," and that she waited for the next meeting to adjust the problem. She testified that Board members were irate and that she personally had further questions she wanted answered such as what petitioner's position would be as a result of the salary ajustment. Ms. Conti was concerned about petitioner's bumping rights on receipt of the $12,000 salary judgment if a budget "crunch" occurred.

Petitioner asserts that these post hoc explanations by Board members must be viewed in the context of the Board's knowledge of the long standing nature of this dispute, and that the Board had the benefit of repeated advice of its counsel as to why petitioner's claim should not be granted. The record shows that the Board members who testified in this matter were present at the Board meeting and questioned Board counsel prior to voting in favor of the award. Consequently, petitioner asserts that the Board action demonstrates a conscious and deliberate recognition of petitioner's grievance and that it understood its action before voting for the award.

Based on these circumstances as set forth in the exhibits and the testimony of the witnesses, I **CONCLUDE** that the salient facts in this matter are not in dispute. That is, the Board action of December 20, 1983, which awarded petitioner $12,000 for the reasons earlier expressed, and the Board action on January 12, 1984, rescinding its resolution which awarded petitioner $12,000.

From my review of the documents in evidence and the several actions taken by the parties including petitioner's action, I make the following observations.

Irrespective of petitioner's alleged understanding that she would suffer no loss of pay for all of the years in the future, P-5 in evidence is a refutation of her testimony in

that regard. That document specifically states that petitioner's transfer and change of classification was approved for the school year 1971-1972. . . "at no change or loss of pay. . ." Consequently, there is an end date which addresses this question of petitioner's salary and that end date would have been the end of the 1971-72 school year. P-5, as set forth above was written by the then Superintendent of Schools on March 22, 1982, and it followed a recommendation from the then Assistant Superintendant of School dated February 17, 1971, which recommended petitioner's transfer at no change or loss in pay effective September 1971 but failed to include an end date; however, the Superintendent's letter clarified that omission by specifically limiting the no change or loss in pay to the 1971-72 school year.

The next submission in evidence is P-7 a letter to William D. Walker, Assistant Superintendent, which is dated September 11, 1978, six years and seven months after the Board action transferring petitioner. This letter is petitioner's attempt to show that she was treated unfairly by her administrative transfer in 1970. A part of this document is a June 25, 1970 letter by another assistant superintendent which shows that petitioner was transferred because of unsatisfactory performance. It was this transfer about which she was notified by letter from still another assistant superintendent on September 29, 1970 which resulted in the School Board action on March 21, 1972, making her transfer effective for the 1971-72 school year (P-7).

In this regard, it is interesting to examine P-27 in evidence which is a compilation of salaries made by petitioner in December 1983. P-27 shows that petitioner received $300 more annually than the Secretary to the Assistant Superintendent in each of the school years 1969-70 and 1970-71. This is the position from which she had transferred. In 1971-72, petitioner received $175 more that the Secretary to the Assistant Superintendent. However, on her document she claims that she should have received an even higher salary and therefore she lost $125. In the 1972-73 school year, petitioner earned $80 more than the secretary in the assistant superintendent's office; however, because she still felt that the difference in her salary and the other secretary's salary should be $300, she claims that she actually lost $220. In the 1973-74 school year, petitioner earned $390 less than the Secretary to the Assistant Superintendent, and she continued to earn less money than the Secretary in that position until and including the time of her claim against the Board. Nevertheless, she waited four years from the 1973-74 school year to write her letter of complaint on September 11, 1978 to the Assistant Superintendent of Schools (P-7).

Based on my evaluations of these documents, I **CONCLUDE** that there is no basis for petitioner's belief that she would forever remain $300 ahead of the other secretaries in the union. Although she filed a grievance which was decided in July 1971, and the Board later transferred her in accordance with that arbitrator's ruling in March 1972, petitioner failed to take any further action regarding her salary and transfer until she wrote the letter on September 11, 1978 which, as stated earlier, was six years and seven months later.

CONCLUSIONS OF LAW

Petitioner asserts that the Board passed a valid and legally binding resolution on December 20, 1983, awarding her $12,000 and that this award was a compromise of petitioner's long-standing claim for over $24,000 in salary adjustment. Further, the Board acted within its authority to approve payment of money to its employee (N.J.S.A. 18A:19-1, 18A:19-2, and 19A:19-4). In support of this assertion, petitioner cites Jersey City v. Zink, 133 N.J.L. 437, 439-440 (E. & A. 1945), Cert. denied, 326 U.S. 797 (1946); Ballarene v. Rosenblum, 133 N.J.L. 108 (Sup. Ct. 1945); American La France Fire Engine Co. v. Seymour, 79 N.J.L. 92, 95 (Sup. Ct. 1909); Compton v. Comptroller, 52 N.J.L. 150, 155-156 (Sup. Ct. 1889); Salmon v. Haynes 50 N.J.L. 97, 101 (Sup. Ct. 1887); Ahrens v. Fiedler, 43 N.J.L. 400 (Sup. Ct. 1881). Petitioner asserts that these cases hold that in order in nature of mandamus must issue to compel the ministerial act of payment by a governmental agency when that entity empowered to authorize payment has exercised its authorization.

Secondly, petitioner asserts that the Board has no power to rescind a resolution after a final determination affecting individual rights. Cited in this regard is Gulnac v. Freeholders of Bergen, 74 N.J.L. 543, 544 (E. & A. 1906); Andrews v. Lamb, 136 N.J.L. 548 (Sup. Ct. 1948); Styles v. Lambertville, 73 N.J.L. 90 (Sup. Ct. 1905); Whitney v. Van Buskirk, 40 N.J.L. 463 (Sup. Ct. 1878). Petitioner asserts that once a final vote is taken and the meeting is adjourned, individual rights vest (Van Buskirk, supra).

Accordingly, petitioner asserts that the Board's action to rescind her back pay award whether viewed as an infringment of her tenure rights or an attempt to avoid a compromise of a claim or merely a reversal of a grievance decision are all actions which affected her "individual" rights.

Thirdly, petitioner asserts that the Board's action of December 20, 1983 was a conscious and deliberate act and therefore could not be revoked. In this regard, petitioner relies on, Louis LiMato v. Bd. of Ed. of the City of Trenton, 1983 S.L.D. _____ decided by the Commissioner September 22, 1983. In LiMato, petitioner asserts that the Commissioner found that the Board action there was "conscious and deliberate" and that the matter here in consideration also reveals that the Board's action awarding her salary adjustment was conscious and deliberate. Citing James Bree v. Bd. of Ed. of the Tp. of Boonton, 1984 S.L.D., decided by the Commissioner August 6, 1984, and Galop v. Bd. of Ed. of the Tp. of Hanover, 1975 S.L.D. 358, aff'd., State Board of Education, 1975 S.L.D. 366, petitioner asserts that the Board is under an obligation to examine its files and resolve questions of fact concerning salary decisions before it takes final action.

Fourthly, respondent asserts that the Board resolution of December 20, 1983, was a compromise of a claim which cannot be avoided by the Board in the absence of a showing of fraud or mutual mistake. In support of this contention, petitioner cites Decaro v. Decaro, 13 N.J. 36 (1953), which stands for the premise that the enforceability of a settlement agreement is not dependent on whether or not petitioner would be successful if she were to litigate her claim before that tribunal. See also, General ACC. Fire & Life Assur., Corp. v. Batterson, 14 N.J. Super. 436 (Chan. Div. 1951), which holds that even if the underlying claim is "unfounded," settlement will not be set aside, and that compromises, absent fraud are "irrevocable." Id.

Petitioner also asserts that unilateral mistake is insufficient as a reason for the Board to set aside its compromise. (Klien v. Florida Airlines, Inc., 96 F. 2d. 919, 920 (5th Cir. 1924).

Finally, petitioner contends that the Board action awarding her adjusted salary payment was not made in error; consequently, she is entitled to that payment. Although conceding that the Commissioner implied in Limato, that rescission of a Board action may be proper in certain cases where the Board proves that the original decision was "erroneously made," the Commissioner held in Limato that the Board was unable to prove or show any error and petitioner states that no error has been made in the matter here under consideration.

The Board argues that its action awarding petitioner $12,000 at its December 20, 1983 meeting was a mistake and that its imprudent action was corrected at its action

in its meeting of January 12, 1984. The Board refers to the four reasons incorporated in its minutes of the meeting of January 12, 1984, stating that they are specific and comprehensive reasons why it had to correct its earlier action through rescission of that December 20, 1983 resolution.

The Board also asserts that not only did it have an absolute legal right to correct its mistake of December 20, 1983 by its rescission of January 12, 1984, it had a legal obligation to prevent the awarding of a substantial gift to the petitioner.

In this regard, N.J.S.A. 18A:19-2 provides in part that no claim for monies or demands against a school district shall be paid by the treasurer, "unless it is authorized by law. . ." Stating that the payment of this claim to petitioner would be a gift by the Board, it would be against that statutory provision because the claim is not authorized by law. The Board states that the testimony of its two members who appeared at the hearing reflects that there was an obvious confusion as to the merits of the case. Both witnesses testified that they were under the assumption that there was a ligitimate grievance that had been filed pursuant to the appropriate bargaining agreement and both testified that in reliance on the information available to them on December 20, 1983, they were misled into believing that petitioner's claim was legitimate. Consequently, these witnesses testified that there was a mistake and only after the meeting of December 20, 1983 did they learn the true underlying facts leading to petitioner's claim.

The Board also cites Mackler v. Bd. of Ed. of the City of Camden, 16 N.J. 362, 369 (1954) which is quoted in part as follows:

> We know of no vested right given defendant to prevent a reopening of a case or a hearing . . .

The court went on to say that:

> Administrative determinations are subject to reconsideration and revision by the agency itself, and a rehearing and the taking of new evidence to that end. . . .This is an inherent power. . . . In re Plainfield-Union Water Company, 14 N.J. 296, 305 (1954).

Mackler also states - "so long as it retains control of the proceeding and rights have not vested."

Included are decisions where the Commissioner has held that a local board has the discretionary authority to rescind actions taken at earlier meetings where no vested

interests have accrued. Glab v. Board of Education of the Borough of Bellmawr, 1975 S.L.D. 243; Harris v. Board of Education of Pemberton Township, 1939-49 S.L.D. 164 (1938); and Leonard v. Moore et al. v. Board of Ed. of the Borough of Roselle, 1973 S.L.D. 526.

The Board distinguishes the cases of Gomack; Andrews; Stiles; and Van Buskirk, which were cited by petitioner in support of her argument. The Board states that all of those cases are dated between 1878 and 1906 and may be distinguished from the matter here in dispute. Those four cases cited by petitioner dealt with situations where the municipality took a subsequent legal action in reliance upon previous actions of the public body. The Board states in the case being considered here, it took no subsequent action affecting the petitioner. It merely reconsidered and rescinded its prior action.

The Board also asserts that petitioner's reliance upon the DeCaro v. DeCaro, which was a matrimonial action, is not applicable to the instant matter. In this case, the Board asserts that there was no possibility of impending litigation, there was no existing litigation, and there clearly was deception and abuse of position in addition to the confusion on the part of board members. The Board concedes that it acted arbitrarily and capriciously when it granted the extraordinary gift to the petitioner.

Based on the testimony at the hearing, the documents in evidence and the briefs submitted by counsel, I **CONCLUDE** that the Board made a grievous error or mistake when it voted on December 20, 1983, to award petitioner the $12,000 that she was clearly not entitled to receive. The record adequately shows that this was not money which had been earned by petitioner; consequently, it has to be seen as a gift of public monies based on mistake, which is clearly inappropriate and improper. Mistake has been defined as a state of mind not in accord with the facts (58 CJS 830); and as a result of its mistake the Board made this improper gift of public monies.

No authority has been cited to support a gift of public monies to anyone. P-5 is clear on its face that petitioner's transfer and change of classification was approved for the 1971-1972 school year at no change or loss in pay. It is also quite clear when examining P-27 in evidence, that petitioner not only received no reduction in salary or loss of pay, but that she was actually paid more than the secretaries to the assistant superintendent between the school years 1969-70 and 1972-73. And even during that time frame, the gap between the salaries of the two secretarial positions was closing; however,

no action was taken by petitioner after the arbitration. There was no further action by petitioner for six years, seven months, when she wrote her letter to Assistant Superintendent Walker in 1978. This series of events up to this time clearly shows the complete absence of any legitimate claim by petitioner against the Board and also her acquiescence to her reassignement and acceptance of her several salaries from the 1971-72 school year to the 1978-79 school year when she wrote her letter to the assistant superintendent (P-7). The response by the assistant superintendent that the phrase "without loss of pay" means "forever" is an astonishing conclusion in my view. In this regard, the Commissioner, the State Board and the courts, have consistently held that boards of education are not continuous bodies and they may not act in ways which bind their successor boards except in those instances provided by statute (Joseph R. Bolger v. Board of Education of the Borough of Keansburg, 1979 S.L.D. 94, 97).

The Commissioner is not bound by his decision in LiMato, which in my view is an aberration because of the peculiar circumstances in that case. It was determined in LiMato that the Board had an unwritten policy to which it had adhered in awarding additional salary to several staff members for outside experience. It was determined there that LiMato qualified as having had outside experience in accordance with the Board's unwritten policy; therefore, he was found to be entitled to the extra salary payment. But in the matter considered here, petitioner has established no legitimate claim whatever to any additional salary entitlement and the Board's award to her was clearly a mistake. Consequently, LiMato is clearly distinguishable.

It can been seen from the factual circumstances in this matter that petitioner has never lost any pay nor has she had her salary reduced. The only dissatisfaction she can express, as shown by the record in this matter, is that her annual raises in salary have not kept pace with the secretaries to the assistant superintendent's salaries; however, this is far from suffering a loss or reduction in salary. And just as a salary increment must be earned so must the purported award to petitioner have to be earned. The facts show that she was not entitled to the award; therefore, the Board's action was arbitrary and capricious, irrespective of its deliberations prior to making the award.

In Alfred Zitiani v. Board of Education of the Township of Willingboro, 1975 S.L.D. 439, the Commissioner held that a person may have a vested right to a salary but he has no vested right to an increment (at 1012). The same may be said for petitioner in the instant matter. She certainly has a vested right to her salary but she had no vested

right nor could she acquire any vested right through the grievous error made by the Board in awarding her a gift of money which she clearly did not earn. It has been established that municipalities may recover payments made under a mistake of law (Board of Education of Passaic v. Board of Education of Wayne, 120 N.J. Super. 155 (Law Div. 1972). In that case, the court stated that a mistake occurs "where a person is truly acquainted with the existence or nonexistence of facts, but is ignorant or comes to an erroneous conclusion as to their legal effect." Id. at 164. (See also Jane M. Williams v. Board of Education of the Township of Deptford, 1982 S.L.D. ___, decided by the Commissioner March 15, 1982; aff'd State Board of Education July 7, 1982).

Here, there was a unilateral mistake by the Board based on mis-information and erroneous or mis-interpretation of critical documents, one of which is P-5 which clearly limits petitioner's transfer and salary considerations to the 1971-72 school year.

If the award by the Board is viewed as a contract, it is illegal and therefore void. This purported contract is contrary to the public interest and would injure the public. This purported contract or award would violate the community of common sense. The mistake by the Board was of such a great consequence that enforcement of its improper award would be unconscionable.

Consequently, it is illegal and unenforceable.

As set forth in the Board's supplemental memorandum, it is unimaginable that the spirit and intent of the law would not allow a board to correct a mistake. The spirit and intent of law is justice and not the hiding behind technicalities because of a mistaken action.

Based on the foregoing legal conclusions and in consideration of the underlying facts in this instant matter, I **CONCLUDE** that petitioner has failed to sustain her burden that she is entitled to an award of monies as shown by the Board resolution adopted at its December 20, 1983 meeting. I **CONCLUDE** further under the circumstances of this case that petitioner acquired no vested right in any salary adjustment since the Board's purported award was an unauthorized, improper gift of public monies.

For all of the above reasons, the petition of appeal is **DISMISSED WITH PREJUDICE.**

OAL DKT. NO. EDU 3356-84

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

31 January 85
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

February 1 '85
DATE

Seymour Wiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 05 1985
DATE

Ronald J. Tasker/pkc
OFFICE OF ADMINISTRATIVE LAW

ks

PATRICIA L. VOGT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, DR. CROSBY COPELAND ET AL., MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

The Commissioner is in agreement with the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter. The facts of this case clearly support that petitioner was not entitled to the award granted by the Board. Even assuming arguendo that confusion did not exist and a conscious deliberate action was made by the Board, the granting of an award to petitioner constitutes an arbitrary, capricious, and improper action by the Board because she had no entitlement to the monies as established by Exhibit P-5. P-5 clearly states a time limit for no change or loss in pay, namely, the 1971-72 school year. The Commissioner observes that there is nothing in the arbitrator's award (P-4) to require that such a condition be applied to even that particular year.

Despite petitioner's legal arguments to the contrary, the Board did make a grievous error when it awarded public monies to her which she clearly did not earn or to which she did not have a vested right. As such, the Commissioner cannot in good conscience support any decision that would permit the use of public monies to be awarded as a gift, to do so would not be in the best interest of the public good.

Accordingly, the Board's action in rescinding the award prior to payment being made to petitioner is upheld by the Commissioner and the matter is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

MARCH 18, 1985

PATRICIA L. VOGT,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, DR. CROSBY COPELAND ET AL., MERCER COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 18, 1985

For the Petitioner-Appellant, Katzenbach, Gildea and Rudner
(Arnold M. Mellk, Esq., of Counsel)

For the Respondent-Respondent, Merlino, Rottkamp and Flacks
(Robert B. Rottkamp, Jr., Esq., of Counsel)

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

July 3, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISIONS ON MOTIONS
OAL DKT. NO. EDU 6225-84
AGENCY NO. 327-7/84

BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK,
Petitioner

v.

ALAN S. TENNEY,
Respondent

Joseph J. Rotolo, Esq., for petitioner

Sheldon H. Pincus, Esq., for respondent
(Bucceri & Pincus, attorneys)

BEFORE **WARD R. YOUNG, ALJ:**

The Board of Education of the Borough of Palisades Park certified charges of inefficiency against a tenured teaching staff member, Alan S. Tenney. The matter was consolidated with EDU 1811-84 (42-2/84), a petition filed by Tenney challenging the withholding of his salary increment. Respondent Tenney filed a Motion for Partial Summary Decision in the tenure case, alleging procedural defects and seeking dismissal of the charges. The Board filed a Motion to Amend the charges to incompetency. Both motions will be decided herein. The Motion to Amend will be addressed first.

The Superintendent of Schools noticed Tenney in a letter under date of March 23, 1984 of the alleged charges presented to the board by the Superintendent on March 21, 1984. It is fully reproduced here:

Pursuant to 18A:6-12, you are hereby notified of the nature and particulars of alleged charges presented by the Superintendent of Schools to the Board of Educaiton for review and consideration, at the regular meeting held on March 21, 1984 at 8:00 p.m.

CHARGE - INEFFICIENCY - ongoing and continual problems with students and parents. Evidence supported in memoranda, letters, observations and evaluations of the science supervisor and administration.

- Unsatisfactorv classroom performance - failure to provide satisfactory lesson plans and failure to complete curriculum assignment. Evidence supported by memoranda from Administrator and Supervisor.

- Failure to comply with administrative directives concerning leaving early, lateness, and signing in and out. Evidence is supported in the form of memoranda, letters, directives and school records.

Be advised that you are given 90 days to demonstrate improvement in the following areas:

1. Classroom management
2. Teacher performance
3. An acceptable teacher/pupil relationship
4. An acceptable teacher/parent relationship
5. Acceptable compliance with administrative directives and procedures

In support of an appropriate program of improvement, you are directed to adhere to:

1. The use of the high school faculty handbook as a daily guide.

2. Weekly meetings with guidance and Mr. Lesko, Science Supervisor, to review progress and seek assistance in order to cope with classroom management problems.

3. Establish communication with parents and Administrators in order to properly address complaints and comply with Administrative directives.

4. Submit completed lesson plans to the Science Supervisor one week in advance for review and approval. Incorporate Supervisor's recommendations. Lesson planning shall be consistent with curriculum guide.

5. Follow directives for signing in and out daily. Do not be late for school or class.

6. Prepare appropriate lesson plans which shall be acceptable to Mr. Lesko, Mr. Meyer and Mr. Rotonda. You are expected to call in an appropriate lesson plan to maintain continuity in the teaching of your subject area, in the event of your absence.

7. In view of the problems with your class, contact the building principal directly in the event you are absent.

8. Together with your subject supervisor, Mr. Lesko, prepare appropriate classroom techniques and strategies to reinforce student discipline.

9. Seek assistance from the administration and supervisory staff to improve your performance in the area of curriculum development for the science department. All curriculum assignments shall have the approval of Mr. Lesko, Mr. Meyer and Mr. Rotonda.

Your evaluation and the certification of charges shall be predicated on the result of your performance during the next ninety (90) days and the degree to which you respond to the above directives, suggestions and recommendations for improvement.

Mr. Lesko, Mr. Rotonda and Mr. Meyer are available to assist during this time.

The certification of counsel for the Board in support of the Motion to Amend states in pertinent part:

3. The certification of charges was based solely upon a claim of inefficiency, however, subsequent review and evaluation has indicated that although termed inefficiency, the claim may actually be either inefficiency or incompetency, two charges which are very closely related.

. . .

6. The above referenced prehearing order did not include an issue pertaining to a charge of incompetency since that charge was not a part of the initial certification.

The Board argues that "to amend from a claim of inefficiency after having complied with all procedural requirements, to include a claim of incompetency, would

impose no hardship or prejudice on the Respondent." (See Pb at 1, 2). The Board cites In the Matter of the Tenure Hearing of Inez McRae, 1977 S.L.D. 572 in support of its argument that "charges of inefficiency and incompetency are closely related with respect to the proofs which would be produced in support of said charges." (Pb at 2). The Board also cites In re: Tenure Hearing of Sokolow, 1982 S.L.D. 345 [it is presumed reference is made to In the Matter of the Tenure Hearing of Renee Sokolow, 1982 S.L.D.. _____ (decided December 20, 1982), aff'd St. Bd. of Ed., 1983 S.L.D. ___ _ (decided May 6, 1983)] for support that charges of inefficiency and incompetence "are similar and, in many cases, interrelated," and "are so similar that they are almost interchangeable, aside from the procedural requirements of a charge of inefficiency." (Pb at 2, 3).

The thrust of Tenney's arguments in opposition to the motion is the distinction between inefficiency and incompetence, unfairness, unreasonableness, and the characterization of the motion as a charade because the Board "failed to provide him with adequate procedural protections as required by law." (Rb at 1).

Honorable Daniel B. Keown, A.L.J., stated in his Initial Decision in Sokolow:

> The charge of incompetency, as distinguished from the charge in inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competence to perform the responsibilities of a classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18AL6-11, would be a useless exercise. . . . Incompetency requires proof that the affected person, regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher. (at 5)

and also said:

> To find a teacher incompetent, notwithstanding the teacher's academic training, her years of experience at the profession, her positive contributions made to pupils over the years as recognized by professional evaluators, and her own sense of pride with which she perceives her efforts, is to find these factors meaningless because incompetence implies a lack of basic skills and knowledge to be a member of the teaching profession. (at 20)

The Commissioner dismissed the Board's charges of incompetence in an affirmance of Judge McKeown's determination.

A fair reading of McRae clearly distinguishes between inefficiency and incompetency and is contrary to the Board's position that the charges are almost interchangeable.

N.J.S.A. 18A:6-12, cited by the Superintendent in his notice to Tenney, was "repealed by L. 1975, c. 304, §2, eff. Feb. 7, 1976." The applicable statute, N.J.S.A. 18A:6-11 was "amended by L. 1975, c. 304, §1, eff. Feb. 7, 1976," and reads as follows:

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

N.J.S.A. 18A:6-13 states:

> If the board does not make such a determination within 45 days after receipt of the written charge, or within 45 days after the expiration of the time for correction of the inefficiency, if the charge is of inefficiency, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon.

It is undisputed that the Board's characterization of the charges have been inefficiency from the March 23, 1984 notice up to the filing of its Motion to Amend on January 14, 1985. It is also undisputed that the Board certified charges of inefficiency on July 18, 1984.

It would appear that the Board's motion seeks to by-pass the requirements of N.J.S.A. 18A:6-13, although perhaps inadvertently, as the certification of charges took place well beyond the 45 days after receipt of same, if in fact they are deemed to be charges of incompetency. I **FIND** this to be totally unfair, unreasonable, and contrary to the statutory scheme. I make no finding as to the allegation that the Board's motivation is to avoid any determination of procedural deficencies. That issue will succeed or fail on its own merits. I CONCLUDE, therefore, that the Board's Motion to Amend is hereby **DENIED** for the reasons stated above.

The respondent's Motion for Partial Summary Decision will now be addressed.

Respondent Tenney seeks dismissal of the charges based on the Board's failure to comply with procedural requirements, alleging the charges were contained in an unsworn letter signed by the Superintendent; no supporting documents or statements of evidence under oath were submitted with the alleged charges; the charges are vague and lack specificity; and the Board failed to afford Tenney the full 90 days to improve.

A jointly executed Stipulation of Facts was filed by the parties and states:

1. The last date of pupil attendance for the 1983-84 school year was June 15, 1984.

2. On July 18, 1984,, the petitioner certified the tenure charges filed against respondent and suspended him without pay, effective July 19, 1984.

It is undisputed that the 90-day period ended on June 21, 1984. The thrust of the Board's argument on the less than 90-day allegation is that Tenney could have remained to meet the 90-day requirement even though pupils had been dismissed prior to the expiration of that time period, and no teacher, including Tenney, was required to remain beyond the pupil attendance period. The Board argues that "the time period after the last day of classes, yet before the last day of teachers' obligation, provided the ideal opportunity for Mr. Tenney to demonstrate improvement in these particular areas. Had Mr. Tenney done so, the Board may not have elected to certify the tenure charges which form the basis for this action." (Board's brief at 7).

A review of the charges incorporated in the Superintendent's notice of March 23 reveals that all charges other than possibly #5 (acceptable compliance with administrative directive and procedures) appears to require pupil attendance. It also appears the expectancy that Tenney remain to run the full 90 days while other teaching staff members were free to leave the district is a disparate treatment that is unreasonable. The possibility that the Board may not have certified charges if Tenney had remained must be considered conjecture and pure sophistry.

The Commissioner stated In the Matter of the Tenure Hearing of Lillian Levine, 1977 S.L.D. 1129, aff'd St. Bd. of Ed., 1978 S.L.D. 1026:

> In consideration of whether the statutory minimum of ninety days for improvement means school days, calendar days, and/or days during the summer recess, the Commissioner holds that the legislative intent of the statute is to allow the affected employee opportunity to establish that his/her work performance can be improved. Employees are designated as either teaching staff members, required to possess appropriate certification, or non-certified staff members. A teaching staff member's primary responsibility is with respect to pupils. A noncertificated staff member's duties are ancillary to those of the certificated staff. Consequently, the tolling of time for the

> period of improvement cannot continue during the summer recess for teaching staff members employed on an academic year basis. Thus, if a teaching staff member is served with a notice of inefficiency less than ninety days before the last day of the academic year, and a summer recess intervenes, the allotted period of time for improvement is to be continued into the next academic vear. The Commissionr so holds. (at 1133).

The Commissioner also stated In the Matter of the Tenure Hearing of Catherine Reilly, 1977 S.L.D. 403 "that the statutory provision with respect to a charge of inefficiency is quite clear and may not be vitiated by a board of education." (at 414).

I **FIND** that the Board did not afford Tenney the statutory 90 days for improvement of alleged inefficiencies pursuant to N.J.S.A. 18A:6-11 and **CONCLUDE**, therefore, that the certified charges of inefficiency shall be and is hereby **DISMISSED**.

The Board is hereby **ORDERED** to reinstate Tenney to his position as teaching staff member with back pay from September 1, 1984 to the date of reinstatement. The rate of pay shall be at the 1983-84 level of compensation.

The increment withholding matter (EDU 1811-84) is hereby bifurcated from the consolidated cases and shall proceed to plenary hearing as scheduled.

Under the circumstances of the determination herein, I **FIND** no compelling reason to address other Tenney allegations relative to procedural deficiencies.

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

I hereby FILE this Initial Decision with **Saul Cooperman** for consideration.

29 January 1985
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

January 30, 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 0 1 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

g

IN THE MATTER OF THE TENURE	:	
HEARING OF ALAN S. TENNEY, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
PALISADES PARK, BERGEN COUNTY.	:	
	:	

The record and initial decision have been reviewed. Exceptions were filed by the parties within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

Both parties filed primary and reply exceptions, although the Commissioner notes that Respondent Tenney's primary exceptions are substantially to clarify an error of Judge Young in his characterization of the remaining consolidated case as dealing with the withholding of Tenney's salary increment. The point is made acceptable to both parties that the remaining bifurcated segment has nothing to do with a withholding of increment but deals with allegations of a violation of Tenney's tenure rights.

The Board pleads for the reversal of the initial decision by the judge arguing that he failed to address the fact that Tenney's inefficiencies pertained to areas outside, as well as inside, the classroom. The Board argues that Tenney failed to complete his assignments for the year in the interim after the last day of pupil attendance and before the end of June.

In reply exceptions Tenney refutes the arguments of the Board and affirms Judge Young's findings and conclusions as corrected. Tenney agrees with the findings and determination, as corrected, and prays for affirmation by the Commissioner.

The Commissioner views with favor the arguments advanced by Tenney who rightly points out that there is a vast difference between incompetency and inefficiency. While Tenney admits the entitlement of the Board to attempt to remove a person considered incompetent or inefficient, it must do so in conformity with the guidelines set down by the Legislature. Ultimately, notwithstanding all the arguments on all other findings in this matter, it remains unrefuted that the Board certified its tenure charges against respondent prior to the conclusion of the 90 day period for improvement required by statute to be provided to an individual charged with inefficiency. N.J.S.A. 18A:6-11 In the Commissioner's view, the judge's determination correctly prevents the Board from attempting to remedy its procedural failure through the self-serving Motion to Amend the nature of the charges.

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

The Board is ordered to reinstate Respondent Tenney to his position as teaching staff member with appropriate remuneration, including compensation at the 1984-85 level from September 1, 1984 to the date of the present decision.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

MARCH 18, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 654-83
(EDU 7779-81 and 5247-81
remanded)
AGENCY DKT. NOS. 310-8/81A
and 398-8/81A

RAMSEY BOARD OF EDUCATION,
BERGEN COUNTY,
Petitioner,
v.
CECELIA O'TOOLE,
Respondent,
and
CECELIA O'TOOLE,
Petitioner,
v.
RAMSEY BOARD OF EDUCATION,
BERGEN COUNTY,
Respondent.

Robert M. Jacobs, Esq., for Ramsey Board of Education (Winne, Banta, Rizzi, Hetherington & Basralian, attorneys)

Cecelia O'Toole, as respondent and petitioner, pro se

Record Closed: December 24, 1984 Decided: February 6, 1985

OAL DKT. NO. EDU 654-83

BEFORE BRUCE R. CAMPBELL, ALJ:

Petitions were filed in this matter on August 13, 1981 (EDU 5247-81), and November 10, 1981 (EDU 7779-81). In the first, Cecelia O'Toole alleged that the Ramsey Board of Education improperly and illegally applied to the Division of Pensions for her disability retirement. She asked for a temporary restraining order barring the Board from making such application. In the second, written tenure charges of incapacity, incompetency, conduct unbecoming a teacher and other just cause were filed by the Board against O'Toole, pursuant to N.J.S.A. 18A:6-10 et seq. Subsequently and as part of her answer to the tenure charges, O'Toole filed a counterclaim in which she asserted that the action of the Board, by adoption of a resolution on April 27, 1981, withholding her annual salary increment for the 1981-82 school year, was without good cause and was arbitrary and capricious.

The matters were transmitted to the Office of Administrative Law as contested cases, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On or about September 25, 1981, the administrative law judge assigned to the cases consolidated the two matters. He also granted the temporary restraining order requested in EDU 5247-81.

On October 1, 1981, expansion of discovery time was granted because of change of counsel representing O'Toole. A prehearing conference was held in January 1982, and a prehearing order issued on January 29, 1982. At this time, the administrative law judge assigned placed EDU 5247-81 on the inactive list for a period of six months pending disposition of EDU 7779-81 involving the tenure charges. The issues were defined as:

A. Did respondent's conduct constitute incapacity, incompetence, conduct unbecoming a teacher, or other just cause in violation of N.J.S.A. 18A:6-11?

B. Did the Board act arbitrarily, capriciously or unreasonably and/or in violation of N.J.S.A. 18A:29-14 in withholding Ms. O'Toole's salary increment by resolution of April 27, 1981?

C. Was the increment withholding in conformance with the collective bargaining agreement?

On February 25, 1982, the administrative law judge granted a motion of the Board to have O'Toole submit to physical and mental examinations. The hearings scheduled for May 25 through May 28, 1982, were adjourned on May 24, when both sides represented that they had reached a settlement. On August 18, 1982, the administrative law judge executed an order of settlement. The delay in settlement was because of hospitalization of one of the attorneys involved. Only the Board's proposed form of settlement had been submitted. On the following day, O'Toole's attorney objected and asked leave to make an alternate form of order.

On September 22, 1982, oral argument concerning the form of order was adjourned until August 26, 1982, so that O'Toole might retain new counsel. She apparently did so on October 26, 1982. It also appears that she applied for disability retirement to the trustees of the Teachers' Pension and Annuity Fund on the same date.

A letter in the record from O'Toole's then counsel dated October 28, 1982, to the Division of Pensions states that the parties wish to forward to the Division $1,337.34 to buy back eight months of additional service credits. The letter requests the Division to extend the time in which O'Toole may complete her repurchase of additional service credits from September 1, 1982 until December 1, 1982.

On November 5, 1982, the settlement agreement was reached in which the parties made reference to certain monetary amounts. On January 3, 1983, the then presiding administrative law judge issued an initial decision incorporating the settlement. On January 21, 1983, the Commissioner of Education rejected the settlement and remanded the matter with specific directions for additional fact finding. The questions presented by the Commissioner were:

1. Did the Board obtain approval for the disability retirement of respondent from the Division of Pensions prior to the time of the initial decision incorporating the settlement?

2. Since it appears that respondent was granted an approved extended leave of absence without pay prior to the certification of tenure charges against her, and that her salary during the 1981-82 school year was $25,907, how did the Board and respondent arrive at the terms of this

> settlement which calls for her resignation at the end of the 1983-84 school year at a lesser salary, with retroactive payment being made to the Pension Fund?
>
> 3. Why now have the parties determined that the terms of this settlement, if approved, would then permit respondent to obtain the necessary years of service (25) making her eligible for an ordinary pension retirement without service being rendered to the Board for the next year and a half?
>
> 4. Although the consent order has been signed by [the administrative law judge], there is no evidence in the record that the parties have indeed signed the joint stipulation to that effect.

The remanded matter was processed under the present OAL docket number in February 1983. On March 1, 1983, a proposed order was submitted by the Board to O'Toole. On April 7, 1983, an order of inactivity issued to allow time for agreement on an order of settlement to be presented to the Commissioner. On June 8, 1983, O'Toole again engaged new counsel.

At some point thereafter, the administrative law judge hearing the case recused himself and control of the matter was taken by the Acting Director of the Office. On February 15, 1984, he placed the matter on the inactive list for 30 days. On March 19, 1984, the Board's counsel sent the following letter to the Acting Director:

> As Your Honor will recall, our office had filed a notice of motion in the above-captioned matter which was listed to be heard by Judge Glickman on February 10, 1984, which motion was withdrawn, and the matter placed on the inactive list for a period of thirty (30) days pursuant to an Order entered by Your Honor on February 15, 1984. The motion was withdrawn as a result of Judge Glickman's disqualification of himself from sitting further in this matter. Inasmuch as the parties have been unable to resolve the issues raised by the motion during the one-month period of time following the entry of the Inactive List Order, I am hereby refiling said motion for determination by the Office of Administrative Law.
>
> In connection with the refiling of this motion, I am herewith filing an original and two (2) copies of the notice of motion which has been revised only to correct an inaccurate figure which was contained in the motion as originally filed as to the amount of compensation paid by the Board to Cecelia O'Toole during the period from December 1, 1982 through September 1, 1983. I am also enclosing a revised proposed form of Order, together with copies of the Certification and attachments previously filed with

> the motion, finally, I am enclosing a copy of the reply certifications which had been filed by the undersigned and my adversary, . . .

Proof of mailing was attached to the letter.

On March 28, 1984, the Board's attorney wrote to the Acting Director stating:

> This will confirm our conference call this morning with Mr. Evanchick in which Your Honor inquired as to the status of the above-captioned matter in light of the refiling by me of the Notice of Motion on behalf of the Ramsey Board of Education. Pursuant to our discussion, the parties have agreed that the Board's motion will be held in abeyance for an additional 15-day period, during which period of time the Board will have an opportunity to review and respond to the settlement proposal which has been made by Mr. Evanchick on behalf of his clients by letter dated March 23, 1984. Finally, this will confirm that, at the end of the 15-day period from the date of this letter, I will notify Your Honor as to the status of the matter and as to whether it will be necessary to proceed with the assignment of the motion to an Administrative Law Judge or whether the motion can be withdrawn as a result of settlement.

The record indicates further attempts at settlement. Conference telephone calls were held on April 27, and May 11, 1984. Additional papers were filed by both parties at various times.

On June 4, 1984, the Acting Director issued an order and a memorandum in support of the order asserting the jurisdiction of the Commissioner of Education and, hence, the Office of Administrative Law, and ordering that this matter be scheduled for an evidentiary hearing.

The matter was set down for plenary hearing on July 24, 1984, with July 25 as an additional date if necessary. At the same time, control of the case was transferred to the undersigned. On July 12, 1984, I received a letter from O'Toole's counsel stating that Mrs. O'Toole was experiencing health difficulties and would need approximately four to six weeks before being able to take part in a hearing. The letter further represented that her treating physician would direct a letter to my attention confirming the medical need for the adjournment. The certificate followed on July 19, 1984.

The Acting Director agreed to an adjournment to August 8 and 10, 1984. I held a conference of counsel by telephone at 1:00 p.m., on July 23, 1984. Counsel were directed to prepare stipulations of facts and to continue settlement discussions and to be prepared to discuss both at the opening of hearing on August 8.

The matter was again adjourned on the basis of a physician's certification and reset for September 21, 1984. Counsel spent considerable time on September 21, with each other and the undersigned in pursuit of stipulations and settlement possibilities. Settlement was not achieved but certain agreements were reached and directions given:

1. The Board's motion challenging the respondent's petition of appeal of the withholding of her salary increment for the 1981-82 school year will be addressed first.

2. The Board's papers have been filed.

3. The respondent will submit a responsive letter memorandum by October 1, 1984.

4. A decision on motion will be rendered on or about October 11, 1984.

5. If the Board's motion is granted, we will arrange a three-way telephone conference in the period October 11-15, 1984.

6. Counsel will be given an additional brief period in which to submit briefs or memoranda on the remaining question, specifically, the amount due and owing to the Board from the respondent.

7. The Board's right to make a submission on the question of contract language in the collective bargaining agreement is preserved.

8. The continued plenary hearing date of September 26, 1984, is adjourned.

O'Toole's attorney timely submitted a letter memorandum attached to which was a transcript of the proceeding of May 24, 1982, before Judge Glickman. On October 3, 1984, I received a submission from the Board on the question of contract language (See 7, above). On October 9, the Board submitted papers responsive to O'Toole's letter memorandum of October 2. On October 12, I received a letter in reply from O'Toole's counsel. That letter addressed contractual salary between O'Toole and the Board applicable to the school year 1981-82. Upon receipt of that letter, I arranged still another conference of counsel by telephone. The conference was held on November 19, and on the same day I sent the following letter to counsel:

1. The record in this matter will be held open until November 29, 1984, for good cause shown.

2. The Board will supply by November 29, any employment contract, employment notice, memorandum or Board minutes with all necessary attachments, dealing with the employment of Mr. O'Toole in the 1982-83 school year.

The Board's counsel responded on November 28, by letter, enclosing copies of five related documents. In late November, I received a letter from Mrs. O'Toole, dated November 23. Inasmuch as the letter gave the appearance that Mrs. O'Toole was representing herself, I contacted her counsel of record. He verified that this, indeed, was the case. On December 11, 1984, I wrote to the Board's attorney and to O'Toole stating that a complete review of the file showed that the facts necessary to a determination of all issues, including the motion which was held in abeyance, were in the record. O'Toole requested an extension of time in order to make additional submissions before close of the record. This was granted. On December 21, I received a letter by express mail from O'Toole requesting that I require submission from all of her former counsel of files related to these petitions.

On December 24, 1984, I wrote to Mrs. O'Toole and her four former counsel stating, among other things, that I had reviewed the record exhaustively including Mrs. O'Toole's submission dated December 10. It appeared from the record that every attorney connected with the case had pursued his client's interests diligently, with normal promptitude and with due consideration for the policy of this State favoring settlements. Every aspect of the matter had been put forth. The letter concluded:

> While the rules regarding amendment of pleadings are liberal, they are not infinitely elastic. A respondent must know at some reasonable time exactly what he must defend. N.J.A.C. 1:1-6.3. See also, N.J.A.C. 6:24-1.6.
>
> Similarly, the hearing may not continue indefinitely. Pursuant to N.J.A.C. 1:1-16.1, I am hereby informing the parties that I shall not require prior counsel to submit files and that the record in this matter is now closed.
>
> Unless I discover a question of essential fact that requires further inquiry, an initial decision in this matter is due not later than February 7, 1985.

Notwithstanding this letter, O'Toole again wrote to this judge before the end of December. Neither the letter nor the attachments to it add anything to the record as it exists.

II.

Before reaching the four points raised by the Commissioner, it is necessary to address the question of timeliness of O'Toole's challenge of the withholding of her increment for the 1980-81 school year. It is not controverted that the withholding was first challenged by way of counterclaim in the answer to the tenure charges that are at the base of this matter. The record reveals no procedural deficiencies in the Board's action to effect the withholding. N.J.S.A. 18A:29-14. Nor am I shown any language in the collective bargaining agreement in effect at the pertinent time or in Board policy that would upset the withholding. See, Shifrinson v. Marlboro Tp. Bd. of Ed., OAL Dkt. EDU 6363-83 (Apr. 19, 1984), adopted, Comm'r of Ed. (June 4, 1984).

The Board adopted a resolution on April 27, 1981, in order to withhold O'Toole's increment for the 1980-81 school year. By letter dated May 6, 1981, a date which is well within the time prescribed by N.J.S.A. 18A:29-14, O'Toole was advised of the action. The letter also set forth reasons for the withholding.

The answer and verified statement of position filed by O'Toole in response to the written tenure charges contained the first challenge to the withholding. The answer and verified statement of position were filed with the Commissioner of Education on September 29, 1981, a little more that five months after the withholding action was taken.

N.J.A.C. 6:24-1.2 provides as follows:

> 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. Petitions are to be mailed to the Assistant Commissioner of Education, . . .

As the Board correctly points out, the Commissioner, the State Board of Education and the Appellate Division of the Superior Court have strictly construed this provision of the Administrative Code. See, e.g., Riely v. Hunterdon Central High School Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980).

Having carefully considered this question, I **FIND** and **CONCLUDE** that O'Toole's charges as to the subject withholding, even if construed as a petition of appeal, were untimely raised. Accordingly, the claim is **DISMISSED**. It is so **ORDERED**.

III.

The remand of this matter by the Commissioner to the Office of Administrative Law vitiated the settlement agreement if, indeed, agreement had been reached. It is apparent from a review of the record as well as the language in the Commissioner's remand that there was not a meeting of the minds as to the settlement terms.

The discussions and negotiations that led to the purported settlement, therefore, may not be offered in evidence. See, e.g., Winfield Mut. Housing Corp. v. Middlesex Concrete Products and Excavating Corp., 39 N.J. Super. 92 (App. Div. 1956). See, also, Evid. R. 52. The questions raised by the Commissioner on remand are thus, in effect, considered de novo.

The answer to the first question — did the Board obtain approval from the Division of Pensions for the disability retirement of O'Toole prior to the order of settlement — is answered in the negative. The record shows that the Board did not apply for the disability retirement of O'Toole at any time during the pendency of this proceeding. As recited above, the Board was restrained from so doing.

The record also shows that O'Toole herself applied for retirement, and a letter dated April 11, 1984, from the Division of Pensions to O'Toole's then counsel states:

> This is to advise that the Board of Trustees of the Teachers' Pension and Annuity Fund, at its meeting on April 5, 1984, reconsidered the effective date of an Ordinary Disability Retirement on the above subject.
>
> It was the Board's determination and decision to approve an effective date of December 1, 1982. All necessary adjustments and calculations will be computed by our Retirement Bureau and notification to this affect (sic) will be forthcoming.

The question of the tenure charges and the remaining questions in the remand appear to be mooted by the ordinary disability retirement of O'Toole effective December 1, 1982. It is necessary, however, to examine the amounts paid to O'Toole in the period September 1982-September 1983, because certain payments were made to her in that period pursuant to the May 24, 1982 settlement terms.

In the months of September, October and November 1982, O'Toole was paid $1,240 per month, less legally required deductions, pursuant to the settlement terms. Inasmuch as no tenure charges were proven against O'Toole, no reassignment from full-time to part-time teaching assignment had been made and no other legally cognizable steps had been taken to reduce her salary, O'Toole should have been paid the sum of $2,994.50 for each of the three months in question. This amount represents one-tenth of her annual salary of $29,945 for the 1982-83 school year.

Therefore, the Board underpaid O'Toole by $5,263.50.

O'Toole's ordinary disability retirement became effective December 1, 1982. But the Board paid her $1,240 in that month also. Further, the Board paid O'Toole at the rate of $1,240 per month from January through June 1983. It also made one payment of $620, representing one-half of the monthly figure, in September 1983. Obviously, O'Toole could not be on the Board payroll while receiving ordinary disability retirement benefits. Therefore, all payments made by the Board to O'Toole after December 1, 1982, represent improper expenditures and must be recouped by the Board. The total amount paid to O'Toole subsequent to December 1, 1982, is $9,300. When the amount due to O'Toole, $5,263.50, is subtracted from this figure, the net amount due the Board is $4,036.50.

IV.

In summary, I **FIND:**

1. The challenge by O'Toole of the withholding of her salary increment for the 1981-82 school year was untimely filed and, therefore, is not cognizable.

2. The granting of ordinary disability retirement to O'Toole, upon her own application, effective December 1, 1982, moots the tenure charges against her.

3. The parties believed that the May 24, 1982 settlement was valid.

4. Under the terms of the settlement, certain payments were made to O'Toole in the period September 1982-September 1983.

5. In the period September-November 1982, O'Toole received $5,263.50 less than she should have been paid in consideration of her place on the teacher's salary guide for the 1982-83 school year.

6. In the period December 1, 1982-September 1983, O'Toole was paid $9,300 which, as an ordinary disability retiree, she should not have received.

7. The net difference in these amounts is $4,026.50, representing the amount of overpayment to O'Toole.

In consideration of the foregoing and having carefully considered the whole record in this matter, I **CONCLUDE** that judgment in favor of the Board in the amount of $4,036.50 must be entered. I can find no basis in statutory or case law for the award of prejudgment or postjudgment interest on this amount in these circumstances. Cf., Newark Bd. of Ed. v. Levitt, 197 N.J. Super. 239 (App. Div. 1984).

Accordingly, it is **ORDERED** that Cecelia O'Toole pay to the Ramsey Board of Education the sum of $4,036.50. Nothing in this decision shall be construed as preventing the parties from cooperatively developing a schedule of payments or from agreeing upon the remittance of that amount in a lump sum.

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

6 FEBRUARY 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

February 7, 1985
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 11 1985
DATE

Ronald I. Lakewood
OFFICE OF ADMINISTRATIVE LAW

ks/e

IN THE MATTER OF THE TENURE HEARING OF CECELIA O'TOOLE, SCHOOL DISTRICT OF THE BOROUGH OF RAMSEY, BERGEN COUNTY.	:	
CECELIA O'TOOLE,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION ON REMAND
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were received from the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Mrs. O'Toole argues, inter alia, that the initial decision denies her of her due process and constitutional rights because she has never been afforded a full hearing on the issue of the tenure charges. She rejects the judge's conclusion that the tenure charges were rendered moot by her own application for disability retirement, alleging that the charges remain open and unproven. She avows that these charges were the direct cause of her filing for retirement and that she was, in effect, forced into involuntary retirement.

O'Toole excepts to the determination of untimeliness with respect to the withholding of her increment, asserting that it was not deemed untimely by the judge presiding in 1982 when the settlement proposal was put forth. She also alleges in her exceptions a number of points with respect to the 1982 settlement which will not be addressed by the Commissioner because that settlement was rejected by him in a prior decision. (In re O'Toole, January 12, 1983) However, it is necessary to point out to Mrs. O'Toole that if she has any complaint with respect to internal revenue taxes springing from that rejected settlement, such complaint does not fall under the jurisdiction of the Commissioner and must be pursued through the appropriate legal channels available for issues of that nature.

O'Toole also questions the accuracies of the salary amounts determined by the judge since the Board did not fully disclose the salary documents as requested by the judge.

The Board contends that the initial decision rendered by the Office of Administrative Law should be affirmed by the Commissioner because the exceptions, objections and statements made by Mrs. O'Toole are not supported in fact or in law.

Upon review of the record and exceptions filed by the parties, the Commissioner affirms the judge's determination that Mrs. O'Toole's challenge with respect to the Board's withholding of her increment for the 1981-82 school year was untimely filed pursuant to N.J.A.C. 6:24-1.2 and is therefore not cognizable. There is no merit in her argument that, because the prior judge did not deem it untimely, it cannot be deemed untimely herein. The issue of untimeliness was never reached in the prior deliberations with respect to Mrs. O'Toole's case because the decision was rendered in the form of a joint stipulation of settlement subsequently rejected by the Commissioner.

The Commissioner is unpersuaded by Mrs. O'Toole's argument that the tenure charges remain open and that she has been denied a fair hearing. By her own application, retirement was effectuated December 1, 1982 which, despite her protests to the contrary, renders the issues of the tenure charges moot as determined by the judge. It is further noted that Mrs. O'Toole having applied for, been granted and received disability retirement monies cannot now seek to argue in her exceptions that said retirement was involuntary.

The Commissioner concurs with the judge that Mrs. O'Toole had been underpaid by the Board for the period leading up to her retirement; however, he cannot accept the recommended decision ordering her to reimburse the Board the monies which constituted duplicate payment following retirement because such recoupment falls under the jurisdiction of the civil courts, not the Commissioner. (See In the Matter of Anthony Castaldo, Union County Regional High School District No. 1, decided by the Commissioner June 10, 1983, rev'd State Board November 4, 1983.)

With respect to the above, the Commissioner is constrained to point out that the factual circumstances of the instant matter provide a clear illustration of difficulties that a board of education can encounter when it proceeds to act on a settlement prior to a determination being rendered by the Commissioner. This should serve as a notice to other boards. In addition, the Commissioner cannot fathom why payments dictated by the rejected settlement continued for so many months beyond the rendering of the decision, a factor which led the Board to further litigation.

Notwithstanding the above, if the Board wishes to seek recoupment of the monies in question herein, it may do so by bringing civil action in a court of competent jurisdiction. The Commissioner renders no judgment on the accuracy of the amount of money involved in the duplicate payments in this matter.

Accordingly, the Petitions of Appeal are hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

MARCH 25, 1985

IN THE MATTER OF THE TENURE HEARING OF CECELIA O'TOOLE, SCHOOL DISTRICT OF THE BOROUGH OF RAMSEY, BERGEN COUNTY, AND CECELIA O'TOOLE,	:	STATE BOARD OF EDUCATION
PETITIONER-APPELLANT,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 25, 1985

For the Petitioner-Appellant, Bucceri and Pincus
(Sheldon H. Pincus, Esq., of Counsel)

For the Respondent-Respondent, Robert M. Jacobs, Esq.

The State Board affirms the decision of the Commissioner of Education for the reasons expressed therein, with the modification that we adopt the Administrative Law Judge's determination that duplicate payments in the amount of $4,036.50 were made by the Board to Appellant. We, however, emphasize that we are without authority to order Appellant to reimburse the Board and that such recoupment must be sought through civil action in a court of competent jurisdiction. See In the Matter of Anthony Castaldo, Union County Regional High School District No. 1, decided by the Commissioner, June 10, 1983, rev'd by the State Board, November 4, 1983.

October 16, 1985

Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3490-84
AGENCY DKT. NO. 115-4/84

BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,
Petitioner,
v.
ROBERT C. BATES,
Respondent.

Robert E. Birsner, Esq., for the petitioner (Maressa, Goldstein, Birsner, Patterson & Drinkwater, attorneys)

Eugene P. Chell, Esq., for the respondent

Record Closed: December 28, 1984 Decided: February 8, 1985

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

This matter concerns the tenure charge brought against Robert C. Bates, a teacher employed by the Board of Education of the Lower Camden County Regional High School District (Board), which was certified to the Commissioner of Education (Commissioner). The respondent requested a hearing regarding the tenure charge and the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

At the prehearing conference held on June 26, 1984, it was agreed by the parties that there were two issues in this matter. The first is the tenure charge, which alleges that the respondent abandoned his teaching position by failing to notify the Board as to when he would return to work. The second issue is whether the respondent was entitled to any sick leave benefits pursuant to N.J.S.A. 18A:30-2.1 for the time he was not working allegedly as a result of an injury sustained in the course of his employment.

The hearing took place on September 11, 1984, and after the submission of additional exhibits and briefs, the record in the matter closed on December 28, 1984.

By letter dated November 27, 1984, Mr. Chell moved for an order requiring the Board to pay Mr. Bates his full salary commencing on May 16, 1984, pursuant to the provisions of N.J.S.A. 18A:6-14. During a telephone conference call, the Board alleged that Mr. Bates was not entitled to such benefits. I indicated that I would not make a decision on the motion at that time since the question was an integral part of the tenure issue and would be decided in this initial decision.

TENURE ISSUE

Based on the evidence presented, I **FIND** that the pertinent facts as to this issue are not in dispute.

At the time of the hearing, Mr. Bates was 52 years old and had been employed by the Board for 10 years as an industrial arts teacher. On February 15, 1983, Mr. Bates' class was doing construction work outside of the school and Mr. Bates slipped, jammed his left foot and fell on the pavement. After being helped up by a student, Mr. Bates reported the accident to the school nurse. At that time, the respondent did not feel any severe pain. On the next day, Mr. Bates had some pain and stiffness on his left side but he went to school. Because the pain was progressively increasing, the respondent went to see his family physician, Dr. Donald J. Fruchtman, on February 17, 1983. In his report, Dr. Fruchtman stated that Mr. Bates had a contusion on his upper left leg and was having significant pain in that leg, and that Mr. Bates could not work (R-4). Mr. Bates has been out of work since February 17, 1983.

Since the respondent's condition did not improve, and because he was experiencing numbness in both legs and a left foot drop, Dr. Fruchtman had Mr. Bates

admitted to the Washington Memorial Division of the John F. Kennedy Hospital on June 14, 1983, for evaluation and tests. Upon his release from the hospital, Mr. Bates was given a leg brace to help correct his left drop foot condition; however, he continued to have pain in his left leg and to have some difficulty walking.

Because Mr. Bates has diabetes he was upset about his continuing physical problems since he had the classic symptoms of a diabetic circulation problem and he was afraid that gangrene might set in and that his leg might have to be amputated.

Following the February 1983 accident, Mr. Bates had a number of conversations with the school principal and Charles P. Prato, the superintendent, regarding his medical condition. By way of telephone conversations during the spring of 1983, the Board requested that Mr. Bates specify when he would be able to return to work. Mr. Bates informed the Board that he would not return to work until his doctor indicated that it was all right.

Since Mr. Bates did not comply with the Board's request as to when he could return to work, the Board requested its attorney, Robert E. Birsner, to contact the respondent. Mr. Birsner wrote three letters to Mr. Bates. The first letter, dated June 23, 1983, requested Mr. Bates to submit a doctor's certificate as to when he could return to work for the 1983-84 school year (P-1). By letter dated August 10, 1983, Mr. Birsner informed Mr. Bates that if he did not receive a response by August 17, 1983, he would assume that Mr. Bates was not returning to his position (P-2). The third letter, dated October 20, 1983, informed Mr. Bates that since he had not responded to the two previous letters, Mr. Birsner was assuming that Mr. Bates had resigned, and that if Mr. Bates did not submit a letter of resignation, formal charges would be filed (P-7).

Mr. Bates responded to Mr. Birsner's letters on November 10, 1983, informed Mr. Birsner that he had tried to reach him by telephone, that he was still unable to work and that he had no intention of resigning his position (P-10).

On April 6, 1983, Mr. Prato wrote Mr. Bates and stated that the Board needed to know when he would return to work since the use of substitute teachers to replace him was unsatisfactory and detrimental to the students (R-2). On September 9, 1983, Mr. Prato again wrote Mr. Bates and stated that since the Board had not been informed as

to whether or not Mr. Bates would return to work in September 1983, the Board was forced to use substitute teachers (P-6). This letter also stated that Mr. Bates had an obligation to submit a doctor's certificate indicating the nature of his medical problem and when he could return to work (P-6).

In response to these letters, Mr. Bates wrote on October 31, 1983, and indicated that he could not respond to the letters from Mr. Prato or Mr. Birsner until then because of the pain and shock resulting from his injury (P-9). In this letter, Mr. Bates stated that he had kept the Board informed regarding his medical condition, that he told a secretary employed by the Board that he would not be returning at the start of the school year in September 1983 and that he would not return until his doctor indicated that he could work (P-9).

By letter dated November 15, 1983, Mr. Birsner informed Mr. Bates that he had to submit a written request for a leave of absence, which could be retroactive to the beginning of the school year in September 1983, and that he also had to submit a doctor's letter setting forth Mr. Bates' medical problem and date on which he could return to work (P-11). Mr. Birsner reiterated this request in a letter to Mr. Bates, dated December 30, 1983 (P-16).

In response to the letters he had received from Mr. Birsner, Mr. Bates wrote several letters on December 28, 1983. One letter was addressed to Mr. Prato and indicated that he was medically ready to return to work (P-13). Another letter was addressed to Philip W. Nicastro, school business administrator/board secretary, and asked for a leave of absence retroactive to February 16, 1983, and continuing until such time as Mr. Bates' doctor determines that he can return to work (P-14).

The Board concluded that Mr. Bates had abandoned his position and the tenure charge was certified by the Board in January 1984 (P-17, P-18). Mr. Bates was not suspended and he has received no salary payments, pursuant to N.J.S.A. 18A:6-14.

By letter dated July 2, 1984, Eugene P. Chell, Esq., the respondent's attorney, informed the Board that Mr. Bates was medically capable of returning to work in September 1984 (R-1). In September 1984, Mr. Bates went to the school and indicated that he was able to work, and he was told to leave.

Based on the facts presented, I **CONCLUDE** that the Board gave Mr. Bates ample opportunity to provide it with a request for a medical leave of absence, and a letter from his physician describing his medical condition and a date on which he could return to work. Although Mr. Bates did submit a request for a leave of absence on December 28, 1983, he totally ignored the Board's explicit and reasonable request that he also submit a letter from his physician.

Both in his correspondence as well as at the hearing, Mr. Bates attempted to excuse his noncompliance with the Board's directives on the basis that he was very ill due to his injury and that he had the right to expect that the Board would allow him to be out for an indefinite period since he was injured at work.

I cannot accept either of these two positions. Although I do not doubt that Mr. Bates had a great deal of pain and anxiety as a result of his medical problems, there is no evidence to support a finding that Mr. Bates was so incapacitated that he could not respond to the Board's requests during the summer and fall of 1983. In fact, the evidence is to the contrary. On June 14, 1983, Mr. Bates wrote Mr. Prato to request a transfer to a guidance counselor position (R-3). Mr. Bates filed for Workers' Compensation benefits, which were denied in August 1983 (P-3, P-4). Mr. Bates corresponded with Mr. Nicastro regarding his sick leave and health insurance benefits (P-8, P-14), and he wrote a number of letters to Mr. Prato and Mr. Birsner regarding his position (P-9, P-10, P-13, P-14).

In addition, I found no justification for Mr. Bates' position that it was sufficient for him to state that he would be out until his doctor said he could return to work and that the Board could have contacted his doctor if it wanted additional information. The prime responsibility of the Board is to provide for the education of students and in order to do so, the Board has to be able to get definitive commitments from its teachers. Mr. Prato informed Mr. Bates that the long-term use of substitute teachers to replace him was unacceptable and it was reasonable for the Board to ask Mr. Bates for a specific date on which he could return to work so that it could arrange for an interim teacher to fill his position. Therefore, I **CONCLUDE** that Mr. Bates offered no acceptable explanation as to why he did not comply with this request.

In addition, I **CONCLUDE** that Mr. Bates, by his letters dated December 28, 1983, gave the Board conflicting information as to when he could return to work. I

specifically reject Mr. Chell's argument that the letter requesting a leave of absence (P-14) and the letter stating that the respondent is ready to return to work (P-13), both dated December 28, 1983, are consistent with each other because the respondent was reacting to requests made of him by the Board.

In its brief, the Board noted that school case law has clearly established that a tenured position can be abandoned, Winters v. Board of Education of Freehold Regional High School District, 1971 S.L.D. 403; In the Matter of the Tenure Hearing of Lawrence Hayes, 1975 S.L.D. 18; Diffenderfer v. Board of Education of the Borough of Washington, 1975 S.L.D. 343. Mr. Birsner argued that the facts establish that the respondent had abandoned his position or, in the alternative, that there was a constructive resignation of his position, and he stated that the tenure charge was filed to formalize the matter.

Mr. Chell did not disagree that tenure positions may be abandoned but argued that in order to establish such an abandonment it is necessary to show that the employee had had some sort of physical or mental disability, that there was a substantial lapse of time between the employee's last day at work and the abandonment, and that there was an act of insubordination by the employee. Mr. Chell argued that by using these criteria the facts clearly show that Mr. Bates had not abandoned his position.

Having reviewed the cases, I disagree with Mr. Chell's position that all of these factors must be shown in order to establish that a teacher has abandoned his or her position. Clearly in this matter, there is no allegation by the Board that Mr. Bates had any mental or physical disability. However, the facts show that the Board made a reasonable request for a doctor's certification or letter indicating the nature and extent of his physical problems and when he could return to work, and that for a nine-month period Mr. Bates failed to supply the Board with this information notwithstanding the numerous requests made by various Board representatives. Further, the Board has established that this delay had a detrimental effect on the students since Mr. Bates' indefinite status forced the Board to use substitute teachers rather than hiring an interim teacher to replace the respondent. I **CONCLUDE** that Mr. Bates' failure to respond to this request of the Board constitutes insubordination and improper conduct, and I further **CONCLUDE** that the Board correctly determined that Mr. Bates had abandoned his teaching position.

In addition, I **CONCLUDE** that Mr. Bates is not entitled to any benefits pursuant to N.J.S.A. 18A:6-14, which provides for the resumption of salary payments to suspended teachers after the lapse of 120 calendar days from the certification of the tenure charges to the Commissioner. In this case, Mr. Bates was not suspended since the Board determined that he had abandoned his position and, therefore, he is entitled to no benefits pursuant to this statute.

As to the question of what other salary payments may be due to the respondent in this matter, that will be addressed in the next section of this initial decision.

SICK LEAVE BENEFITS ISSUE

The respondent alleges that he is entitled to benefits pursuant to N.J.S.A. 18A:30-2.1, which provides:

> 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 calander 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. . . .

As to this issue, the respondent relies on his testimony as heretofore summarized in the tenure issue portion of this initial decision as well as a number of medical records and reports regarding Mr. Bates' condition (R-4 through R-10).

In chronological order, the reports introduced into evidence show the following:

(1) A report from Dr. Fruchtman to Ohio Casualty Group, dated July 5, 1983 (R-4). In this report, Dr. Fruchtman stated that prior to his fall on February 15, 1983, Mr. Bates had been treated for high blood pressure, hypertension and diabetes. In November 1982, Mr. Bates was in the hospital due to a stasis ulcer on his left leg, venous insufficiency, uncontrolled diabetes mellitus and hypertension. When Dr. Fruchtman

saw Mr. Bates on February 17, 1983, he noted a contusion on the respondent's left upper leg and that he was having a great deal of pain, and the doctor concluded that Mr. Bates should not return to work at that time. For a while Dr. Fruchtman treated Mr. Bates for his leg problem and then had him admitted to the hospital for treatment and tests. As of the date of this letter, July 5, 1983, Dr. Fruchtman concluded that Mr. Bates was still unable to work; however, he could not state whether the respondent's medical problems were directly related to his injury on February 15, 1983.

(2) The report of Dr. Richard D. Rubin, a neuropsychiatric specialist (R-7), to Mr. Chell, dated June 15, 1984 (R-5). In this report, Dr. Rubin describes Mr. Bates' instability as to his gait and the need for further tests prior to reaching any conclusion or diagnosis. Dr. Rubin also stated in the report that Mr. Bates was employed as a maintenance worker.

(3) The report of Dr. Fruchtman to Mr. Chell, dated September 10, 1984 (R-8). In this report, Dr. Fruchtman still could make no conclusion as to the cause of Mr. Bates' medical problems. The doctor indicated that Mr. Bates has a permanent left foot drop and that he would be able to return to work if he were working in a position which would not require any long-term standing or lifting or moving things.

(4) The report of Dr. Rubin to Mr. Chell, dated September 22, 1984 (R-6). In this report, Dr. Rubin concluded that Mr. Bates has a permanent partial neurologic disability that was caused or aggravated by his accident on February 14, 1983. Dr. Rubin's conclusion was based on the tests given to Mr. Bates as well as his opinion that Mr. Bates could not have performed the duties of a maintenance worker if he had diabetic neuropathy. Dr. Rubin disagreed with the statements made by Dr. Fruchtman in his two reports (R-4, R-8).

By letter dated August 23, 1983, Mr. Nicastro informed Mr. Bates that since his workers' compensation claim had been denied (P-4), the Board had credited his 79 1/2 accumulated sick days towards the 81 days he was out of work from February 17, 1983

through June 21, 1983 (P-3). Thereafter, on September 6, 1983, Mr. Nicastro indicated that there had been an error in computation and that Mr. Bates had 75 1/2 rather than 79 1/2 accumulated sick days as of September 1983 (P-5).

I **FIND** that the pertinent facts as to this issue are as stated above, and based on these facts, I **CONCLUDE** that Mr. Bates has shown that he was injured during the course of his employment and that as a result of said injury, he was unable to work from February 17, 1983 through June 21, 1983, the last school day of the 1982-83 school year. I accept the conclusion reached by Dr. Rubin, and I **CONCLUDE** that although Mr. Bates' preexisting medical problems may have contributed to the extent and duration of his medical problems, that a causal relationship existed between the accident and medical problems experienced by Mr. Bates during the remainder of the 1982-83 school year. I also **CONCLUDE** that the respondent has not proven that the medical problems resulting from his accident of February 15, 1983, prevented him from returning to school in September 1983. Although Mr. Bates testified that he was unable to return to school in September 1983, there is nothing in the medical reports to support his position. In neither of his two reports does Dr. Rubin address the question of whether Mr. Bates could return to his job as a teacher (R-5, R-6). Dr. Fruchtman stated in his first report that Mr. Bates could not work as of July 5, 1983 (R-4), and in his second report, Dr. Fruchtman stated that Mr. Bates could return to work under certain conditions but does not indicate when Mr. Bates' condition improved (R-8).

Therefore, I **CONCLUDE** that Mr. Bates is entitled to sick leave benefits pursuant to N.J.S.A. 18A:30-2.1 from February 17, 1983 through June 21, 1983 (81 work days) and that the Board restore the respondent's accumulated sick days that had been allocated for that period. Therefore, as of the beginning of the 1983-84 school year, Mr. Bates was entitled to the 65 1/2 accumulated sick days and a credit of 10 sick days for the 1983-84 school year. Since the Board did not dispute that Mr. Bates was unable to work during the 1983-84 school year prior to the deadline of January 9, 1984, set forth in Mr. Birsner's letter (P-16), I **CONCLUDE** that Mr. Bates is entitled to salary payments for the period of his accumulated sick days, a total of 75 1/2 days.

CONCLUSION

I **ORDER** that the termination of Mr. Bates as determined by the Board be **AFFIRMED** and that the Board pay Mr. Bates a lump salary payment for 75 1/2 working days after the final decision in this matter.

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

February 5, 1985
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

2/11/85
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 14 1985
DATE

Ronald J. Parker/sko
OFFICE OF ADMINISTRATIVE LAW

ml/E

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT C. BATES,	:	
SCHOOL DISTRICT OF THE LOWER	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY REGIONAL HIGH	:	DECISION
SCHOOL DISTRICT, CAMDEN COUNTY	:	
	:	

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

It is observed that no timely exceptions have been filed by the parties with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner upon review of those findings of fact and conclusions set forth in the initial decision finds and determines that there is ample evidence in support of the Board's tenure charges of insubordination and abandonment of position of which respondent has been found guilty herein.

The initial decision is modified, however, to the extent that it is found and determined that respondent may only be credited with 4 rather than 10 days sick leave for the 1983-84 school year. Respondent's sick leave entitlement for the 1983-84 school year may not extend beyond the date of the Board's determination to certify tenure charges against him. See in re: Schwartz v. Dover Public Schools, 180 N.J. Super. 222 (App. Div. 1981).

Except as modified above, the Commissioner affirms those findings and conclusions in the initial decision and hereby adopts them as his own.

Accordingly, respondent is hereby dismissed from his position as a tenured teaching staff member in the Lower Camden County Regional School District as of the date of the Commissioner's decision.

The Board, however, is directed to forthwith compensate respondent for 69¼ days of accumulated sick leave.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MARCH 28, 1985

Pending State Board

INITIAL DECISION
OAL DKT. NO. EDU 5950-84
AGENCY DKT. NO. 271-7/84
OAL DKT. NO. EDU 5951-84
AGENCY DKT. NO. 250-7/84
(CONSOLIDATED)

ELIZABETH SZPIECH,
Petitioner,
v.
HOPATCONG BOROUGH BOARD OF EDUCATION,
Respondent.

APPEARANCES:

Kenneth I. Nowak, Esq., for petitioner
(Zazzali, Zazzali & Kroll, attorneys)

Robert M. Tosti, Esq., and **Ellen S. Bass,** Esq., for respondent
(Rand & Algeier, attorneys)

Record Closed: January 8, 1985 Decided: February 13, 1985

BEFORE **ARNOLD SAMUELS,** ALJ:

This matter was begun on July 9, 1984 when the petitioner, Elizabeth Szpiech, filed a petition with the Commissioner of Education, pursuant to his authority under N.J.S.A. 18A:6-9 to hear and determine controversies and disputes arising under the school laws, contesting the termination of her employment by the respondent, Hopatcong

Borough Board of Education, (Board) as of June 30, 1984. The petitioner claims that the removal violated her tenure status as a full-time teacher. Ms. Szpiech also challenged the Board's action in withholding her 1984-5 salary increment. She further alleged that she had been improperly placed on the salary guide.

Less than a week before the above petition was filed with the Commissioner, the Board had filed its own petition for a declaratory judgment, requesting a determination of Ms. Szpiech's tenure rights and asking for a determination that she was not entitled to the status of a full-time teacher.

On August 8, 1984, the Commissioner of Education transmitted both matters to the Office of Administrative Law for hearing and determination as contested cases pursuant to N.J.S.A. 52:14F-1 et seq. Timely answers to both petitions had been filed by the respective parties. The petition filed by Ms. Szpiech is identified as OAL DKT. NO. EDU 5950-84, and the petition filed by the Board is OAL DKT. NO. EDU 5951-84. On September 17, 1984, a motion for consolidation of the two petitions was granted.

A prehearing conference was held on September 26, 1984, and a Prehearing Order was filed, defining the issues, fixing hearing dates and regulating other procedural aspects of the forthcoming hearing. The issues to be decided were listed as follows:

A. Is the petitioner a tenured teaching staff member? If so, when did such tenure attach, in September 1983 or in April 1984?

B. If and when the petitioner became tenured, what is the nature of such tenure, full time or part time?

. . . . .

D. What is the petitioner's proper placement on the salary guide?

The salary withholding issue (C in the Prehearing Order) was withdrawn by the petitioner prior to hearing. Another issue (E in the Prehearing Order) relating to the petitioner's statutory right to obtain special insurance coverage from the Board's carrier, was also withdrawn prior to hearing. However, it was recognized that the petitioner's entitlement to insurance benefits, if any, would accompany any finding that would ultimately be made as to her tenure status.

The hearing, held on November 13, 1984, was confined to the oral argument of counsel, following their filing of briefs and a complete stipulation of uncontested facts. No testimony was taken because it was agreed that, once the increment withholding issue was withdrawn, the remaining questions were capable of being decided as cross motions for summary decision. Both parties also filed posthearing briefs and memoranda that were considered in addition to the earlier submissions.

After the oral argument was concluded, the petitioner moved for interim relief, seeking immediate placement by the Board into a full-time teaching position, pending final decision. The petitioner claimed that she was entitled to such relief because she would suffer irreparable harm otherwise and because of a balancing of the equities. After consideration of all papers filed in support of and in opposition to the motion, and after hearing oral argument on January 3, 1985, the application was denied. The order of denial, dated January 8, 1985, is incorporated herein by reference. The order concluded that no irreparable harm was being suffered by the petitioner, that the embarrassment and humiliation she claimed to be suffering does not rise to the level of irreparable harm, that no harm to the public interest or to the children of the district had been demonstrated, that the position taken by the Board in opposition to petitioner's claims was not frivolous or totally lacking in meritorious argument and that a decision from the Office of Administrative Law was relatively imminent because all hearing procedures had already been concluded.

The facts, as stipulated by counsel, are as follows:

1. Petitioner, Elizabeth Szpiech, possesses a certificate as an Elementary School Teacher, which certificate was issued in June 1969. (Exhibit A).

2. From on or about April 27, 1981 to June 30, 1981, Szpiech was employed by the respondent school district on a part-time basis for three and one-half hours each school day as a Basic Skills Improvement Instructor.

3. Throughout the entire 1981-82 school year, beginning with the commencement of school in September and ending with the closing of school in June, petitioner was employed on a hourly basis for 19 1/2 hours per week as a Basic Skills Improvement Instructor.

4. Throughout the entire 1982-83, school year, beginning with the commencement of school in September and ending with the closing of school in June, petitioner was employed on a hourly basis for 19 1/2 hours per week as a Basic Skills Improvement Instructor.

5. Throughout the 1983-84 school year, beginning with the commencement of school in September and ending with the closing of school in June, Szpiech was employed as a full-time teacher in the second grade at the Hudson Maxim school.

6. By letter of April 23, 1984, the respondent school district informed Szpiech that the Board would take formal action on April 26 to "non-renew" Szpiech's employment contract for 1984-85 "for reasons of lack of work and/or economy." (Exhibit B).

7. By letter of April 27, 1984, the Board informed Szpiech that it had voted not to renew her employment contract for 1984-85. (Exhibit C).

8. Commencing in September 1984, respondent employed a nontenured teacher to replace Szpiech.

9. On June 19, 1984, Szpiech received a letter, dated June 18, 1984, advising her that a special meeting of the Board would be held on June 20, 1984 regarding a withholding of her increment for 1984-85. (Exhibit D).

10. At its meeting of June 20, 1983, the Board passed a conditional resolution withholding Szpiech's increment for 1984-85. (Exhibit E). By letter of June 25, 1984, the Board informed Szpiech of its decision to freeze her salary for 1984-85 at $12,450 which is the first step on the salary guide. (Exhibit F).

11. Since the commencement of the 1984-85 school year, Szpiech has been employed as a Remedial Teacher for 19 1/2 hours each week. Szpiech accepted this position under protest and simply because of her duty to mitigate damages.

All of the foregoing discussion, plus the facts recited above, for purposes of this decision, are found to be **FACT.**

The first question to be decided is whether or not the petitioner is a tenured teaching staff member, and if so, when did tenure attach? There is no need to ponder that question at length. The answer is yes, she is tenured. It is conceded in the Board's brief at pages 8 and 9. The Board further acknowledges that tenure accrued in April 1984. However, the concession is limited because the respondent takes the position that Ms. Szpiech only acquired tenure in a part-time position, and therefore was not entitled to a full-time appointment. The petitioner opposes that point of view, stating that current law does not provide for fractional tenure as a separate category from full tenure. She argues that, once tenure is acquired, on the first day of continuous service after expiration of the statutory three years, as provided in N.J.S.A. 18A:28-5, its status is fixed and determined

to be that of the employment held on the day tenure attaches. The facts indicate that the petitioner worked part-time for approximately 70 percent of the three years of her employment prior to the acquisistion of tenure. She was a full-time classroom teacher for approximately 30 percent of the three years, and she held that position on the day tenure attached in April 1984.

The question has been dealt with administratively and by the courts in similar circumstances:

There is no question that the petitioner is tenured. She was employed in positions which required the possession of appropriate certificates. She possessed those certificates, and she served the requisite time for the acquisition of tenure. Spiewak v. Rutherford Board of Ed., 90 N.J. 63 (1982). The crucial questions is one of her right to an available full-time teaching position, for which she holds a certificate and in which capacity she was employed at the time she acquired tenure, as against a nontenured teacher.

The New Jersey Supreme Court has held, in Lichtman v. Ridgewood Board of Ed., 93 N.J. 362 (1983), that a tenured part-time teaching staff member with proper certification can claim seniority rights against a nontenured applicant in seeking appointment to a full-time position. This is permissible as long as the full-time position is within the specific category covered by the tenured staff member's certification and has responsibilities identical to those of the part-time position in which the staff member was employed. In Lichtman, the Commissioner of Education first ruled that full-time versus part-time status should not be the basis for determining an employee's seniority, and that such seniority should be determined solely on the basis of the category of certification. The State Board reversed the Commissioner and its decision was affirmed by the Appellate Division. The Supreme Court noted that the regulations (N.J.A.C. 6:3-1.10 et seq.) governing the award and the calculation of seniority do not evince any intent to distinquish between full-time and part-time positions. The language and import of the regulations are to be understood, however, as allowing a pro rata calculation of seniority based upon the total accumulated service in a specific category.

As a tenured employee, the petitioner's seniority credits are capable of calculation. It is also well recognized that nontenured employees do not accrue seniority rights. N.J.S.A. 18A:28-10, et seq; Lichtman; Union County Regional High School Bd. of Ed. v. Union County Regional High School Teachers Assn., Inc., 145 N.J. Super. 435 (App. Div. 1976).

However, the respondent's argument approaches the question from a different point of view. The Board claims that the petitioner's tenure is limited and restricted to a part-time capacity only, because she did not continuously occupy a full-time position for the entire three years and one day required for the attainment of tenure. In support of the proposition that Ms. Szpiech has only attained part-time tenure, the respondent relies upon the opinion in Kathleen Carlson v. Board of Education of the Township of Cranford, Union County, (N.J. App. Div. March 24, 1982, A-4433-A0-T3) (unreported). Carlson is, to some extent, the converse of the case at hand. There, Kathleen Carlson was employed in a part-time position on the day she acquired tenure, although she had previously been employed as a full-time teacher for the three years prior to the first day of her fourth year. The court held that the appellant acquired tenure as a half-time teacher only, stating that:

> It is length of service in a single position, not length of service in the district in any capacity, which determines tenure in that position. [citations omitted] Upon employment in a half-time position for her fourth year, she acquired tenure as a half-time teacher, since she then had worked the equivalent of more than three years as a half-time teacher (a full-time position necessarily encompassing a part-time one). at 4.

The court also noted that the Commissioner of Education had consistently held that tenure in a part-time position does not entitle a teacher to a full-time position.

Interpreting Carlson in accordance with the Board's position has its difficulties. "Length of service in a single position" might refer to the single area of certification, i.e. the position of elementary school teacher, rather than a full-time or part-time position. The decision is not clear in that respect. Moreover, it must be observed that the

unpublished Carlson decision on March 24, 1982, preceded the Supreme Court's analysis in Lichtman, decided on June 20, 1983.

Since Lichtman, several similar cases have been decided by the Commisioner of Education or by the State Board of Education, each holding essentially that the nature of tenure is determined by the status of the teacher's employment on the date tenure attaches.

Carnathan v. Board of Ed. of the Townhip of Randolph, 1983 S.L.D. ____ (Commissioner of Education July 18, 1983), is almost identical to the case at hand. There, the petitioner, an elementary school teacher was employed on a part-time basis for most of the time that she was accruing tenure. She acquired tenure during the 1980-81 school year while employed as a full-time teaching staff member. The Commissioner held that her tenure was in a full-time position. She was ordered reinstated (following her layoff) to full-time teaching duties in a position within her field of certification to which she was entitled by reason of seniority, with back pay and retroactive benefits.

See also Kiminkinen v. Board of Education of the Township of Randolph, Morris County, 1983 S.L.D. ____, (Commissioner of Education, September 26, 1983); Raffaele v. Board of Education of the Borough of Tenafly, Bergen County, 1983 S.L.D. ____, (Commisisoner of Education, November 7, 1983); Greiner v. Board of Education of the Townhip of Shamong, Burlington County, 1984 S.L.D. ____, (State Board of Education, September 5, 1984).

In Greiner, the State Board specifically referred to the Lichtman decision stating:

> The Court there (Lichtman) reviewed the regulations governing the award and computation of seniority. Finding that they do not disclose any intent to distinguish between part-time and full-time service, the Court concluded that seniority accrues from actual service, whether in a part-time or a full-time capacity, in the particular position for which a teacher is certified. Accordingly, the court held that a tenured part-time teacher may claim preference

> over a nontenured applicant in seeking appointment to a full-time position, so long as the certification requirements and the responsibilities in the full-time position are the same as those demanded in the part-time position. [at 516]

The same analysis must apply in the case at hand. Ms. Szpiech is seeking preference for appointment to a full-time position over a nontenured appointee. The petitioner acquired tenure as a full-time fully certified classroom teacher. That is the identical position to which the nontenured teacher was appointed, without regard to any rights held by the petitioner.

In Kiminkinen, the Commissioner of Education stated:

> An examination of the circumstances of the present matter reveals to the Commissioner that petitioner was employed full-time after three years and one day of continuous employment in the district. Her tenure, as a consequence, is that of a full-time teacher as a teacher's employment status on the date tenure attaches determines the nature of the tenure.

The respondent has presented arguments against application of the foregoing principles that are not unreasoanble or without merit. See Greiner, at 6. The Board questions the present state of the law, which provides that a teacher can attain tenure as a full-time staff member if she is teaching in a full-time capacity only on the one "magic day" immediately after three years of continuous service as a part-time teacher. The concept undoubtedly rests on a quantitative measure, to a greater extent than on a qualitative standard. Nevertheless, the ruling in Lichtman is controlling, together with its progeny, Kiminkinen, Raffaele, Carnathan, and Greiner, decided thereafter.

It is therefore **CONCLUDED** that the petitioner did attain tenure on April 28, 1984. On that day, she was employed and was working as a full-time classroom teacher. She holds the requisite certificate, and she has taught for the statutorily mandated time. Her tenure is not limited to a part-time status, even though her employment was part-time for approximately 70 percent of the three years and one day that she taught in the district at the time she became tenured. Once tenured, she is entitled to an

admeasurement of seniority rights, as against other tenured teachers, if a choice must be made. However, under all circumstances, once tenured, the petitioner became entitled to appointment to the available full-time position that was awarded instead to a nontenured teacher. She satisfied all of the requisites for that appointment and her seniority rights placed her in a preferential position above the nontenured teacher.

As to the petitioner's placement on the salary guide, her position should follow the acquisition of tenure. During all of the time she was employed in tenure eligible (part-time or full-time) positions, she was nevertheless retained on step one of the salary guide each year, including the year during which she attained tenure. Unless salary increments were withheld, she should have been moved up on the salary guide each year, even as a part-time employee. See Kalisch v. Board of Ed. of the Borough of Hasbrouck Heights, 1983 S.L.D. ___, (Commissioner of Education, November 14, 1983).

Therefore, the petitioner, who was on step one of the salary guide in the 1981-2 school year should have been on step two in 1982-3. In 1983-4, when she was employed in the full-time position and attained tenure, she should have been placed on step three of the salary guide. Since the petitioner's 1984-5 increment was withheld and her appeal of that action was withdrawn, her position should remain on step three of the guide for 1984-5.

The petitioner is also entitled to appropriate accumulated sick days, pension credits and all other contractual rights enjoyed by tenured teachers. She should be compensated for all benefits and sick days retroactive to June 1982. (Spiewak was decided in June 1982, near the end of the 1982-3 school year.)

It is therefore **ORDERED:**

A. That the petitioner be immediately assigned to the full-time position to which she was entitled, now held by a nontenured teacher;

B. That the petitioner be paid on step three of the salary guide for the 1984-5 school year, retroactive to the beginning of the school year in September

1984, when she should have begun working in the full-time position, reduced and mitigated to the extent of any income she earned during this period.

C. That she be compensated for the difference between her actual earnings and the salary she would have earned in the positions she occupied from September 1982 to September 1984, in accordance with the above conclusions as to salary guide placement;

D. That she be awarded and credited with accumulated sick days, pension credits, insurance benefits and all other contractual rights enjoyed by tenured or tenure eligible teachers since June 1982.

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

OAL DKT. NOS. EDU 5950-84 & EDU 5951-84

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

February 13, 1985
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

February 20, 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

dm/e

ELIZABETH SZPIECH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HOPATCONG, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

It is observed that the Board's exceptions to the initial decision and petitioner's reply thereto have been filed with the Commissioner pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Commissioner observes that the Board takes issue with the recommended findings and conclusions reached by the judge in determining that petitioner had acquired a tenure status as a full-time teaching staff member pursuant to N.J.S.A. 18A:28-5 and that petitioner is to be advanced to Step three of the regular teachers' salary guide.

It is further observed that the Board urges a different interpretation of decisional case law relied upon by the judge in the initial decision.

The Commissioner, upon review of the Board's exceptions, is not persuaded by the arguments in support of its position. In the Commissioner's judgment the findings and conclusions in the initial decision are consistent with the interpretation of N.J.S.A. 18A:28-5 et seq. rendered by the N.J. Supreme Court in Spiewak, supra, and Lichtman, supra.

The undisputed facts of this matter clearly establish that petitioner achieved tenure protection as an elementary teacher in a full-time position during the 1983-84 school year by virtue of having complied with the following provisions of N.J.S.A. 18A:28-5 in accordance with the construction laid down by the Court in Spiewak:

1. During all periods of petitioner's part-time and full-time employment controverted herein she possessed an appropriate instructional certificate with an elementary endorsement issued by the State Board of Examiners and

required by the Board as a condition for her employment.

2. Petitioner served the requisite period of time in the Board's employ (3 years and 1 day) to trigger the provisions of N.J.S.A. 18A:28-5(b).

3. Petitioner enjoyed the status of a properly certificated full-time elementary teacher during the 1983-84 school year at the time the precise conditions pursuant to statutory prescription mandated in N.J.S.A. 18A:28-5(b) had been met. She therefore acquired tenure protection in a full-time position as elementary teacher which was the only tenurable category or position to which her part-time and full-time employment service entitled her by virtue of the endorsement on her instructional certificate. Consequently, petitioner had also acquired seniority protection in her full time capacity as an elementary teacher at the precise time the provisions of N.J.S.A. 18A:28-5(b) were effectuated during the 1983-84 school year.

The seniority category according to the provisions of N.J.A.C. 6:3-1.10(1)16, into which petitioner's part-time and full - time employment service is to be credited is designated as the "Elementary" category.

It is evident from the factual recitation in the record of this matter that the Board, when it notified petitioner that her full-time employment was terminated, failed to recognize her legal entitlement to tenure. Consequently, the Board improperly terminated petitioner's tenured employment without abolishing her teaching position and further without determining her seniority status.

Assuming arguendo that the Board did abolish an elementary teaching position and had also properly determined that petitioner had the least seniority to remain in active employment, it could not then employ a nontenured person to be employed in a vacant elementary teaching position without violating petitioner's seniority claim to such position. Lichtman

Finally, the Board's reliance on Carlson, supra, and Greiner (decided by the Commissioner, April 7, 1983, aff'd State Board September 5, 1984), as well as the provisions of N.J.S.A. 18A:28-6, to support its claim to tenure could only be determined to be in a part-time teaching position, is misplaced.

The Board in this regard argues that petitioner did not acquire tenure in the full-time elementary position to which she was transferred as of the 1983-84 school year because she did not serve the requisite time pursuant to N.J.S.A. 18A:28-6. The provisions of the above-cited statute read in pertinent part:

> "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 unless a shorter period is fixed by the employing board for such purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years***." (Emphasis supplied.)

In construing the provisions of the above-cited statute the Commissioner cannot agree with the Board's position that petitioner was transferred to another position. The position which petitioner held under her instructional certificate must presumably be one with an elementary endorsement. For the reasons stated above, petitioner had acquired tenure under that certificate so endorsed pursuant to N.J.S.A. 18A:28-5 during the 1983-84 school year.

The provisions of N.J.S.A. 18A:28-6 apply only in those instances when a teaching staff member is transferred or promoted to another position or title endorsed on their certificate in which they are qualified to serve.

In the instant matter petitioner was reassigned from a part-time capacity to a full-time capacity as an elementary teacher within the scope of her instructional certificate with an elementary endorsement. This was the only certificate that the Board required of petitioner for employment in either capacity. She was therefore not required to obtain tenure a second time under the same certificate.

Thus, the provisions of N.J.S.A. 18A:28-6 apply only to tenured or tenure - eligible teaching staff members who are transferred or promoted with their consent to positions other than those for which they have already acquired a tenure status by virtue of the certificated endorsement thereon in which such employment service has been rendered.

In view of the foregoing the Commissioner affirms the findings and conclusions in the initial decision as his own.

Accordingly, the Board is directed to recognize petitioner's status as a full-time teaching staff member pursuant to N.J.S.A. 18A:28-5. The Board is further directed to take the following actions in effecting the relief to be granted to petitioner:

- That the petitioner be immediately assigned to the full-time position to which she was entitled, now held by a nontenured teacher;

  That the petitioner be paid on Step three of the salary guide for the 1984-85 school year, retroactive to the beginning of the school year in September 1984, when she should have begun working in the full-time position, reduced and mitigated to the extent of any income she earned during this period.

- That she be compensated for the difference between her actual earnings and the salary she would have earned in the positions she occupied from September 1982 to September 1984, in accordance with the above conclusions as to salary guide placement;

- That she be awarded and credited with accumulated sick days, pension credits, insurance benefits and all other contractual rights enjoyed by tenured or tenure eligible teachers since June 1982.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 1, 1985

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4212-84

AGENCY DKT. NO. 173-5/84

ROGER SMITH, AN INDIVIDUAL,

Petitioner,

v.

BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, COUNTY OF CAMDEN,

AND

CHARLES P. PRATO,

Respondents.

Steven R. Cohen, Esq., for the petitioner (Selikoff & Cohen, attorneys)

Robert E. Birsner, Esq., for the respondents (Maressa, Goldstein, Birsner, Patterson & Drinkwater, attorneys)

Record Closed: December 31, 1984 Decided: February 13, 1985

BEFORE **AUGUST E. THOMAS**, ALJ:

Roger Smith is a tenured teaching staff member employed by the Board of Education of the Lower Camden County Regional High School District No. 1 (Board) whose employment increment was withheld for the 1984-85 school year because of petitioner's alleged deliberate misrepresenting of facts to his principal regarding the contents of a document found in a trash can located within the teachers' faculty lounge.

This matter was transferred to the Office of Administrative Law by the Commissioner of Education, pursuant to N.J.S.A. 52:14F-1 et seq., and a prehearing conference was held on July 27, 1984, in the Office of Administrative Law, Trenton. The parties agreed to complete their discovery, and dates for hearing in this matter were established. Three exhibits (A, B, and C) attached to the petition of appeal were marked in evidence as P-1, P-2, and P-3.

Petitioner filed a Notice of Motion for Summary Judgment with a brief in support of the motion. Respondents filed a brief in opposition to the motion. Oral argument on the motion was conducted on October 26, 1984, in the Camden County Hall of Justice, Camden.

In denying petitioner's Motion for Summary Decision, I held that there were facts in dispute which had to be decided after a plenary hearing. (See: Order - Summary Decision, OAL DKT. NO. EDU 4212-84, decided November 1, 1984. No further action was taken on this Order by the Commissioner). Thereafter, a plenary hearing was conducted in the Camden County Hall of Justice on November 19, 1984.

The issues decided at the prehearing conference are as follows:

A. Was petitioner's increment properly withheld, pursuant to N.J.S.A. 18A:29-14?

B. Did the Board violate any of petitioner's rights in questioning him after acquiring Exhibit C (P-3) which had been placed in a trash can?

C. If not, did petitioner misrepresent facts concerning the origination of Exhibit C (P-3)?

DISCUSSION

Petitioner has served as a teaching staff member employed by the Board since September 1, 1977. By letter dated February 10, 1984, petitioner was informed that the Board had voted to withhold his employment increment for the 1984-85 school year (P-1). In voting to withhold petitioner's employment increment for the 1984-85 school year, the Board relied upon the contents of a letter from its superintendent to petitioner, dated January 16, 1984 (P-2), accusing petitioner of deliberately misrepresenting facts to his

principal regarding the contents of a document found in a trash can located within the teachers' faculty lounge (P-3).

The superintendent and the Board learned of the existence of P-3 as a result of action by a third party individual who removed the document from the teachers' faculty lounge and caused it to be distributed, published, and otherwise disseminated within the school district and surrounding community. Petitioner did not admit authorship of any part P-3; nor did he admit to any association with P-3 including any dissemination or publication of its contents when questioned by his building principal.

P-3 is a form prepared in the school district as a guide for district personnel to call citizens in the community to remind them to vote in the annual regional school election. The document is reproduced below as typed. The additional phrases written by petitioner and the signature of an unknown person are enclosed in brackets.

> Hello, my name is [Dr. Academia & boy am I messed up.]
>
> I'm calling to remind you to vote in the regional school election on April 12 (today, tomorrow, Tuesday). [I won't get the chance because of marking papers.]
>
> We are hoping you will approve both the school budget and the building referendum. We need the additions badly in order to prevent the need for double sessions. [& elimination of blacks.]
>
> The polls are open from 2:00 p.m. to 9:00 p.m. Can we count on you to come out and vote?
>
> Please inform anyone else you know who might be interested in supporting our schools.
>
> Thank you.
>
> *If any questions arise about details, refer to the brochure from the Board of Education, or have the person call the following numbers if you can't find the answer - 784-9023. Or 227-9017 or 767-1563.
>
> *If transportation to the polls is needed, the Hot Line # is 767-2389. [signed,] [Roger Smith]
>
> (P-3)

The building representative for the Lower Camden County Education Association (Association) who is also a shop teacher in the school building where this incident took place testified on behalf of petitioner. Similarly, Marie Knott and Connie McCart

who are teachers of art and English respectively in the school building testified in petitioner's behalf. Both of them are officers in the Association.

The three teachers' testimony was offered to describe the atmosphere that existed in the faculty lounge where the document in question was discovered. They testified that the faculty lounge at the high school has two levels. These three teachers and the petitioner frequented the lower level of the lounge which had been nicknamed "the Dungeon" by the faculty. It was generally understood that the Dungeon was off limits to students and there was a sign on the outside of the door indicating that only faculty was permitted beyond that door. The Association representative testified that there was no reason to believe that students or anyone other than faculty would enter or become privy to the activities in the lounge, and in particular, the lower level known as the Dungeon. The Dungeon is a small area where smoking is permitted and it contains a table and bulletin board. The record shows that the Dungeon area was understood by the faculty and the administration to be a place for the faculty to do as they pleased. The administration has never sought to regulate what went on in the Dungeon. Teachers posted notices and their own messages on the Dungeon bulletin board. Dr. MacNamara, the high school principal, was hesitant to enter the Dungeon because he feared he might be intruding upon the privacy of the faculty. However, he had been invited to eat lunch there with them.

It was uncontroverted that the Board had never attempted to assert control over the activities in the Dungeon. The teachers testified that Dungeon was a place where the teachers could "let off steam" at the administration at each other or at anyone or anything through humor, sarcasm, criticism and the like. The Assocation representative testified that the atmosphere in the Dungeon area was "loose," full of humor, sarcasm, verbal fencing between teachers, ethnic and racial humor, and criticism of Board and administrative policies. He analogized the activity in the Dungeon to the popular television satire of the Korean War, "M.A.S.H." The humor and sarcasm cut across all ethnic and racial lines with no group or individual spared commentary. He testified that the criticism and sarcasm was so intense at times that some faculty members chose not to participate and spent their free time elsewhere.

The Board and the administration were among the primary targets in the Dungeon and the teachers indicated that there was material, both written and verbal,

expressed in the Dungeon area that the participants, including themselves, would certainly not want the administration or the public to hear or see.

One of the vehicles used to express criticism of the administration and of the teachers themselves was a fictional character, "Dr. Academia." This character was a creation of the group in the Dungeon whose primary function was as a foil for faculty criticism and ridicule of the administration and its policies. Dr. Academia represented an assemblage of the personalities, backgrounds and experiences of his creators. The teachers used him for repeated emphasis on the presentation of their thoughts and ideas in a humorous vein through the posting of this fictional character on the bulletin board. Virtually every memorandum which came from the administration would ultimately be posted in the faculty lounge with a Dr. Academia comment or response to it.

The Dr. Academia phenomenon was known throughout the faculty at the high school. His popularity was such that faculty socials were sponsored in the name of Dr. Academia and the manufacture and distribution of Dr. Academia T-shirts throughout the faculty was demonstrated at hearing. A photocopy of the T-shirt was entered in evidence as P-4. The record shows that the high school principal was very familiar with Dr. Academia and the role he played in the Dungeon area and amongst the faculty. Dr. MacNamara had even attended some Dr. Academia socials at the faculty's invitation.

Another vehicle through which the faculty expressed themselves in the Dungeon was through ridicule directed at members of the faculty group themselves through its "Teacher of the Week" poster. The teachers would periodically ridicule one of their own by making a caricature of a member of the group on a large poster, emphasizing personal traits or physical characteristics of the individual teacher. P-5 in evidence is a caricature of petitioner which pokes fun at a nasal condition he suffers from. The teachers testified that between 15 and 30 of such posters were created and that they were running out of room in the Dungeon area to post them. The Association representative testified that there were posters of teachers that included material that would be considered offensive to some racial or ethnic groups outside the lounge, or to the public in general, but that within the faculty lounge they were understood to be sarcasm and not malicious or personal. All took the criticism in jest, as part of the give and take in the Dungeon area.

The high school principal admitted that he was familiar with the activities in the Dungeon. He understood the role and reputation of Dr. Academia in the high school and admitted that Dr. Academia's views were typically expressed through sarcasm and were not to be taken seriously. He also admitted that the Dungeon area contained material that would be offensive to those who were strangers to the lounge and that he would not want such material to be exposed to the public at large. In spite of this, he admitted that activities in the lounge were tolerated and that administration did not seek to control or limit them.

It was within this frame of reference of the Dungeon that P-3 was generated.

Mary Harris is also a teacher in the high school and it was she who picked up P-3 from the Dungeon and brought it to the attention of the building principal. The teachers who previously testified stated that they had never seen Mary Harris in the Dungeon. The record shows through the testimony of the high school principal that Mary Harris heard of the contents of P-3 in the upper level of the faculty lounge; later she visited the Dungeon and found the document now in controversy in a trash can.

After Mary Harris delivered this document (P-3) to the principal and advised him that it was her belief that it contained racial slurs, the document was circulated throughout the school and the community allegedly by Mary Harris. The result was a great deal of community unrest particularly among black residents of the school district and these residents demanded explanations, answers, and corrective action to be taken by the Board and the superintendent. The superintendent testified about this disturbance in the community and that in 30 years as an educator he has never seen a public so outraged about the contents of a letter.

The high school principal testified that he had asked petitioner (in the presence of another high school principal in the Board's school district) about authorship of the document P-3. The principal testified as did the other high school principal he called to witness his inquiry, that petitioner denied authorship of the document. Consequently, he was unable to ascertain the meaning of the language, which was determined by some to be a racial slur. He could not even determine who authored the document.

Petitioner stated that he neither admitted nor denied authorship of the document. He asserts as did his association representative, that his representative did all of the talking at their meeting with the principal in April and that he neither admitted nor denied writing P-3. The principal testified as did the superintendent that had they been able to determine authorship of the document, prior to the public meeting, they might have been able to defuse the situation and calm the community. Nevertheless, the document was discussed in a public meeting which lasted two hours but the Board was unable to calm community feelings because it did not know who wrote P-3. The public demanded that the Board to do something about P-3; consequently, it was thereafter analyzed by the handwriting expert.

At the hearing, Roger Smith admitted writing the remarks on P-3 but he denied signing the document. The Board concedes that he did not sign the document since their own handwriting expert determined that it was signed by another person. Smith testified that he left P-3 on the table for 15 minutes while he ate his lunch and that he placed it in the trash can before leaving the Dungeon. He testified also that whoever signed it took it out of the trash can.

Based on the series of events as described above, the superintendent wrote to petitioner on January 16, 1984, concerning the conclusions of the handwriting expert and petitioner's unwillingness to admit to the high school principal his involvement with the document. The superintendent concluded as follows:

> I have been unable to draw a conclusion other than a deliberate misrepresentation of facts by yourself to Dr. MacNamara; and on this basis, I intend to recommend to the Board of Education at its next regularly scheduled meeting on February 6, 1984, that your employment step increment for the 1984-85 school year be withheld. (P-2).

Accordingly, the Board adopted the recommendation of the superintendent and voted to withhold petitioner's increment for the 1984-85 school year (P-1).

Petitioner argues that he did not misrepresent his situation with regard to P-3 to the Board or its agents; rather, he let his association representative speak for him. Consequently, there was no misrepresentation possible.

FINDINGS OF FACT AND CONCLUSIONS BASED ON THOSE FACTS

1. Petitioner added the written phrases to the form P-3 during his lunch time in the Dungeon.

2. Petitioner shared this information, albeit in jest, with another teacher or teachers.

3. Another teacher (known or unknown by petitioner) signed P-3 with petitioner's name.

4. Unknown and unnamed teachers discussed P-3 in the upper faculty lounge and were heard by Mary Harris.

5. Mary Harris was sufficiently disturbed by what she heard in the faculty lounge to feel compelled to visit the Dungeon. There she found P-3 in the trash can.

6. Mary Harris delivered P-3 to the principal, informed him that she found that it contained racial slurs, and was offensive. She was responsible for its reproduction and circulation particularly in the black community.

7. Roger Smith did not answer his principal's questions regarding the authorship of P-3.

8. As a result, the black community was outraged, and demanded action.

9. The resultant determination by the handwriting expert led to the withholding of petitioner's increment.

CONCLUSIONS OF LAW

Petitioner asserts that the Board violated the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, paragraphs 1, 5, 6, 7 and 21 of the New Jersey Constitution when it interrogated him about his association

with written expression composed in the privacy of the faculty lounge, and when it withheld his increment for declining to reveal his association with that document.

Petitioner cited in his brief in support of his earlier Motion for Summary Decision and in his post-hearing brief in this matter approximately 50 cases which he asserts support his claim to the right of privacy and that his client's constitutional rights have been violated. I find it unnecessary to review each of those decisions to find what precise holding each of them reached. Most of the decisions cited by petitioner were rendered by the United States Supreme Court. Many of them were decided by federal district courts and a few were decided by high courts in other states as well as two decided by the New Jersey Supreme Court. The most recent case cited by petitioner is Connick v. Myers, 51 U.S.L.W. 4436 (1983). Fortunately, this decision contains a review of many of the other U.S. Supreme Court decisions, and federal district court decisions cited by petitioner in his briefs.

A review of Connick shows the following fact pattern:

Sheila Myers was employed as an Assistant District Attorney in New Orleans with the responsibility of trying criminal cases. When the petitioner District Attorney proposed to transfer her to prosecute cases in a different section of the criminal court, she opposed the transfer and expressed those views to several of her supervisors including petitioner Connick. Myers then prepared a questionnaire that she distributed to other assistant district attorneys in the office concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. Connick then informed Myers that she was being terminated for refusal to accept the transfer and told her that her distribution of the questionnaire was considered an act of insubordination. Myers filed suit in Federal District Court alleging that she was wrongfully discharged because she had exercised her constitutionally protected right to free speech. The District Court agreed, ordered her reinstated, and awarded back pay, damages and attorneys fees. The District Court found that the questionnaire, and not Myers refusal to accept the transfer, was the reason for her termination. The court held that the questionnaire involved matters of public concern and that the state had not clearly demonstrated that the questionnaire interferred with the operation of the district attorney's office. The Court of Appeals affirmed. The United States Supreme Court reversed and held that Myers' discharge did not offend the first Amendment.

In reaching this conclusion, the Court made several significant statements, some of which are quoted as follows:

> For at least 15 years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression (four U.S. Supreme Court cites omitted). Our task as we defined it in Pickering, is to seek "a balance between the interests of the [employee], as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. 391 U.S., at 568. The District Court, and thus the Court of Appeals as well, misapplied our decision in Pickering and consequently, in our view erred in striking a balance for respondent.

Also -

> . . .
>
> Connick contends at the outset that no balancing of interest is required in this because Myers' questionnaire concerned only internal office matters and that such speech is not upon a matter of "public concern," as the term was used in Pickering. Although we do not agree that Myers' communication in this case was wholly without First Amendment protection, there is much force to Connick's submission. The repeated emphasis in Pickering on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language reiterated in all of Pickering's progeny, reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter. (Emphasis added). (at 4437)

Citing many of its own earlier decisions, many of which were cited by petitioner in his briefs, the court went on to say that

> . . . government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. Bd. of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Bishop v. Wood, 426 U.S. 341, 349-350 (1976). (Myers, at 4438)

The Court continued.

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. (Ibid.)

The Court concluded that Myers' questionnaire "touched upon matters of public concern in only a most limited sense" and that "her survey . . . is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment." (Myers at 4440)

In my view, the matter contested here can be analogized to the Court's holding in the Connick v. Myers decision. Here, petitioner's conscious and deliberate action refusing to cooperate with this supervisors concerning the document P-3 which caused so much community unrest is the basis for the superintendent's charge of "deliberate misrepresentation." Despite petitioner's protestations to the contrary, his failure to admit to his superiors his involvment with P-3 allowed a local community reaction to get out of hand when it might have been defused by an admission, and an explanation that the notation was only sarcasm or written in jest. Petitioner's failure to cooperate with his supervisors caused the Board to employ a handwriting expert to determine authorship of contested document while the community was left without any resolution to a problem it felt was offensive.

Arguing that his privacy rights were violated, petitioner cites Griswold v. State of Connecticut, 381 U.S. 479 (1965) which stands for the premise that an individual in a certain penumbra of privacy has a right as against government "to be left alone."

However, I do not conceive public officials' inquiry into a matter which caused a community disturbance involving a teacher in one of its schools as government intruding into the affairs of one of its employees who claims a right to be left alone.

A recent decision by the United States Supreme Court New Jersey v. T.L.O., decided January 15, 1985, and reported at 53 U.S. L.W. 4083, discussed school children's expectations of privacy. Relevant sections are paraphrased below: The Court held that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials and is not limited to searches carried out by law enforcement officers. Further school officials act as representatives of the state, not merely as surrogates for the parents of students and they cannot claim the parents immunity from the Fourth Amendment's strictures.

However, the Court went on to hold that a warrant need not be obtained before searching students under the school's authority and that school officials are not required to base their searches on probable cause that the student has violated or is violating the law. The standard established by the Court is reasonableness, and school officials must determine reasonableness in accordance with the scope of the circumstances of the matter in question. Where there is reasonable grounds for suspecting that the search will turn up evidence that the student has violated the law or the rules of the school, the search will be permissible so long as the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the student's age and sex and the nature of the infraction.

Consequently, the Court held under this standard that the search in the matter of T.L.O. was not unreasonable for Fourth Amendment purposes.

The matter of privacy considered in the present case is similar in that it was reasonable for the Board under these circumstances, to inquire about the origin and the meaning of the words written on P-3.

In the present matter we are dealing with public school property and a local board of education who with its administrators have a responsibilitity to operate and control the conduct of the schools of the district. N.J.S.A. 18A:11-1. The record shows that the teachers who frequented the Dungeon had a relatively free reign to do practically what they wished. However it must be recognized that any and all of their actions took place on public school property administered by public officials pursuant to statute. When the alleged offensive document came to light, it was incumbent upon the administration and the Board to get to the bottom of the controversy and put it to rest as quickly as possible. However, petitioner's unwillingness to cooperate to that end allowed the matter

to get out of hand. I **CONCLUDE** that petitioner had no right "to be left alone" during the administration's legitimate inquiry into the document which had caused the disturbance to one of its teaching staff members and which later became a controversy in the community itself.

The applicable statute N.J.S.A. 18:29-14 provides, in pertinent part 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. . . .

The standard for review of a local board's action pursuant to the statute is set forth in Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960) where the court said that "the scope of the Commissioner's review is . . . not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions" (at 296).

According to Kopera, there are only two determinations to be made when reviewing a board's determination to withhold a teacher's increment: (1) whether the underlying facts were as those who made the evaluations claimed, and (2) whether it was unreasonable for them to conclude as they did based upon those facts. The burden of proving unreasonableness is upon petitioner.

In the instant matter, petitioner has failed to show that the Board action was unreasonable (Kopera).

Consequently, the Petition of Appeal is **DISMISSED WITH PREJUDICE.**

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

13 February 85
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

February 14, 1985
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 19 1985
DATE

Ronald L. Tabakin/sh
OFFICE OF ADMINISTRATIVE LAW

ij/ee

ROGER SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH SCHOOL DISTRICT NO. 1, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

Petitioner's exceptions to the initial decision and the Board's reply have been filed with the Commissioner pursuant to N.J.A.C. 1:1-16.4a, b and c.

Initially, the Commissioner has determined that the record of this matter establishes that petitioner did, in fact, alter the contents of a copy of a typewritten communication (P-3) prepared by the school district directed to residents of the regional school district with regard to the annual school election. It is further determined that the handwritten comments made by petitioner on P-3 were sarcastic and racially derogatory. Petitioner's signature that appears on P-3 was placed there by someone whose identity could not be ascertained by the school officials, nor was it established as a result of the instant proceedings. Petitioner, however, is solely responsible for the impropriety of the comments that appear on P-3 which was retrieved from the wastepaper basket in the teachers' room (The Dungeon) by Ms. Harris. It was she who showed it to the principal and was ultimately responsible for its reproduction and dissemination to the residents of the regional school district.

In his exceptions to the initial decision petitioner raises the following arguments which are summarized below:

1. Inasmuch as the judge issued a finding that petitioner did not answer his principal's question regarding his involvement with P-3, it therefore cannot be concluded by the judge that petitioner deliberately misrepresented the facts to his principal with respect to P-3. This was the reason given by the Board for the withholding of his salary increment for the 1984-85 school year. (Petitioner's Exceptions, at pp.1-5)

In this regard, petitioner argues that the judge's conclusion must be deemed erroneous since it does not rest upon any finding of fact supported by credible evidence.

2. The judge's conclusion that petitioner's failure to comment regarding the notations on P-3 contributed to community unrest is not supported by any evidence in the record of this matter. In this context petitioner states that:

> "***The high school principal admitted that he was familiar with the activities of the Dungeon. He understood the role and reputation of Dr. Academia in the high school and admitted that Dr. Academia's views were typically expressed through sarcasm and were not to be taken seriously. He also admitted that the Dungeon area contained material that would be offensive to those who were strangers to the lounge and that he would not want such material to be exposed to the public at large. In spite of this, he admitted that activities in the lounge were tolerated and that administration did not seek to control or limit them.
>
> "It was within this frame of reference of the Dungeon that P-3 was generated.
>
> "As noted in Exception No. 1, Petitioner's employment increment was not withheld for failing to cooperate with his superiors, but allegedly lying to them, and on this basis alone the Board's action must be overturned. However, even assuming arguendo that Petitioner had ignored the advice of his association representative and communicated directly with Principal MacNamara, he would not have told him anything that he was not already aware of. Principal MacNamara already understood 'Dr. Academia's' role in the 'Dungeon area'; already knew that the fictional character was a vehicle for sarcasm, satire and jest over a broad spectrum of social and political matter, cutting across all ethnic and racial lines; already knew that no administrative decision was spared commentary by 'Dr. Academia'; and most significantly, already knew that the Dungeon Area contained material that would be offensive to strangers such that he would not want the same exposed to the public at large. Accordingly, the principal's testimony that 'he was unable to ascertain the meaning of the language [of P-3]' is clearly untruthful.
>
> "The ALJ's 'conclusion' that the community reaction to P-3 might have been defused had Petitioner offered an explanation for same to Principal MacNamara is worthless, since it is founded on nothing more than sheer speculation. Indeed,

> in light of the foregoing evidence, it could just as well be speculated that Respondent's administration could have defused the community reaction from the outset by providing it with the background of the Dungeon and Dr. Academia, as set forth at I.D. 2-6. Rather than admit to the community that it had not regulated the activities of the Dungeon area, Respondent chose a course of feigning ignorance and [then] making a political scapegoat out of Petitioner.
>
> "Similarly, the ALJ's bald assertion that:
>
> "'Petitioner's failure to cooperate with his supervisors caused the Board to employ a handwriting expert to determine authorship of the contested document while the community was left without any resolution to a problem it felt was offensive.' (I.D. at 11)
>
> is not based upon any evidence in the record. Irrespective of the identify of the author of P-3, the Board already had at its disposal complete knowledge of the Dungeon's activities and the purpose served by 'Dr. Academia'. That the Board, of its own volition, chose not to share this information with the community cannot, under any stretch of the imagination, be attributed to Petitioner.***" (Emphasis in text.)
>
> (Petitioner's Exceptions, at pp.7-9)

3. The judge erred in failing to conclude that petitioner's federal constitutional rights were violated when he was interrogated about his association with P-3 and is argued by petitioner as follows in pertinent part:

> "***Pointedly, in Connick v. Myers, supra, the court found that Connick, the public employer, was not required to tolerate the action of Myers, the public employee, 'which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships'. 51 U.S.L.W. at 4440. Conversely, the Board in the instant matter, through its administration, tolerated and supported the activities of Petitioner and his coworkers because they were carried out in private and expected to remain private. No one could reasonably be expected to anticipate that a piece of paper placed in a trashcan as rubbish would be removed by a third party and circulated to others outside of the teachers' faculty lounge. Indeed, although the ALJ makes no reference to the principal's testimony respecting the trashcan in the Dungeon, a review of the transcript at hearing will show

> that the principal conceded that Petitioner was justified in believing that he had an expectation of privacy regarding any items placed in that trashcan.***" (Emphasis in text.)
>
> (Petitioner's Exceptions, at pp. 10-11)

4. The judge erred in failing to give any consideration to petitioner's independent State constitutional claim concerning the propriety of his interrogation by the Board about P-3.

(Petitioner's Exceptions, at p.11)

The Commissioner, upon review of petitioner's exceptions and the Board's opposing reply thereto is not persuaded that a reversal of the judge's findings and conclusion is warranted. In the Commissioner's judgment there are pertinent unrefutable facts contained in the record of this matter which clearly indicate that petitioner's conduct with regard to the alteration of P-3 was inflammatory and exceeded the bounds of propriety. This is so notwithstanding the fact that he was not directly responsible for its dissemination to the community at large.

Initially, the Commissioner is constrained to observe and conclude that petitioner seeks to excuse the propriety and reasonableness of his conduct on the grounds that his actions with regard to P-3 must be wholly attributable to the Board and its administrators. It was they who knew that the atmosphere and activities that prevailed in the lower level teachers' room (the Dungeon) cut across all racial and ethnic lines and that this room contained material that would be offensive to strangers such that it should not be exposed to the public at large.

Furthermore, petitioner seeks to convince the Commissioner that those racially derogatory comments which he made on P-3 and subsequently threw into the trashcan in the lower level teachers' room (the Dungeon) constituted his own private thoughts. Petitioner maintains that he had an expectation to such privacy notwithstanding the removal of P-3 from the trashbasket, which was brought to the attention of the principal and subsequently disseminated to the community at large by a third party.

Similarly, petitioner relies upon the protection of the federal and State Constitutions in asserting his right to remain silent when interrogated by the school administrators about his association with P-3. In exercising such right to remain silent, petitioner points out that the school administrators, as well as the Board, falsely accused him of deliberately misrepresenting facts to his principal regarding his involvement regarding the contents of P-3.

Petitioner argues that there is no credible evidence in the record of this matter which supports the reason given to him by the Board in withholding his salary increment for the 1984-85 school year pursuant to N.J.S.A. 18A:29-14.

The Commissioner cannot agree with the positions taken by petitioner herein on the following grounds:

1. As previously described herein many of the activities of the teachers who frequented the lower level teachers' room (the Dungeon) and certain of the materials contained therein were offensive to the public at large who were not entitled to enter that room. However, the facts of this matter reveal that the atmosphere and the conduct displayed in this room were equally offensive to certain other faculty staff who sought refuge from these conditions in the teachers' room on the upper level. Notwithstanding the atmosphere which unfortunately was tolerated by the Board and its administration, petitioner cannot escape responsibility for his personal actions in this matter.

2. Petitioner cannot claim that his comments written on P-3 were to remain his own private thoughts. Petitioner relinquished such right to privacy when he divested himself of P-3 which he deposited in the trashbasket used by other teachers who visited that room. It is conceivable that any other person who sought to regain material which they inadvertently threw into the trashbasket would have occasion to peruse P-3. Consequently, there was no expectation of privacy upon which he had a right to rely.

Indeed, the record establishes that another unnamed person had knowledge of P-3 and altered that document by placing petitioner's name on it. Further, petitioner's contention that such document contained his private thoughts strains credibility insofar as it is obvious that Ms. Harris obtained knowledge of it from another staff member.

That unknown person did, in fact, inform Ms. Harris, a faculty member who spent time in the upper level teachers' room, of the nature and location of P-3. Ms. Harris ultimately retrieved the document and showed it to the principal. She was, in fact, responsible for its dissemination to the community.

3. Petitioner's right to remain silent upon being interrogated by the principal in the presence of his representative about P-3 is not focal to the matter herein controverted. His refusal to comment at that time was unfortunate inasmuch as his statement could have possibly calmed the community's concerns as to the Board's actions in this matter. Unfortunately, the Board had to ascertain through a handwriting expert that petitioner was responsible for the derogatory racial comments contained thereon. Such delay in determining the authorship of P-3 exacerbated community outrage. Moreover, petitioner during the hearing process did admit as to his having made the comments, even though it is conceded that he did not sign it.

Although both parties herein argue the merits of the Board's knowledge and acquiescence of the kinds of activities which were permitted to occur in the lower level teachers' room (the Dungeon), as well as the unilateral role Ms. Harris played in the actual dissemination of the contents of P-3 to the community, the issue in controversy is the validity of the Board's reason for withholding petitioner's salary increment for the 1984-85 school. In this regard, the Commissioner finds and determines that given the factual context of this matter the Board did have a reasonable basis for taking such action. Kopera, supra

It is further found, although the specific reason given to petitioner by the Board for the withholding of his salary increment is technically deficient, it is not fatal to the action taken. In the Commissioner's judgment increment withholding for good cause is permissible pursuant to N.J.S.A. 18A:29-14 and it is determined that the Board did have a reasonable basis herein to withhold petitioner's salary increment. Accordingly, the Board is directed to expunge any reference from petitioner's personnel file which refers to the original reason given for its withholding of his salary increment.

Finally, the Commissioner cannot ignore the fact the Board through its administrators has tolerated those questionable conditions as described in the record of this matter with reference to those activities in the lower level teachers' room (the Dungeon). The school administrator's failure to take appropriate affirmative measures to hold those persons professionally accountable for their conduct in this particular faculty room has offended the sensibilities of certain other members of the faculty. These staff members were compelled to waive their right of access to that area so as not to be subject to the intolerable abuse or intimidation from those teachers whose actions have exceeded the bounds of propriety and good judgment.

Similarly, the actions of Ms. Harris, who in some manner duplicated and disseminated copies of P-3 to the community at large, cannot be ignored. The impact of her action created the understandable public furor over the racial slurs contained in that document. Certainly, based upon the evidence in the record, her actions were at best unwarranted insofar as they were taken without having provided school authorities with an opportunity for imposing some internal discipline both upon the individual involved and upon the atmosphere which prevailed in the Dungeon.

It appears, however, that Ms. Harris' precipitous conduct in this regard severely hampered the Board in effectuating internal management and control of the school district, especially as it affected its investigatory prerogative in taking disciplinary action against one of its teaching staff members and in controlling the school environment.

Ms. Harris' premature action in disseminating P-3 was unquestionably a contributing factor to the atmosphere of racial tension which emerged as a consequence of this incident. A calm, deliberate consideration of this disciplinary action by the Board might well have served to reassure the black community of the Board's determination to condemn and punish thoughtless racial slurs. Unfortunately, the Board never had this opportunity to prove its resolve without the pressure of an aroused community.

Accordingly, the findings and conclusions in the initial decision are affirmed by the Commissioner as modified above.

The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

APRIL 1, 1985

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6445-81
AGENCY DKT. NO. 321-7/81A

PATRICIA NAFASH,
Petitioner,
v.
RIDGEFIELD BOARD OF EDUCATION, BERGEN COUNTY,
Respondent.

Sheldon H. Pincus, Esq., for petitioner (Bucceri & Pincus, attorneys)

Stanley Turitz, Esq., for respondent (Gallo & Gefner, attorneys)

Record Closed: January 8, 1985 Decided: February 15, 1985

BEFORE **BRUCE R. CAMPBELL, ALJ:**

Patricia Nafash (petitioner) contends that the Ridgefield Board of Education (Board) improperly withheld her salary increment for the 1981-82 school year. She demands that the increment be reinstated and her salary be adjusted to date accordingly.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The matter was held in abeyance pending disposition of Ridgefield Bd. of Ed. v. Nafash, OAL Dkt. EDU 9459-82 (Jan. 25, 1984), adopted, Comm'r of Ed. (Mar. 12, 1984). In that matter, tenure charges against the petitioner here were dismissed.

When the present case came on, a conference of counsel was held on November 27, 1984. The parties agreed that the matter could proceed to summary judgment inasmuch as there were no disputes of essential fact. Each party was provided a list of the relevant exhibits from Ridgefield Bd. of Ed. v. Nafash, above, and each party agreed to and stipulated relevant portions of the transcript of that matter. The issue under consideration in the present case is whether the subject withholding was properly effected and, if not, to what relief the petitioner is entitled.

I.

By letter dated April 28, 1981, the petitioner was noticed that on April 16, 1981, the Ridgefield Board of Education resolved to withhold her salary increment for the 1981-82 school year. The letter states that the reasons for the action are contained in the "observations and evaluation reports" issued during the year.

The petitioner argues that the Board's withholding action was arbitrary and capricious. The authority of the Board to withhold increments is not argued. N.J.S.A. 18A:29-14 states:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within ten days, to give written notice of such action, together with the reasons therefore, 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 be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his power of 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.

This is the only authority the Legislature has given boards of education in this regard. Thus, if a board attempts to exceed such authority or fails to comply strictly with the statute, its actions will be found ultra vires. See, e.g., Gill v. Clifton Bd. of Ed., 1976 S.L.D. 661, aff'd, St. Bd., 1976 S.L.D. 666, aff'd, N.J. App. Div., Dec. 7, 1977, A-912-76.

Specifically, "the Board does not have absolute power to withhold increments for any reason or no reason, . . . " Edison Tp. Bd. of Ed. v. Edison Tp. Ed. Ass'n, 161 N.J. Super. 115, 160 (App. Div. 1978). Rather, the Board must withhold an increment on the basis of a specific, valid reason. In the present case, the reason given for the withholding was an allegation of inefficiency based on a reference to the various evaluations and observations during the year. All documentation was prepared by the then director of music.

The standards by which withholding cases are to be examined were set forth by the Appellate Division in Kopera v. W. Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). In that case, the court held that the scope of the Commissioner's review is not to substitute his judgment for that of those who had made the evaluation but to determine whether a reasonable basis existed for the evaluation. The court added:

> [W] e think the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon these facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving unreasonableness is upon the appellant. [At 296-97]

The Board also urges this tribunal to examine the statute and Kopera, above. The Board, however, draws a different conclusion. In the Board's view, the statute was drafted to give school administrators, who have the professional training and practical experience as teachers, supervisors and administrators, the broadest possible leeway, if not absolute discretion, to make such a professional determination.

Whether the record supports the petitioner's allegation of hostility and uncooperativeness on the part of the former director of music is not the issue. The Office of Administrative Law must inquire as to whether there existed a reasonable basis for the evaluation.

The Board believes the record indicates that there is such a basis. The petitioner was observed and evaluated by a qualified administrator. He used the procedures and criteria set forth in a district-wide evaluation policy. As a result, the petitioner was evaluated in the same manner as every other faculty member in the district. The evaluations provide the basis of a specific valid reason for the Board's decision to withhold the petitioner's increment. In order for this tribunal to find

otherwise, the petitioner would have to demonstrate that no observations were ever conducted or that the record of the observations is inaccurate, unfair or biased. The petitioner has done neither and, as a result, this tribunal must find that the Board, in withholding the petitioner's increment, acted in good faith and in compliance with N.J.S.A. 18A:29-14, above.

II.

It is not controverted that the Board relied solely on observations and evaluations prepared by the former director of music. In the tenure matter, above, the charges against the petitioner here were dismissed on the basis that the Board's evidence, based primarily on the music director's testimony and evaluations, lacked credibility. The initial decision stated, in pertinent part:

> What emerges from the whole record . . . is the lack of credibility of the music director. And since he was the maker of the observations and evaluations presented in major support of the charges he drew, the truthfulness of these is cast in doubt also. [emphasis added]
>
> . . . .
>
> It is possible that a teacher suddenly may lose the ability to perform effectively. It also is possible that a conflict of personalities suddenly may produce a spate of negative evaluations. I am convinced that the latter is the case here.
>
> Considering testimonial demeanor in general and contradictions, admissions and examples of selective recall in particular, I cannot credit the music director's testimony. Mayflower Securities v. Bureau of Securities, 64 N.J. 85, 92-3 (1973), citing Close v. Kordulak Bros., 44 N.J. 589, 599 (1965).
>
> The documentary evidence before me is not persuasive after hearing the testimony of the music director.
>
> [at 8-9]

Each of the evaluations and observations relied on for the withholding was considered and discredited during the course of the tenure matter.

Although the petitioner raises other points, I do not find it necessary to address them. The observations and evaluations that were the basis for the withholding in this matter have been discredited. Although this tribunal does not ordinarily reach behind

such observations and evaluations in withholding matters on the sound premise that withholding cases are not mini-tenure trials, the present case is a special circumstance. In a collateral matter in which no exceptions were filed to the initial decision, the administrative law judge found, and the Commissioner affirmed, that the testimony and evidence presented therein were not credible. It defies common sense that the discredited evidence may somehow be rehabilitated for the purposes of withholding an increment.

III.

Having considered the whole record in this case, particularly those observations and evaluations pertinent to the 1980-81 school year, I **FIND** and **CONCLUDE** that the subject increment withholding was not reasonably based on fact. Kopera, above. Although the evidence, on its face, could establish a reasonable basis for a withholding, it has been discredited in a collateral matter.

Accordingly, it is **ORDERED** that the Ridgefield Board of Education reinstate the increment withheld from Patricia Nafash for the 1981-82 school year and it is further **ORDERED** that the Board adjust her salary and her Teachers' Pension and Annuity Fund account for that year and each subsequent year.

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

15 FEBRUARY 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

2/20/85
DATE

Seymour Weis
DEPARTMENT OF EDUCATION

Mailed To Parties:

2/22/85
DATE

Elizabeth J. Lazzara Esq
OFFICE OF ADMINISTRATIVE LAW

bc

PATRICIA NAFASH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law in the form of summary judgment have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

The Board takes exception to the summary decision rendered by the Office of Administrative Law, objecting to the judge's treating the matter as a special circumstance and asserting that he conducted the matter as a "mini-tenure trial." (Board's Exceptions, at p.1) It contends that the judge substituted his judgment for that of the judgment of the licensed administrator who observed and evaluated petitioner. It further argues that the fact the judge dismissed the charges against petitioner in a separate matter involving the parties herein should not have been considered in the instant matter because the burdens of proof and issues were totally different in the prior matter.

More specifically, the Board contends that, in view of the fact that there were stipulations agreeing to submit this matter to summary judgment, the only issues to be considered were the evaluations and observations themselves and the testimony of the Petition itself. It further avows that, when applying Kopera, supra, it has sustained its burden of proof and its action to withhold petitioner's increment should be supported based upon the evaluation and observation of its licensed administrator. To do otherwise would be to allow substitution of the Office of Administrative Law's judgment for that of the Board's expert administrator.

Upon review of the record and exceptions filed in this matter, the Commissioner is in agreement with the Office of Administrative Law's analysis, findings, conclusions and recommended decision ordering the Board to reinstate petitioner's increment. In the Commissioner's judgment it is clear that the judge was fully cognizant of the standard of review articulated in Kopera, supra, and he appropriately applied that standard.

The judge had a responsibility pursuant to Kopera to determine whether the underlying facts were as those who made the evaluation claimed and to ascertain whether it was unreasonable for the Board to conclude that petitioner's increment warranted withholding. As recited in the Board's exceptions, the parties submitted this matter for summary judgment and the only matters put

forth by the Board to be considered were the evaluations and observations of its administrator who conducted them. No other bases for the withholding were advanced by the Board.

In the Commissioner's judgment it was appropriate for the judge to look to the prior matter adjudicated before the Commissioner which specifically examined the selfsame evaluations and observations under review in the instant matter. In view of the fact that the evaluations and observations relied on for the withholding were examined and discredited in the prior matter, it is clearly appropriate that the judge concluded the increment withholding was not reasonably based on fact given that these evaluations and observations constituted the sole bases for the Board's action. To have disregarded the lack of credibility determination in the prior matter would have been unreasonable and improper. Further, the Commissioner agrees with the judge's statement that "***It defies common sense that the discredited evidence may somehow be rehabilitated for the purposes of withholding an increment." (Initial decision, ante)

Accordingly, in the absence of any reasons other than the evaluations upon which there can be demonstrated a reasonable basis for the increment withholding, it is the determination of the Commissioner that petitioner has successfully borne her burden of proof that the Board's action in withholding her increment was unreasonable. Therefore, he affirms and adopts as his own the recommended order to reinstate the withheld increment for 1981-82 and that petitioner's salary and Teachers' Pension and Annuity Fund account for that year and each subsequent year be adjusted.

COMMISSIONER OF EDUCATION

APRIL 8, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5940-84
AGENCY DKT. NO. 292-7/84

THOMAS S. MARSHALL,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,
Respondent.

Wayne J. Oppito, Esq., for petitioner (New Jersey Principals and Supervisors Association)

Andrew J. Wilson, Esq., for respondent (Laird & Wilson, attorneys)

Record Closed: January 8, 1985 Decided: February 22, 1985

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

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Township of Neptune (Board), alleges, among other things, that the Board failed and/or refused to recognize petitioner's superior seniority service in the school district when the Board abolished a position of assistant principal and assigned someone other than petitioner to a remaining position as assistant principal. Petitioner seeks to be reinstated to his former position. The Board, by way of answer, asserts that its actions were legal, lawful and pursuant to its own stated policy; therefore, it demands that the petition be dismissed.

On August 8, 1984, the Commissioner of Education transmitted the instant matter to the Office of Administrative Law for determination as a contested case,

pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 22, 1984, at which time the parties agreed to the issues to be determined by this tribunal. The parties further agreed that there were no material facts in dispute and cross-moved for summary disposition. The matter is now ripe for such disposition based upon the briefs of counsel, stipulated facts and exhibits submitted by the parties. The last submission was received by this court on January 8, 1985, which date constitutes the closing date in the matter.

ISSUES

The agreed-upon issues to be determined by this court are set forth below as follows:

1. Whether the Board violated its own policy, No. 4001, when it determined that petitioner was less senior than the individual it retained in the position of assistant principal as a consequence of a reduction in force?

2. In the alternative, did the Board have an affirmative duty to retain petitioner in the position if it is determined that petitioner and the individual retained, had equal seniority?

3. Whether the determination of seniority entitlement between petitioner and the assistant principal retained in position was pursuant to N.J.A.C. 6:3-1.10(c)?

4. Whether the assistant principal retained can be credited with military service credit for seniority purposes?

STIPULATION OF FACTS

The parties mutually stipulate to the following facts:

A. Petitioner and Daniel Edelson are tenured High School Assistant Principals, both having been appointed on September 1, 1973.

B. Petitioner and Daniel Edelson are both tenured teachers in the district.

C. Petitioner, Thomas Marshall was a teacher in the Junior High School from 1959 to 1973 and a Senior High School Vice Principal (10 months) from 1973 through 1984.

D. Daniel Edelson was a teacher from 1957 to 1960 and from 1963 to 1973 and a Senior High School Vice Principal (10 months) from 1973 through 1984.

E. Daniel Edelson has two years of military service.

F. Student demographics for High School Staff demographics for District.

G. Plan for Affirmative Action Employment-Contract Practices

PROCEDURAL HISTORY

In preparing its budget for 1984-85 school year, the Board determined that it was necessary, because of budgetary constraints and declining enrollments, that one of the three positions of senior high school assistant principal be abolished. On or about April 25, 1984, respondent Board abolished a position of assistant principal at Neptune Senior High School, effective for the 1984-1985 school year. At that time, there were three assistant principals assigned to the school. Joseph Ryan commenced employment in that position on February 1, 1971. Thomas Marshall, the petitioner, and Daniel Edelson both commenced employment on September 1, 1973.

Petitioner Marshall's years of employment in the Neptune School District consisted of 14 years as a teacher, 1959 to 1973, and 11 years as a high school assistant principal, for a total of 25 years. Daniel Edelson's years of employment in the Neptune School District consisted of 13 years as a teacher, 1957 to 1960 and 1963 to 1973, and 11 years as a high school assistant principal, for a total of 24 years. Edelson had also served two years' active duty in the United States Army from July 24, 1953 to June 10, 1955.

Respondent has in place a Board Regulation No. 4001, which concerns abolition of position and reduction in force. Regulation No. 4001 provides that when two or more teaching staff members have equal seniority in a category, the first criterion for breaking the tie is total years of experience in Neptune.

The Board concluded that since both Edelson and petitioner had the same seniority as assistant principals, seniority should be determined according to Board Regulation No. 4001 and N.J.A.C. 6:3-1.10. The Board accorded Edelson two years' seniority for military service, pursuant to N.J.A.C. 6:3-1.10 which, when added to his

thirteen years of previous service within the district and eleven years as an assistant principal, provided him a total of twenty-six years' seniority.

PRELIMINARY FINDINGS OF FACT

The pupil population of the Neptune Senior High School is composed of approximately 50 percent minority pupils. Petitioner was the only minority administrator assigned to Neptune Senior High School. The Board has in place its own Affirmative Action Plan.

LEGAL ARGUMENTS OF THE PARTIES

PETITIONER'S ARGUMENTS

At Point I, petitioner complains that the Board violated its own Regulation No. 4001 when it failed to grant petitioner greater seniority in the category of high school assistant principal than it granted Edelson. The Board's policy concerning a reduction in force states, in pertinent parts, as follows:

Section C

> All tenured staff members will be considered for reduction pursuant to N.J.S.A. 18A:28-9 et seq., and the N.J. Administrative Code 6:3-1.10. Should it be necessary to select from two or more tenured staff members, having the same job entitlement, the choice shall be made by utilizing the criteria in B-3 and B-9 of this regulation.

Section B-3 states:

> In the event a choice must be made between two or more teachers at the same level, the following list of criteria will be utilized. Item "a" will be considered first and each succeeding item as necessary until the tie is broken:
>
> a. Past experience (Neptune)
> b. Past experience (Total)
> c. Evaluations (instructional year-end)
> d. Certification
> e. Degrees
> f. Evaluations (other)
> g. Activities

Petitioner asserts it is well established in school law that when a board policy does not contravene the law, it is a valid policy and accordingly, a board of education is bound by that policy. See: Applegate v. Freehold Reg. High School Dist. Bd. of Ed., 1969 S.L.D. 56; Shifrinson v. Marlboro Tp. Bd. of Ed., 1984 S.L.D. _____, decided, Comm. of Ed. (June 4, 1984). Petitioner contends that the Board recognizes that its Regulation No. 4001 is a validly adopted policy. Petitioner recognizes, moreover, that N.J.A.C. 6:3-1.10 does not provide for a procedure for determining seniority when teaching staff members have equal amounts of service in a category. However, respondent adopted Board Regulation No. 4001, which expressly provides for a tie-breaking procedure when two or more teaching staff members have equal seniority in a category. The first criterion to be considered in breaking a tie between petitioner and Edelson is found at Section B-3 a. "Past experience (Neptune)."

It is uncontroverted and stipulated that petitioner has a total of 25 years of experience in Neptune. It is equally uncontroverted and stipulated that Edelson has 24 years of experience in Neptune. The controversy is that respondent added two years of credit to Edelson's seniority for military service. Edelson served in the United States Army from July 24, 1953 to June 10, 1955. He commenced employment in Neptune on or about September 1, 1957, more than two years after he left the Army.

Petitioner observes that the Commissioner of Education has recently decided the issue of applying military service time for seniority. In Andrew T. Corrado v. Newfield Bd. of Ed., 1984 S.L.D. _____, decided, Comm. of Ed. (May 24, 1984), the Commissioner determined that:

> The specific provisions of R.S. 18:13-19, now N.J.S.A. 18A:28-12, as related to the acquisition of seniority and the seniority rights of tenured teaching staff members may only be construed to grant accrued seniority to tenured teaching staff members who were required to serve in the armed forces after September 1, 1940, provided they previously enjoyed a tenure status in the Board's employ which was subsequently interrupted by being called into the armed forces of this State or the United States. [emphasis added; at 38]

Petitioner contends that in the case sub judice Edelson served in the Army from 1953 to 1955. He did not commence employment in the Neptune School District until 1957. Is is obvious that his military time did not interrupt his tenure status in the school district. Thus, in accordance with the Commissioner's decision in Corrado,

Edelson's years of military service do not qualify him for an equal amount of seniority credit in the Neptune School District inasmuch as his service was rendered prior to the time he commenced employment with the Board and without his first having acquired tenure in the school district, pursuant to N.J.S.A. 18A:28-5, or seniority protection pursuant to N.J.S.A. 18A:28-12.

Petitioner asserts that Edelson may claim as a matter of seniority only those 24 years of tenured employment service rendered to the Board. Petitioner, by virtue of his 25 years of seniority, is more senior to Edelson, pursuant to N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10(c) as amended.

The Commissioner noted in Corrado at 40 that:

> Moreover, to the extent that this determination is contrary to the prior decision rendered by the Commissioner in Lang, supra., that decision is hereby overruled.

Petitioner asserts that under the current interpretation of the law, Edelson is not entitled to add military time to his years of seniority. Therefore, petitioner clearly has greater seniority than Edelson and respondent has violated its own Board policy by retaining Edelson instead of petitioner.

At Point III, petitioner contends that the Board has an affirmative duty to retain petitioner in the position of high school assistant principal in accordance with N.J.A.C. 6:4-1.1 et seq. and its own Affirmative Action Plan (AAP).

Petitioner observes that N.J.A.C. 6:4-1.1 et seq. is the section of the New Jersey State Board of Education's regulations concerning "Equality in Educational Programs." Pursuant to N.J.A.C. 6:4-1.9, disputes arising from these regulations may be resolved by the Commissioner of Education. The regulations provide at N.J.A.C. 6:4-1.3 that each local school district shall develop a policy of equal educational opportunity and an affirmative action plan. In compliance with the regulations, respondent has adopted such a policy and plan. One of the intents of respondent's plan is: "To establish goals for increasing the number of women and minority group members in various job categories when deficiencies presently exist."

Petitioner asserts that an objective of the Board in developing its plan is:

> Where disparity in minority and female employment is evident, recruitment and employment of qualified personnel to alleviate and eradicate condition will be implemented.
>
> e.g.
> Data on criteria for representation in work force shows need for minority administrators, professional staff and office and clerical staff.

Petitioner observes that in the plan's summary, the Board states:

> Neptune Township Public School System is determined to improve its representation of women and minorities where an analysis of appropriate availability pools indicates that we are presently under utilizing these personnel resources. . . .
>
> Further, we acknowledge that decisions involving recruitment, hiring, and retention of minorities and women must recognize that the primary obligation of the Neptune Township Board of Education and its school system must be to meet the needs of the student body and the needs of the school system.

Petitioner argues that in view of the above, it is clear that the Board has an affirmative duty to retain petitioner as a high school assistant principal in accordance with N.J.A.C. 6:4-1.1 et seq. and its own AAP.

In the pleadings, it is acknowledged that the student population of Neptune Senior High School is 50 percent minority and that petitioner was the only minority administrator assigned to the school. Petitioner argues that pursuant to Board Regulation No. 4001, petitioner was entitled to be retained over Edelson (Point I). However, in the alternative, at best, Edelson has only equal seniority with petitioner in the category of high school assistant principal. In this situation where two teaching staff members have equal seniority, it is arbitrary and unreasonable for the Board to retain a white male instead of an equally qualified minority person, especially in view of the school district's goals and objectives in its AAP.

Furthermore, observes petitioner, the Board acknowledges that in the retention of minority staff persons, its primary obligation is to meet the needs of the student body—what better way to meet the needs of the student body than to provide a

role model for minority students of a respected minority professional in a position of authority. Petitioner was the role model for the minority students at Neptune Senior High School and the Board violated N.J.A.C. 6:4-1.1 et seq. and its own AAP by not retaining petitioner in that position.

For all the foregoing reasons, petitioner, Thomas Marshall, respectfully requests that it be recommended to the Commissioner of Education that respondent Board be ordered to recognize that Thomas Marshall has greater seniority than Daniel Edelson in the category of high school assistant principal.

THE RESPONDENT BOARD'S ARGUMENT

The Board acknowledges its Regulation No. 4001 and states that it followed its own policy by granting both petitioner and Edelson credit for previous years of service within the school district. Section C. Also, the Board in relying on the plain language contained in N.J.A.C. 6:3-1.10, credited Edelson's previous years of service in the school district with two additional years of seniority for military service. This additional credit afforded Edelson was, the Board argues, pursuant to the Administrative Code regulations then in full force and effect, pursuant to N.J.A.C. 6:3-1.10(c). The regulation in its clear and unambiguous language provided:

> (c) In computing length of service for seniority purposes full recognition shall be given to previous years of service within the district and the time of service in or with the military or naval forces of the United States or this State, pursuant to the provisions of N.J.S.A. 18A:28-12. [emphasis added]

The Board observes that the above-cited regulation had just been amended and had become effective September 1, 1983. Prior to this time the regulation did not provide for crediting time of military service in computing seniority. The 1983 amendment added paragraph (c), quoted above, which specifically provided that time of service in the military or naval forces should be recognized in computing length of service for seniority purposes. The amendment, a complete change from the previous regulation, left no doubt that credit for military service was intended to be counted when determining seniority and emphasis was placed on this intent by the addition of paragraph (c) to the regulation.

The Board further observes that in addition to the Administrative Code Regulations, the state of the decisional law with respect to the issue of whether military service in the armed forces should be credited for seniority purposes was enunciated by the Commissioner in Lang v. Bd. of Ed. of Princeton, 1979 S.L.D. 245 and Howley v. Bd. of Ed., Tp. of Ewing, 6 N.J.A.R. 509 (1982).

Military credit is given under two statutes, N.J.S.A. 18A:29-13 in relation to salary benefits and N.J.S.A. 18A:28-12 in relation to seniority. There have been many Commissioner's decisions dealing with seniority; all except the above cases addressed the issue of seniority under the salary statute, N.J.S.A. 18A:29-11. The distinction was clearly made in Howley, where the administrative law judge wrote as follows:

> In fact, veterans are entitled to credit for years served in the military for purposes of calculating seniority, but the relevant statutory source of such benefits is not the salary statute cited by the Petitioner but a tenure statute N.J.S.A. . . . . 18A:28-12 . . . [emphasis added; at 531]

In the Howley case, Mr. Howley had seven years' seniority in the position of high school vice principal; the other high school vice principal, Mr. Bookholdt, had nine-and-one-half years' experience. It was Howley's contention that his four years of military credit should be added to his seven years of seniority as a high school vice principal, giving him more seniority than Mr. Bookholdt. The Commissioner decided that his position was without merit since the military credit can be added only to a category in which he held employment when he first obtained tenure, that of secondary school teacher (English).

The Board asserts that in determining Edelson's seniority, the Board in the instant case did not give Edelson credit for his military service entitlement in the category of high school assistant principal, where both he and Marshall had the identical term of service. Edelson's military credit was added only when, in order to break the tie, Board Regulation No. 4001 was employed together with N.J.A.C. 6:3-1.10, and both parties' previous years of service in the district were taken into consideration.

The Board contends that Edelson, as Howley, was a veteran with two years of military service entitlement. He was entitled to have the two years added to the

category in which he had held employment when he first obtained tenure, that being a high school teacher. Therefore, by giving Edelson seniority credit for thirteen years plus two years of military service in relationship to his previous years of service within the district, he would be entitled to twenty-six years of seniority entitlement, when his eleven years of service as an assistant principal was included.

The Board's determination of Edelson's entitlement was done in strict accordance with the state of the law as promulgated by Howley. At the time the Board made its decision Howley was the latest prevailing case law interpreting N.J.S.A. 18A:28-12. Howley stood for the proposition that military credit could not be applied to each succeeding category to which an employee advanced, but it clearly held that in calculating Howley's seniority rights his years of military credit should be counted:

> Petitioner Howley is, therefore, entitled to have his years of military service added to his years of employment by respondent for purposes of calculating seniority rights. This entitlement arose on the first day he acquired a tenure status in the district, approximately 15 years ago. [emphasis added; at 532]

In Lang, the Commissioner was concerned solely with the applicability of military service in determining the seniority status of a teaching staff member. The Commissioner addressed the issue as a matter of first impression. In Lang the board did not grant the tenured petitioner with his period of military service in determining his seniority status. The Commissioner in interpreting N.J.S.A. 18A:28-12 held that the statute was clear and unambiguous and directed the board to fix the seniority status of the petitioner by adding his two years of military service to his total years of teaching service in the respondent's district. This was the state of the case law in April 1984 when the Board in the instant matter made its decision.

Corrado was decided on May 24, 1984, and specifically overrules Lang. For the first time the Commissioner chose to go beyond the language of the statute as originally enacted as R.S. 18:13-19 and to interpret the statement attached to the amendment. This statement indicates that the purpose of the bill is to provide that teachers who are serving in the military service not lose seniority upon resuming service in the district. By applying this statement in interpreting N.J.S.A. 18A:28-12, the Commissioner held that the specific provisions of N.J.S.A. 18A:28-12:

> . . . as related to the acquisition of seniority and the seniority rights of tenured teaching staff members may only be construed to grant accrued seniority to tenured teaching staff members who were required to serve in the armed forces after September 1, 1940, provided they previously enjoyed a tenure status in the Board's employ which was subsequently interrupted by being called into the armed forces of this State or the United States. [emphasis added; at 38]

The Board asserts that the Commissioner's statement obviously developed a new legal rule that constituted a significant change in the law.

The Board asserts that from a practical and academic approach, when considering the specific factual situation in Corrado, one cannot argue with the Commissioner's decision. The factual situation was, to say the least, unique. The petitioner, Mr. Corrado, was a tenured teacher with four years of experience. His job was being abolished and a teacher with ten years of experience in the district was the other candidate for the lone job that would remain. However, Mr. Corrado had completed one career as a member of the armed forces of the United States, having served for twenty years, and it was his position that, under N.J.S.A. 18A:28-12, he was entitled to twenty years of military service credit, plus his four years of teaching seniority for a total of twenty-four years' seniority.

The Commissioner refused to interpret the statute which would have the analogous result "of a 20 year career serviceman with four years of teaching obtaining seniority preference over a person whose entire career had been spent in the education service" (at 40).

The Commissioner was aware of the effect of his decision and in concluding he states as follows:

> In rendering the determination herein, the Commissioner is mindful of the consequences of this decision upon the seniority entitlement of those teacher veterans whose careers, while not interrupted were perhaps delayed in being launched by virtue of time spent in service. In the Commissioner's view such justifiable recognition of military service contributions may and should be accomplished through statutory modification which could accord seniority entitlement to veterans for up to four years of service to the same degree as is accorded for salary purposes by N.J.S.A. 18A:29-11. [emphasis added; at 40]

It is clear that the Commissioner is mindful of the effect that his decision will have on the prior state of the law and that it constitutes a significant change in the law. Yet the Commissioner was constrained to reach this decision in order to avoid the analogous result which he referred to in his decision.

It is the Board's position that the decision made by respondent in April 1984 was made based on the state of the law at that time and in reliance of the rules established in prior case law. While since May 24, 1984, Corrado has been the controlling case law, the Board submits that the decision in Corrado should have only prospective application.

The Commissioner in Corrado did not state that the decision was to be prospective only. However, the Supreme Court has consistently declined to apply a new legal rule retrospectively when it constitutes a significant change in the law.

The Board observes that our Supreme Court in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) at 82 stated:

> We have previously declined to apply a new legal rule retrospectively when it constitutes a "significant change in the law." Merenoff v. Merenoff, 76 N.J. 535, 560 (1978). This policy rests in a perceived unfairness to parties that have acted in reliance on the rules established in prior case law. See: Ramirez v. Amstead Industries, Inc., 86 N.J. 332, 357 (1981).

As the Commissioner specifically overruled Lang and by implication Howley in the Corrado decision, the Supreme Court in Spiewak overruled the decision in Pt. Pleasant Beach Teachers Ass'n. v. Bd. of Ed. of Borough of Pt. Pleasant, 173 N.J. Super. 11 (App. Div. 1980). The Court at 83 stated:

> One can hardly imagine a clearer case of a clean break in the law than disapproval of a court decision that has been followed by state agencies. We therefore conclude that his decision should have only prospective application to those parties who are not before the Court.

The Board argues that it would be fundamentally unfair for this court to apply the new interpretation of N.J.S.A. 18A:28-12 as enunciated in Corrado to a decision that was made by this respondent at least a month prior to the Corrado decision and which was

based on the case law as enunciated in Lang and Howley and the plain language of N.J.A.C. 6:3-1.10.

In Merenoff v. Merenoff, 76 N.J. 535, 560 (1978), the application of the holding was made prospective "in view of the significant change in the law" represented by the decisions in these cases. In Ramirez v. Amstead Ind., Inc., 86 N.J. 332, 357 (1981), the Supreme Court concluded that as a matter of fundamental fairness the benefit of the rule adopted in these cases should be extended to others similarly situated only if they had suits which were in progress on the date of the Appellate Division decision.

While the Board does not urge a different result in Corrado, it does urge that the application of Corrado, in fundamental fairness to respondent, be applied prospectively.

PETITIONER'S ARGUMENT WITH RESPECT TO
THE APPLICATION OF CORRADO

Petitioner contends that the Board's argument that Corrado should be applied prospectively is self-defeating in that Corrado was decided by the Commissioner on May 24, 1984. Petitioner continued in his assignment as high school assistant principal until June 30, 1984. Respondent's reduction in force and petitioner's corresponding reassignment did not become effective until September 1, 1984. The reduction in force did not become effective until more than three months after the Commissioner's decision in Corrado.

Petitioner further contends that respondent's agent, the superintendent of schools, had actual notice of the Commissioner's decision in Corrado immediately after the decision was made, and respondent had sufficient opportunity to rescind its April 25, 1984 resolution and to adopt a successor resolution in accordance with the Commissioner's decision in Corrado.

Petitioner was still employed as a high school assistant principal when the Commissioner's decision in Corrado was rendered. Respondent had a duty to continue to employ petitioner in that capacity in accordance with that decision. Respondent, of its own volition, opted to maintain its original resolution. Respondent cannot now argue that its erroneous determination of petitioner's seniority entitlement could not be corrected

prior to the filing of the petition in this matter with the Commissioner's office on July 10, 1984. The matter sub judice is clearly initiated subsequent to the Corrado decision and is controlled by that decision.

DISCUSSION

I

The issues to be addressed in this portion of the discussion include those set forth hereinbefore under numbers 1, 3 and 4.

Both petitioner and Edelson were, with their respective consents, transferred and promoted from positions as tenured classroom teachers to positions as high school assistant principals effective the same date, September 1, 1973, and, thus, both acquired tenure status in the assistant principal positions on September 1, 1975. N.J.S.A. 18A:28-6. Subsequently, and as a consequence of the Board's 1984-85 budget constraints, the Board determined to eliminate one assistant principal position by way of a reduction in force. When such an event is triggered, the applicable statutes under Education Laws, New Jersey Revised Statutes, are called into play for the Board's consideration and determination as follows:

> 18A:28-10. Reasons for dismissals of persons under tenure on account of reduction
>
> Dismissals resulting from any such reduction shall not be made by reason of residence, age, sex, marriage, race, religion or political affiliation but shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board.
>
> 18A:28-11. Seniority; board to determine; notice and advisory opinion
>
> In the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status, and the board may request the commissioner for an advisory opinion with respect to the applicability of the standards to particular situations, which request shall be referred to a panel consisting of the county superintendent of the county, the secretary of the state board of examiners and an assistant commissioner of education designated by the commissioner and an advisory opinion shall be furnished by said panel. No determination of such panel shall be binding upon the board of education or any other party in interest or upon the commissioner or the state board

if any controversy or dispute arises as a result of such determination and an appeal is taken therefrom pursuant to the provisions of this title.

18A:28-12 Dismissal of persons having tenure on reduction; reemployment

If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service, 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.

18A:28-13. Establishment of standards of seniority by commissioner

The commissioner in establishing such standards shall classify insofar as practicable the fields or categories of administrative, supervisory, teaching or other educational services and the fields or categories of school nursing services which are being performed in the school districts of this state and may, in his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole, or both.

Pursuant to the Legislature's mandate in N.J.S.A. 18A:28-13 above, the New Jersey State Board of Education adopted "Standards for determining seniority," N.J.A.C. 6:3-1.10, which became operative September 1, 1983, and which provides, in pertinent part, as follows:

(a) The word "employment" for purposes of these standards shall also be held to include "office" and "position".

(b) Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. The periods of unpaid absences not exceeding 30 calendar days aggregate in one academic or calendar year, leaves of absence at full or partial pay and unpaid absences granted for study or research shall be credited toward

seniority. All other unpaid absences or leaves of absence shall not receive seniority credit.

(c) In computing length of service for seniority purposes full recognition shall be given to previous years of service within the district and the time of service in or with the military or naval forces of the United States or this State, pursuant to the provisions of N.J.S.A. 18A:28-12.

(d) Employment in the district prior to the adoption of these standards shall be counted in determining seniority.

. . . .

(h) Whenever a person shall move from or revert to a category, all periods of employment shall be credited toward his or her seniority in any or all categories in which he or she previously held employment.

(i) Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority.

. . . .

(k) In the event of his or her employment in some category to which he or she shall revert, he or she shall remain upon all the preferred eligible lists of the categories from which he or she shall have reverted, and shall be entitled to employment in any one or more such categories whenever a vacancy occurs to which his or her seniority entitled him or her.

(l) The following shall be deemed to be specific categories but not necessarily numbered in order of precedence:

. . . .

11. High school vice-principal or assistant principal.

In addition to the above-stated statutory and regulatory provisions, the Board also had in place a policy for further consideration of an employee's status subject to a reduction in force. The Board's Regulation No. 4001 provides, among other things, a mechanism for the Board's consideration in selecting one tenured employee over another where both have been employed in the district for the same number of years. The Board's Regulation No. 4001 does not conflict with the above-cited statutes and regulations except to the extent that the policy makes no provision for the recognition of previous military service time to be credited to an employee who so served, in computing the length of service for seniority purposes as then required by N.J.A.C. 6:3-1.10(c).

The prior military service credit recognition for seniority purposes under N.J.A.C. 6:3-1.10(c) had support by way of decisional law enunciated by the Commissioner in Lang and Howley when the Board, on April 25, 1984, was confronted with the problem as to which of the two employees, petitioner or Edelson, had the greater seniority. Placing all of the factors into their proper prospective—the applicable statute, Regulation No. 4001—the Board reasoned that N.J.A.C. 6:3-1.10(c) was mandatory, had greater weight than its Regulation No. 4001, and, thus, credited Edelson with two additional years' seniority over petitioner as a consequence of Edelson's prior military service.

Petitioner has failed to carry his burden with respect to the Board's action on April 25, 1984, that the Board was in error or that it was arbitrary, capricious and/or unreasonable in concluding that Edelson had greater seniority over petitioner. I **CONCLUDE**, therefore, that the Board acted properly and in accordance with law in crediting Daniel Edelson with 26 years' seniority. I further **CONCLUDE** that Edelson's 26 years' seniority was greater than petitioner's 25 years' seniority and, accordingly, subjected petitioner to the reduction in force in the position of assistant principal.

I **CONCLUDE** that petitioner's argument that retrospective effect of Corrado should be given in the instant matter is without merit. The Board made its determination on April 25, 1984, based upon applicable statutes and existing administrative regulations supported by decisional law. Essex Co. Welfare Bd. v. Klein, 149 N.J. Super. 241, 247 (App. Div. 1977). Subsequently, on May 24, 1984, the Commissioner announced his decision in Corrado in which, among other things, the Commissioner explicitly overruled Lang. Petitioner contends that subsequent to the Commissioner's announcement of Corrado, the Board was obliged to reconvene and reconsider its duly authorized decision of April 25, 1984.

I **FIND** no merit in petitioner's argument. The most recent and leading decision with respect to the application of retrospective or prospective treatment of a new legal rule is found, as the Board observed, in Spiewak. Our Supreme Court held there that when such a significant change in law occurs, it will be applied prospectively in fairness to those who acted in reliance upon the rules established in prior case law. Spiewak at 82. I **CONCLUDE** that under this judicial rule, the Board herein acted in good faith and in reliance upon prior Commissioner's decisions and, therefore, was or is under no duty to reconsider its action of April 25, 1984.

II.

With respect to petitioner's allegation that the Board was in violation of N.J.A.C. 6:4-1.1 et seq. and its own AAP by not retaining petitioner in the position as assistant principal, it is noted here that there has been no showing by petitioner that the Board's action to abolish petitioner's position was motivated by race, color, creed, religion, sex or national origin. Nor has petitioner demonstrated, in any manner, that he was the subject of discrimination, in violation of N.J.S.A. 10:5-1 et seq., or of disparate treatment by the Board because of his race. The record clearly reflects that the Board abolished petitioner's position in reliance on and pursuant to statutory, regulatory and decisional law then extant. The record herein reveals that in the 1983-84 school year the Board employed a total of forty-one full-time administrators/supervisors, six of whom were black and nine of whom were female (Exhibit A). It is apparent, therefore, that the Board was and is in compliance with N.J.A.C. 6:4-1.6 and its own AAP by providing "equal access to all categories of employment" in its public education system.

Given the tenure statutes and seniority regulations existing on April 25, 1984, and notwithstanding the fact that petitioner was the only black administrator in the senior high school, which had a black pupil enrollment of approximately 50 percent in 1983-84 (Exhibit A), it is not the provenance of this court to vitiate the Board's legitimate action in petitioner's favor. Thomas v. Morris Twp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965) aff'd. o.b. 46 N.J. 581 (1966). Consequently, I **CONCLUDE** that petitioner's assertions and allegations that the Board was in violation of N.J.A.C. 6:4-1.6 et seq. and its own AAP are without basis in fact or law and, therefore, must be **DISMISSED.**

Accordingly, I **CONCLUDE** that petitioner Thomas S. Marshall has failed to prove, by a preponderance of the reliable and credible evidence, that the Board of Education of the Township of Neptune was in any manner or fashion arbitrary, capricious or unreasonable when it took its action to abolish petitioner's position as assistant principal and subjected him to a reduction in force.

Accordingly, it is hereby **ORDERED** that the herein Petition of Appeal be and is hereby **DISMISSED.**

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

22 February 1985
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

2/28/85
DATE

Seymour Weis
DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 27 1985
DATE

Ronald L. Parker/jeb
OFFICE OF ADMINISTRATIVE LAW

bc/e

THOMAS S. MARSHALL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a and b. Reply exceptions were received from the Board beyond the date of extension granted.

Petitioner argues that the judge erred when concluding that Corrado, supra, does not apply in the instant matter because the Board made its determination on April 25, 1984 and the Corrado decision was not made by the Commissioner until May 24, 1984. He contends that, contrary to the judge's determination, he was not seeking retrospective application of Corrado in that he filed his Petition of Appeal in accordance with the procedures set forth in N.J.A.C. 6:24-1.2 which was nearly two months after that decision was issued. Further, the effective date of his reassignment was not until September 1, 1984, more than three months after Corrado.

At issue herein is the applicability of Corrado when reviewing the Board's actions with respect to petitioner's reassignment from his assistant principal's position. It is clear that, on the basis of Corrado, petitioner has greater seniority than Mr. Edelson because Edelson's military service does not meet the conditions for seniority accrual articulated in that decision. It is likewise clear, however, that, at the time the Board resolved not to issue petitioner a contract for the 1984-85 school year as an assistant principal due to a reduction in force (Exhibit C), it acted in accordance with the case law prevailing at that time with respect to military service and seniority as required by N.J.A.C. 6:3-1.10. Does this then mean that the Board had no responsibility to reconsider its action when Corrado was rendered by the Commissioner and to correct its action, if warranted? The Commissioner believes that the Board did have such a responsibility for the following reasons.

At the time Corrado was rendered, the reduction in force had not been implemented, the effective date being the 1984-85 school year. Both petitioner and Edelson were still employed as

assistant principals. In addition, petitioner's appeal was filed with the Commissioner post Corrado and within the timelines prescribed by N.J.A.C. 6:24-1.2.

In the Commissioner's judgment, common sense and the principles of fair play and equity dictated that the Board review its action once Corrado was rendered to determine if that action was correct in view of the fact that the reduction in force was not effectuated until the subsequent school year. Corrado is quite clear and unambiguous with respect to the conditions under which military service is to be applied for seniority purposes; therefore, the Board had direct knowledge that its seniority determination was erroneous well in advance of the effective date of the reduction in force. As such, the Commissioner cannot in good faith support the judge's determination in this matter that the Board was under no duty to reconsider its action of April 25, 1984. A board's action is not cast in stone and can be rescinded for good cause in order to correct an erroneous determination.

Accordingly, it is the Commissoner's conclusion that petitioner has greater seniority than Mr. Edelson, having accrued 25 years of total seniority in the Neptune district as opposed to Edelson's 24 years as dictated by Corrado, supra. Therefore, it is ordered that petitioner be reinstated to the assistant principal position immediately and that he be provided with any differential in salary and emoluments to which he is entitled as a result of his improper reassignment from the assistant principal position.

Having established petitioner's entitlement to the assistant principal position by virtue of his tenure and seniority rights, there is no need to decide the alleged violations of N.J.A.C. 6:4-1.1 et seq. and the Board's affirmative action plan; therefore, the Commissioner refrains from rendering a determination with respect to those allegations.

COMMISSIONER OF EDUCATION

APRIL 8, 1985

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6238-84
AGENCY DKT. NO. 300-7/84

ELIZABETH PRINCIPE,
Petitioner,
v.
WOODBRIDGE TOWNSHIP
BOARD OF EDUCATION,
MIDDLESEX COUNTY,
Respondent.

Stephen R. Klausner, Esq., for the petitioner (Klausner & Hunter, attorneys)

Carl J. Palmisano, Esq., for the respondent (Palmisano & Goodman, attorneys)

Record Closed: January 23, 1985 Decided: March 7, 1985

BEFORE BRUCE R. CAMPBELL, ALJ:

Action for an order directing the reinstatement of Elizabeth Principe to a tenured teaching position with back pay and appropriate emoluments.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on October 5, 1984. Among other things, the issue was defined as, "Has the Woodbridge Board of Education violated the petitioner's tenure and seniority rights in respect of the reduction in force voted by the Board on April 17, 1984, to become effective for the 1984-85 school year. If so, to what relief, if any, is the petitioner entitled."

Under the terms of the prehearing order, counsel were to submit a joint stipulation of facts. Counsel and I conferred again, by telephone, on November 21, 1984. Counsel were able to stipulate all essential facts and it was agreed that the matter would proceed on cross-motions for summary judgment. The plenary hearing set down for November 26, 1984, was adjourned. Counsel submitted their briefs in support of their respective motions and the record closed on January 23, 1985.

I.

The jointly stipulated facts are as follows:

1. Elizabeth Principe is a tenured teaching staff member in the employ of the Woodbridge School District since September 1, 1974.

2. At the time of initial hire, and continuing to the present, Elizabeth Principe has a validly issued certificate to teach Art in grades K-12.

3. In school years 1974-75, 1975-76, 1976-77 and 1977-78, Elizabeth Principe was assigned for the majority of her time to teach in the Glen Cove School, School #28.

4. Elizabeth Principe was assigned during these years to teach trainable mentally retarded students who had an age range of 6 to 17.

5. Glen Cove School is an elementary school.

6. All TMR students enrolled in the Woodbridge School District, regardless of age, were assigned to and enrolled at the Glen Cove School.

7. Pursuant to a finding of noncompliance with 34 C.F.R. 104.33(b)(1) (Exhibit A) issued by the Office for Civil Rights of the United States Department of Education, effective September 1, 1983, in accordance with Federal requirements, all older TMR students were transferred to Fords Middle School.

8. The Woodbridge Township School District's Art curriculum has been in effect since January, 1977, without change.

9. Elizabeth Principe was granted an unpaid medical disability leave for the 1978-79 school year.

10. Over the years, on one occasion, the Woodbridge Township Board of Education transferred an Art Teacher from elementary to secondary; one Art Teacher was working in an elementary program which, later, was also classified as a secondary program and one Art Teacher was working simultaneously at an elementary and secondary level.

11. Elizabeth Principe was reduced in force effective June 30, 1984.

12. The Board of Education has retained a teacher with secondary certification in a Secondary Art program, notwithstanding the fact that the individual so retained had an initial date of employment later than the initial date of employment of Elizabeth Principe.

13. Elizabeth Principe has been re-employed effective December 3, 1984.

II.

The petitioner's arguments may be briefly summarized. She maintains she is entitled to district-wide seniority; the new seniority regulations operate only prospectively and do not affect rights she accrued prior to September 1, 1983, which continue in effect; the seniority regulations themselves provide for continuation of previously accrued seniority, and, therefore, the Board erred in failing to acknowledge the retention of the petitioner's seniority rights as a teacher of art, and the petitioner had a vested right in the seniority she had accrued under the prior regulations which could not be disturbed by the amendments to those regulations.

The petitioner argues that although substantial changes are effected by the September 1, 1983, Department of Education regulations relating to seniority, she is entitled to district-wide seniority as a teacher of art. The Administrative Code

definitions of "secondary" and "elementary" fail to define the concept of district-wide seniority. However, N.J.A.C. 6:3-1.10(l)16 provides, in pertinent part, "Persons employed and providing services on a district-wide basis under a special subject field endorsement or an educational services certificate shall acquire seniority on a district-wide basis."

Moreover, the concept has been discussed and explained by the Commissioner in a declaratory judgment, In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Township Board of Education and the Edison Township Board of Education, Middlesex County (Aug. 6, 1984). In that decision, the Commissioner states:

> ISSUE NO. 3
>
> Upon examination of petitioners' arguments as they relate to the seniority entitlement of individuals serving under special subject field endorsements or educational services certificates, the Commissioner rejects petitioners' contention that such individuals once transferred from elementary to secondary category would be permitted to count all time served on a district-wide basis and thus have "bumping rights" over any less senior person with the same endorsement regardless of category. The Commissioner finds such position to be inconsistent with the language of the regulations which specifically limits the acquisition of seniority entitlement to the category in which the person has actually served pursuant to the special subject field or educational services endorsement. Of course, pursuant to the "tack on" provision embodied in N.J.A.C. 6:3-1.10(h), an art teacher who served five years in the elementary category and then by virtue of transfer served five additional years as an art teacher in the secondary category would have acquired ten years of seniority in the elementary category and five years of seniority in the secondary category. Seniority on a district-wide basis for persons serving under special subject field or educational services endorsements would be limited to those persons whose actual duties were assigned on a district-wide basis, such as a child psychologist who as a member of the child study team provided services to children on a K-12 basis. [at 13, 14)

The petitioner urges that, because the stipulation sets forth that between the school years 1974-75 and 1977-78 she was assigned for a majority of her time to teach art to all trainable mentally retarded pupils in the district, regardless of age, she has actually served on a district-wide basis as an art teacher. Based upon these facts and the regulations as interpreted by the Commissioner, all service since that period may be tacked on pursuant to N.J.A.C. 6:3-1.10(h) to give her ten years of district-wide seniority.

Since her district-wide seniority subsumes both the secondary and the elementary categories, when a reduction in force occurred in April 1984 in the elementary category, the petitioner should have been reassigned to a secondary school position and a less senior art teacher riffed.

The petitioner also urges this tribunal to accept the argument that the statutory changes in issue were intended to be prospective only and that the changes in the seniority regulations do not affect seniority accrued under the former regulations. Administrative regulations generally apply prospectively, except where they merely clarify and provide the true meaning of the already existing law. In the present case, the seniority regulations do much more than clarify existing laws. They affect substantive rights and, if restrospective, would significantly change the law.

The only question raised is whether the amended regulations affect tenure and seniority rights accrued prior to the effective date of those amendments. The answer is clearly no. There is no authority directly on point in New Jersey, but authorities from other jurisdications uniformly hold that previously accrued tenure or seniority continues in effect under such circumstances. State v. District No. 2, Town of Red Springs, Wisc., 295 N.W. 36, (1940); Brewer v. Bd. of Ed. of Bethpage Central School District, 419 NYS 2d 159 (App. Div. 1979), aff'd 443 NYS 2d 1009 (Ct. App. 1980), Waiters v. Bd. of Ed., Amityville U. Free School, 387 N.E. 2d 625, (N.Y. 1979); Aebli v. Bd. of Ed., 145 P. 2d 601 (Cal. App. 1944). See also, Barnes v. Bd. of Trustees, Mt. San Antonio College Dist., 32 Cal. Rptr. 609 (Cal. App. 1963).

The general rule in New Jersey regarding retroactivity of statutes and hence regulations is that words ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be expressed to them. Nichols v. Jersey City Bd. of Ed., 9 N.J. 241, 244, 248 (1952). In Nichols, the court held that the plaintiff, whose position was abolished at a time when she had no statutory right to placement on a preferred eligiblity list, could not claim such a right when the statute was amended to create a right after she had been riffed. The creation of a seniority right after the plaintiff was terminated (despite her tenure) could not give her a right which had not accrued under the prior statute.

Similarly, amendments to seniority regulations after a person has already accrued seniority cannot affect the seniority that that person had already accrued. The teaching of Nichols is that the bar to retroactivity is not limited to prior employment

decisions, but also relates to later decisions. Otherwise, upon passage of the amended statute, Nichols would have been entitled to the new statutory right. She was not. Similarly, amendments to the seniority regulations cannot destroy already accrued seniority rights, since the new regulations in no way include the necessary clarity of expression required to demand retroactivity. Other New Jersey authorities have reached similar conclusions. Weinstein v. Investors Savings and Loan Assn, 154 N.J. Super. 164 (App. Div. 1977); Shack v. Weissbard, 130 N.J.L. 472 (Sup. Ct. 1943), aff'd 131 N.J.L. 314 (E. & A. 1944).

The Commissioner also has deemed to recognize these principles. In Matter of Seniority Rights, above, the Commissioner considered among other issues the seniority status of elementary teachers who were previously assigned to secondary grades. In response to a claim that the teachers acquired seniority on a secondary basis, the Commissioner stated that such service rendered at a time when departmentalized grades seven and eight were classified as falling within the elementary category would be credited for seniority purposes in the elementary category. There, the Commissioner stated:

> At no time did the new regulations intend to suggest that the years of elementary seniority which these teachers had earned under the old regulations were wiped out or somehow converted into secondary seniority rights. The clear intent of the State Board was to permit said elementary-endorsed persons to continue to accrue seniority in the elementary category.
>
> In reaching such a conclusion, the State Board recognized that as a matter of equity a redefinition of all categories had to take into consideration the years of service and experience both prior to and subsequent to the implementation of the regulations. While recognizing that an individual who had taught exclusively in a departmentally-organized grade 7 under an elementary endorsement did not fully meet the criteria of having had experience in a self-contained classroom situation, the State Board had to take cognizance, as a matter of fundamental fairness, that the service rendered in a departmentally-organized grade 7 or 8 was, prior to September 1, 1983, actually an elementary category as then defined and that these teachers were actually earning experience within their elementary endorsement and in the elementary category as then defined. (Commissioner's decision at 10-11.)

Further support for this position is found in the Commissioner's policy statement submitted to the State Board with the new regulations. This statement, interpreting and explaining the then proposed regulations included questions and answers.

One of the questions was:

> Q. What sections of the revised regulations are different from those which were recommended by the advisory committee?
>
> A. Additionally, the Commissioner's proposal also applies the distinction between secondary category and elementary category to special subject teachers such as art, music and physical education, as well as noninstructional service personnel such as school nurses and librarians. Thus, a person hired by a local board for service in the elementary schools will not acquire seniority at the secondary level even though his or her certificate endorsement is for grades K-12. Those who have served at both levels will obtain seniority at both levels.

The petitioner maintains that the new regulations are clearly to create a new set of rules prospectively. Under the old regulations, it was clear that teachers employed under educational service endorsements and special subject field certificates constituted a distinct category for seniority purposes, N.J.A.C. 6:3-1.10(k)27 and/or 28, and acquired seniority on a district-wide basis. Popovich v. Wharton Bd. of Ed., 1975 S.L.D. 737; Aslanian v. Fort Lee Bd. of Ed., 1979 S.L.D. 575, rev'd on other grounds St. Bd., 1980 S.L.D. 1475.

In light of this, the petitioner submits she acquired tenure as a teacher of art, grades K-12, and that this cannot be rescinded by administrative rule making. Furthermore, her attendant seniority rights under the old regulations as a teacher of art, K-12, must be honored by the Board.

The petitioner further argues that the new seniority regulations operate prospectively and, therefore, seniority accrued under the old regulations continues undisturbed. This conclusion is required by the rules governing construction of statutes and regulations in New Jersey and, in addition, by the language of the new regulations themselves. N.J.A.C. 6:3-1.10(c) provides:

> In computing length of service for seniority purposes full recognition shall be given to previous years of service within the district and the time of service in or with the military or naval forces of the United States or this State, pursuant to the provisions of N.J.S.A. 18A:28-12.

This makes clear, in the petitioner's view, that prior service in a school district shall be recognized when a teacher's total service in the district is calculated for seniority purposes. Pursuant to this section, seniority is not computed from September 1, 1983 only, but all prior service is considered in the determination.

The petitioner's prior service as an art teacher, K-12, within the district and her attendant seniority rights cannot be ignored by the Board. Given the limited prospective effect of the new regulations and the tacking prescriptions of N.J.A.C. 6:3-1.10(h), it is urged that the petitioner's years of seniority as an art teacher prior to September 1, 1983, could not be constricted or rendered null by Board action even if based on a mistaken interpretation of the effect of the new seniority regulations. The petitioner has greater seniority than other full-time art teachers in the district assigned to secondary grades. Nevertheless, she was not assigned to a full-time position within the district upon a reduction in force.

N.J.A.C. 6:3-1.10(d) provides:

> Employment in the district prior to the adoption of these standards shall be counted in determining seniority.

This differs in sense from the language included in section (c). Rather than focusing on the length of service, thus requiring that all service in the district be included in computing seniority, a different phrase is used, i.e., that all prior employment in the district will be counted in determining seniority. This phrase is not limited to length of service and thus includes a broader concept: that a teacher will not lose the benefit of his prior service in the district for seniority purposes. Any other construction would deprive the language of section (d) of its full force and effect, and render that language meaningless.

The petitioner retained her seniority accrued under the former seniority regulations and, in fact, continues to accrue such seniority. Therefore, the Board erred in failing to recognize that seniority when it failed to retain the petitioner in a full-time art position and instead retained less senior art teachers for the 1984-85 school year on a full-time basis while riffing the petitioner.

The petitioner also argues that seniority accrued under the prior regulations constitutes a vested right which cannot be divested. The petitioner maintains that Pennsylvania Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372 (1954) defines vested right as follows:

> The term "vested right" is not defined in either the Federal or State Constitution; but it would seem that, generally, the concept it expresses is that of a present fixed interest which in right reason and natural justice should be protected against arbitrary state action - an innately just and imperative right that an enlightened free society, sensitive to inherent and irrefragable individual rights, cannot deny. [at 384, 385]

This definition requires review of the concept as applied in actual cases. Tenure, although accrued under statute, once acquired constitutes a property right. Buff v. North Bergen Bd. of Ed., OAL DKT. EDU 758-80 (Feb. 4, 1981) adopted Comm'r of Ed. (Mar. 19, 1981). It follows, according to the petitioner, that seniority, an emolument of tenure, becomes a property right whether it springs from a statutory or a contractual source. Seniority is clearly a sufficient property right to be subject to protection in the sense of constituting a vested right.

It is conceded that tenure is a legislated status and, conceivably, could be modified or abolished. However, legislative history shows expansion, not limitation, of tenure protection. The petitioner cites New Jersey and other decisions having to do with tenure protection and vested rights. It is not deemed necessary to examine those decisions here.

The petitioner states she acquired vested rights in the tenure and seniority she accrued as a teacher of art within the district, pursuant to N.J.A.C. 6:3-1.10(k)27 and/or 28. This is so regardless of whether these rights were acquired under contract theory or statute. The controlling vested rights definition is neither based upon contract nor statute. It is instead based upon flexible considerations which, in turn, are based upon fairness and justice. Accordingly, it is clear the seniority the petitioner had accrued under the former regulations as an art teacher continues undisturbed. Her seniority rights were violated when the Board failed to employ her in a full-time position within the district.

III.

The Board agrees that the new seniority regulations operate only prospectively and do not affect rights accrued prior to September 1, 1983. The Board contends, however, that the complex analysis offered by the petitioner is merely subterfuge. It quite simply overlooks the fact that is the essence of the case. The petitioner, while certified to teach K-12, never in fact taught more than an elementary program during her tenure as an art teacher in the district. TMRs, while arguably chronologically over the age normally associated with elementary students, were taught a curriculum which was entirely elementary in character.

The question which must be addressed is whether the art program taught to TMRs, although elementary, can be classified as secondary merely because of the chronological age of some of the pupils. The Board submits that no case law can be found which is even remotely helpful. The issue is one of first impression.

The petitioner urges the logic of In the Matter of the Seniority Rights, above, as a precedent, at least as to prior discussion by the Commissioner. The quote above speaks of a child psychologist who, as a member of a child study team, provides services K-12, though the endorsement is in a special subject. As the Board reads the same language it believes and urges that the Commissioner's language in fact supports the Board where the Commissioner speaks of "a child psychologist who, as a member of a child study team, provided services to children on a K-12 basis" [emphasis supplied]. In that hypothetical case, the child psychologist provided services K-12. In the present matter, the petitioner provided no service K-12. She simply taught an elementary art curriculum in an elementary school to students who, as TMRs, may have been chronologically over elementary school age - though no such age has been defined categorically.

The Board's position is bolstered by the language of the Commissioner quoted above:

> At no time did the new regulations intend to suggest that the years of elementary seniority which these teachers had earned under the old regulations were wiped out or somehow converted to secondary seniority rights. The clear intent of the State Board was to permit said elementary-endorsed persons to continue to accrue seniority in the elementary category.

> In reaching such a conclusion, the State Board recognized that as a matter of equity, a redefinition of all categories had to take into consideration the years of service and experience both prior to and subsequent to the implementation of the regulations. . . .[at 10]

In the Board's view, the main point the Commissioner makes in relation to the case at bar is not as to a prospective or retroactive application of the regulations; rather, the point the Commissioner makes is that one does not acquire seniority in a level just because certification permits one to teach the subject K-12. Seniority is acquired in both levels only if the individual actually served at both levels.

The Board urges that it did not err in recognizing seniority rights of the petitioner as an elementary teacher. Regardless of the regulations applied, the Board never in fact rescinded any rights of seniority that the petitioner claims. Rather, the petitioner was properly credited with seniority rights as an elementary art teacher as a result of her service to the district as a teacher of the elementary art curriculum. The fact that the curriculum may have been taught to TMRs who might have been in a secondary program if not for their classification is of no consequence and should be disregarded by this tribunal.

The Board concurs with the petitioner that this tribunal need not reach the constitutional issue of deprival of vested rights as raised in the petitioner's brief.

The Board also argues that the seniority regulations themselves provide for continuation of previously accrued seniority and yet, the Board did not err in that it recognized all seniority rights of the petitioner as a teacher of art. The Board concurs with much of the law stated by the petitioner with respect to the prospective application of the regulations. It is the result with which the Board disagrees. The Board states it clearly evaluated and acknowledged the seniority rights of the petitioner. The stipulation of facts set forth above shows that no dispute exists that the petitioner was a teacher of elementary art in the district. When a reduction in force occurred, the petitioner was terminated because her services as an elementary art teacher were not required.

The petitioner's service was considered by the Board as falling within the elementary category. Accordingly, her seniority was measured against others who also taught art at the elementary level.

N.J.A.C. 6:3-1.10(c) and (d) provide:

> (c) In computing length of service for seniority purposes, full recognition shall be given to previous years of experience within the district and the time of service in or with the military or naval forces of the United States or this State, pursuant to the provisions of N.J.S.A. 18A:28-12.
>
> (d) Employment in the district prior to the adoption of these standards shall be counted in determining seniority.

The key term "employment" refers to the petitioner's actual employment within the district. A review of her file and the stipulation of facts, above, clearly shows that she was employed as an elementary art teacher by the district. When her seniority was calculated, it was calculated on that basis.

Accordingly, the Board submits that this tribunal need not go through the cases cited by the petitioner for guidance. N.J.A.C. 6:3-1.10(c) and (d), above, clearly establish that the actual service of the petitioner must be examined. No reading of those regulations cited could possibly lead to the interpretation the petitioner seeks, that is, that the petitioner, as an elementary art teacher, somehow acquired secondary seniority because her elementary program included pupils of an age normally considered secondary. The Board submits that a proper reading of the regulations leads to the conclusion that the petitioner was properly credited with seniority as an elementary art teacher, and as such, was properly terminated due to a reduction in force.

The Board also asserts that the petitioner had no vested right in the seniority she had accrued under the prior regulations which could be disturbed by the amendments to those regulations. The right to seniority which she claims has not been removed by the Board of Education. Assuming, arguendo, that the petitioner had indeed established that her teaching years with the Board included actual service as a teacher of art in both an elementary and secondary curriculum to elementary and secondary pupils, the Board would agree that the petitioner's rights may have been violated.

The Board sees no point in commenting on the cases cited by the petitioner. The constitutional protection elucidated by the petitioner would be most helpful if, in fact, she were both an elementary and secondary teacher of art in the district.

N.J.A.C. 6:3-1.10(c) and (d) require both service and certification if tenure is to attach. In the present case, the undisputed fact which runs through the Board's argument, but which is omitted by the petitioner, is that the petitioner never held employment as a secondary art teacher. Therefore, she never could have acquired the property right which she seeks to protect. If the petitioner did have such experience and the Board failed to recognize it, she might correctly argue the violation of a constitutionally protected right. The Board urges that the only right the petitioner had was as an elementary art teacher and that this property right was fully recognized and respected by the Board.

The petitioner asserts and the Board agrees that her rights could not be abrogated by the new regulations of September 1, 1983. The Board stresses that the new regulations did not abrogate any such right of the petitioner. The regulations speak of service in a classification. The Board merely recognized the service the petitioner had within the district as an elementary art teacher. Such recognition did not operate to deprive the petitioner of any protected vested rights.

The Board also states that any application of the regulations, either before or after September 1, 1983, can lead only to the conclusion that the petitioner was entitled to tenure as an elementary art teacher and nothing more. Further, the Board properly respected her rights under the law.

IV.

It appears from the stipulation of facts that the petitioner, as many special subject teachers are, was an itinerant teacher during much or all of her service in the Woodbridge district. In the four school years 1974-78, she was assigned for a majority of her time to teach in the Glen Cove School. During this period she taught trainable mentally retarded pupils who had an age range of 6 to 17.

Pursuant to a finding of noncompliance with 34 C.F.R. 104.33(b)(1) (Exhibit A) issued by the Office for Civil Rights of the United States Department of Education, effective September 1, 1983, in accordance with Federal requirements all older TMR students were transferred to the Fords Middle School. The Office for Civil Rights finding may be summarized as follows:

> The program for Trainable Mentally Retarded (TMR) students exists only at the Glen Cove Elementary School, resulting in all TMR students, from ages 8 to 21, being placed in an elementary school setting. OCR concluded that this is an inappropriate setting for the older TMR students and does not meet their educational needs as adequately as the needs of nonhandicapped students are met, as required by 34 C.F.R. 104.33(b)(1).

I agree with the Board's argument that the petitioner's assertion that the chronological age of some of the TMR pupils somehow confers upon her secondary service does not follow. As the Board aptly observes, to extend the petitioner's logic, one would have to confer district-wide seniority upon the eighth grade teacher in a school without departmental instruction simply because one or more of her students is of secondary school age. And, as the Board observes, the regulations do not define "secondary student."

The threshold lies here. If the petitioner is not entitled to district-wide seniority, the further arguments need not be considered. For the reasons that follow, I determine that the petitioner is not so entitled.

N.J.A.C. 6:3-1.10(l)15 provides, in pertinent part:

> Secondary. . . . Any person employed at the secondary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such educational services certificate or special field endorsement.
>
> Persons employed and providing services on a district-wide basis under a special subject field endorsement or an educational services certificate shall acquire seniority on a district-wide basis.

N.J.A.C. 6:3-1.10(l)16 provides, in pertinent part:

> Elementary. . . . Persons employed and providing services on a district-wide basis under a special subject field endorsement or an educational services certificate shall acquire seniority on a district-wide basis.

As the petitioner points out, the Commissioner has stated in In the Matter of the Seniority Rights, above, that seniority on a district-wide basis for persons serving under special subject field endorsements would be limited to those persons whose actual duties were assigned on a district-wide basis, such as a child psychologist who as a member of a child study team provided services to children on a K-12 basis. These citations lead inevitably to this matter's pivotal point.

Beyond a mere assertion that because some of her TMR pupils were of secondary school age the petitioner acquired secondary service, there is nothing in the record pertinent to secondary service. Irrespective of their ages, the TMR pupils in question were not secondary pupils. Nor, strictly speaking, were they elementary pupils although it may be said that the art curriculum presented to them was an elementary curriculum or a variant of the elementary curriculum. Except and unless there were art education components to the individual education programs for these TMR pupils, there has been no showing that what was presented to them was other than the elementary curriculum.

It simply defies common sense that mere age classifies a pupil as a secondary pupil. The Office for Civil Rights did, some five years later, direct that the older TMR pupils be placed in another setting. It must be noted that the language cited above speaks in terms of the appropriate setting for the older TMR pupils and does not address the matter of curriculum at all. Thus, the change ultimately worked by the Office of Civil Rights determination was as much of a psychosocial nature as it was of an educational nature although it is difficult to separate these factors other than in theory.

The Board's insistence that the educational placement of pupils rather than their chronological ages must determine whether they are elementary or secondary pupils is compelling. The matter does appear to be one of first impression as the Board suggests. Diligent research has revealed no case law on point. The petitioner's certification includes grades K-12. But it cannot be said upon this record that her experience includes any in the secondary grades. In the years 1974 through 1978, the petitioner simply taught in an elementary school and, as part of that service, taught some TMR pupils. Their chronological ages are immaterial.

Beginning with Van Wagner v. Roselle Bd. of Ed. 1973 S.L.D. 488, a long line of Commissioner and State Board decisions holds that the duties of the job and not the title or the certification held determine tenure rights. There was no transfer here as mentioned in the declaratory judgment cited above. Many special subject teachers such as those of physical education, music and art regularly provide instruction to classified pupils. This does not make them special education teachers. The mere, occasional instruction of some special education pupils who happen to be in their teen years cannot confer secondary teaching experience for tenure and, hence, seniority purposes.

Having carefully considered the arguments of the parties and having reviewed the entire record in this matter, I **FIND** that the service of the petitioner from September 1, 1974 through the reduction in force effective June 30, 1984, was in the elementary category only. I therefore **CONCLUDE** that she could not have accrued either secondary or district-wide service in that period. I further **CONCLUDE** that the Board properly ascertained the petitioner's seniority, in the proper category, when it effected the reduction in force that became effective June 30, 1984. Accordingly, there is no relief that may be afforded the petitioner.

It is therefore **ORDERED** that the petition of appeal be **DISMISSED.**

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

7 MARCH 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

March 8 1985
DATE

Seymour Weis
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 12 1985
DATE

Ronald L. Parker/jab
OFFICE OF ADMINISTRATIVE LAW

ij/ee

ELIZABETH PRINCIPE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

Upon review of the record and exceptions filed in this matter it is the determination of the Commissioner that petitioner's seniority rights have not been violated by the Woodbridge Board of Education for the following reasons. The reduction in force in question in this case occurred effective June 30, 1984. Hence, the applicable regulations determining petitioner's seniority entitlement are solely restricted to those which were effective September 1, 1983, N.J.A.C. 6:3-1.10. It has clearly been established that seniority comes into play only upon a reduction of force. Thus, petitioner had no vested seniority entitlement pursuant to the prior regulations; she has seniority entitlement only as dictated by the regulations in effect at the time the reduction in force took place which was post September 1, 1983.

The seniority regulations in effect at the time of the reduction in force herein clearly and unambiguously limit district-wide seniority accrual to those individuals with special subject field endorsement employed and providing services on a district-wide basis. The pertinent regulation reads in part.

> (1)16. "***Any person employed at the elementary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the elementary category and only for the period of actual service under such educational services certificate or special [subject] field endorsement. Persons employed and providing services on a district-wide basis under a special subject field endorsement or an educational services certificate shall acquire seniority on a district-wide basis."

The Commissioner agrees with the judge that petitioner's argument is without merit when avowing she served on a district-wide basis by virtue of teaching all the district's trainable mentally retarded pupils who were placed in the Glen Cove School. Such a tortuous interpretation flies in the face of the clear purpose and intent of the revised regulations and cannot be accepted by the Commissioner. It is the conclusion of the Commissioner that petitioner's teaching of these pupils occurred merely as a result of their placement in an elementary school to which she was assigned, not by virtue of petitioner having been assigned district-wide duties by the Board.

Consequently, the Commissioner accepts the recommended decision of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed herein and in the initial decision.

APRIL 22, 1985 COMMISSIONER OF EDUCATION

ELIZABETH PRINCIPE,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 22, 1985

For the Petitioner-Appellant, Klausner and Hunter
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Palmisano and Goodman
(Carl J. Palmisano, Esq., of Counsel)

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

August 7, 1985

Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1183-84
(ON REMAND OF OAL DKT. NO. EDU 11083-82)
AGENCY DKT. NO. 415-10/82A

)ARD OF EDUCATION OF THE :HOOL DISTRICT OF SOUTH ORANGE-APLEWOOD, ESSEX COUNTY,

Petitioner,

V.

\UL COOPERMAN,)MMISSIONER OF EDUCATION OF IE STATE OF NEW JERSEY,

Respondent.

Monica E. Olszewski, Esq., for petitioners
(Greenwood and Sayovitz, attorneys)

Regina Murray, Deputy Attorney General, for respondent
(Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

cord Closed: January 22, 1985 Decided: March 7, 1985

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

State aid reimbursement for pupil transportation costs of $49,867 for 1981-82 of : Board of Education of South Orange-Maplewood, Essex County, under N.J.S.A. 4:58-7 was denied by the Commissioner of the Department of Education through the :eau of Pupil Transportation for non-compliance, generally, with contract bidding |uirements of N.J.S.A. 18A:39-3 and regulations promulgated thereunder in N.J.A.C. 1-15.1 et seq.

OAL DKT. NO. EDU 1183-84
(On Remand OAL Dkt. No. EDU 11083-82)

Under OAL Dkt. No. EDU 11083-82, the Board in a petition of appeal against the Commissioner sought judgment authorizing and directing approval and payment of the full amount of State aid reimbursement of $49,867 for 1981-82, invoking the controversies and disputes jurisdiction of the Commissioner under N.J.S.A. 18A:6-9 and alleging denial was arbitrary because non-compliance was technical and excusable. The Commissioner denied the claim and/or any basis for it, saying non-compliance with N.J.S.A. 18A:39-3 disentitled petitioner to relief. An Initial Decision of the Office of Administrative Law concluded denial by the Commissioner through the Bureau of Pupil Transportation of such State aid for pupil transportation costs was properly issued for non-compliance with contract bidding requirements, holding denial was consistent with law and regulations and neither technical or arbitrary. The petition of appeal was dismissed with prejudice. Following exceptions[1] taken by the Board to the initial decision, the Commissioner remanded the matter on February 14, 1984, to the Office of Administrative Law to enable the Board to "prove [such] significant facts favorable to its position as may exist," without prejudice to "arguments" advanced in the initial decision by the administrative law judge or to "the position struck by the Board on substantive grounds."

The matter on remand was received on remand by the Office of Administrative Law on February 17, 1984 and proceeded, under OAL Dkt. No. EDU 1183-84, on notice to the parties, to a prehearing conference on June 18, 1984. A prehearing conference order was entered directing the parties to confer with a view to fashioning and filing for record stipulation of all supplemental or amendatory facts in chronological and sequential order. Thereafter, it was provided, the matters should be addressed and resolved on cross-motions for summary decision in accordance with N.J.A.C. 1:1-13.1 et seq., on pleadings, admissions, supplemental stipulations and documentation and supplemental memoranda of law. All such submissions having been completed, the record closed then.

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[1] The Board excepted to a ruling by the administrative law judge rejecting as untimely revised stipulations of fact by which the Board said it intented to prove such facts would demonstrate that based upon the equities, a total denial of State aid reimbursement was proper. Board's exceptions, at 4.

As provided in the prehearing conference order, at issue were the following:

A. Is this an appropriate forum for equitable relief?

B. If so, whether petitioner shall have proven by a preponderance of the credible evidence its entitlement, legally and/or equitably, to State aid reimbursement for pupil transportation costs for 1981-82 in the amount of $49,867; and/or

C. Whether the Commissioner's denial thereof was arbitrary.

STIPULATIONS AND FINDINGS OF FACT

The parties having so stipulated, I make the following findings of fact:

1. In preparation for the 1981-82 school year pupil transportation needs, the Board of Education of South Orange/Maplewood gave public notice in May 1981 that sealed bids would be received by it from interested contractors. In advertising for bids, the Board utilized the following designations for bus routes:

Designation	Destination
MA	Jefferson School
JF	Marshall School
MJ	Jefferson School
MM	Marshall School

N	South Mountain School
AMK	Marshall School (morning kindergarten)
PMK	Marshall School (afternoon kindergarten)

2. All routes advertised were either "straight" or "combined" routes. A "straight" route is a transportation route which requires the bus driver to pick up all the pupils for one school and to then discharge them at such school. When routes are "combined", only one bus is utilized: the bus driver picks up all pupils for one school, drops them off at such school and then proceeds along the route to pick up and drop off all the pupils for another school. Combined routes were viewed by the Board to be more cost efficient.

3. Before any of the contracts for pupil transportation for 1981-82 were entered into by the Board, it publicly advertised for bids pursuant to N.J.S.A. 18A:39-3 (see P-1, Legal Notice and Specification). The Board sought a "Base Bid" for all routes on a "straight" basis. (See paragraph 2 supra). The Board also sought an "Alternate Bid" on a "combined" route basis in the event the Board staggered school openings and the contractor would "piggy back" certain routes. All routes advertised were in fact bid by S & E Transportation Co., Inc. pursuant to N.J.A.C. 6:21-15.1 (See P.2, Proposal). No company or person, other than S & E Transportation Co., Inc., submitted a bid to the Board. S & E Transportation Co., Inc. had been the sole bidder for the past several years. The following routes were advertised by the Board and bid by S & E Transportation Co., Inc.

BASE BID:

Route No.	Per Diem Rate with Aide
*MA 1	$135.00
*MA 2	$135.00

*MA 3	$135.00
*JF1	$135.00
*JF2	$135.00
*JF3	$135.00
N1	$135.00
N2	$135.00
*MM	$135.00
*MJ	$135.00
A.M. Kindergarten	$135.00
A.M. Kindergarten	$135.00

ALTERNATE BID:

*Combined Routes	Per Diem Rate with Aide
MA1 & JF1	$137.50
MA2 & JF2	$137.50
MA3 & JF3	$137.50
MJ & MM	$137.50

4. The Board entered into nine transportation contracts totalling $185,300 with S & E Transportation Co., Inc. for the 1981-82 school year. (See P-3(a) through P-3(i). The contracts pertained to the following routes:

Combined Routes	Per Diem	Total Contract Price
MA 1 & JF 1	$137.50	$25,162.50
MA 2 & JF 2	$137.50	$25,162.50
MA 3 & JF 3	$137.50	$25,162.50
J-4 & N-2	$137.50	$25,162.50

Straight Routes	Per Diem	Total Contract Price
N-1	$ 28.75	$ 5,267.50
AMK-M	$135.00	$24,705.00
PMK-M	$135.00	$24,705.00
41-CHS	$135.00	$24,705.00
PMK-SM	$ 28.75	$ 5,267.50

The destination of bus routes J4; 41CHS and PMK-SM were as follows: J4 (Jefferson School); 41CHS (Columbia High School); and PMK-SM (South Mountain School afternoon kindergarten).

5. There has been no allegation that: (1) fraud, favoritism, or dishonesty was a factor in the selection of the S & E Transportation Co. as contractor for any of the transportation routes; (2) that costs would have been reduced had all routes, as ultimately contracted, been included in the advertisement for bids and the submission of proposals; (3) that the Board acted in other than good faith.

6. Routes MJ and MM were ultimately handled by the Board's own buses and contracts for these routes were thus not awarded.

7. The PMK-SM routes were added subsequent to the advertisement of bids when it was ascertained by the Board that an additional kindergarten route was necessary due to unexpected student demand. This route served pupils who lived less than two miles from school. Busing was provided to these children because walking was hazardous. State aid was requested on this basis.

8. In school years prior to the 1981-82 school year, the Board utilized its own 34 passenger bus to transport pupils to Columbia High School. To alleviate anticipated overcrowding, the 41 CHS route was contracted for with S & E Transportation Co., Inc. which provided a 54 passenger bus at the per diem rate of $135.00 which was the same as proposed by the contractor for all straight routes originally bid. This route was eligible for State aid since students resided more than two miles from school. The Board determined that since it would probably need a larger bus, it would be more cost efficient to utilize its own bus for a route not eligible for State aid.

9. In approximately October-November 1981, it was determined that bus route MAI did not have sufficient seating capacity to accommodate students from the Marshall School area who were attending the Jefferson School. The Jefferson School and the Marshall School had been paired for purposes of desegregation: Marshall School educating kindergarten through second grade and Jefferson School educating grades three through five.

10. In order to rectify the situation described in parapgraph 9, supra, the Board added another S & E Transportation bus. This bus originally followed the MA1 bus route and these buses followed the same route. Ultimately the MA 1 route was split so that the two buses could accommodate the students more efficiently. Part of the original MA1 route was relabeled J4 by the Board. Route J4 was combined with Route N2. The S & E Transportation Co., Inc. contract for the combined route was based on a per diem rate of $137.50 — the same rate proposed for all combined routes originally bid. The Board did not advertise for a combined route labeled J4 and N2 nor receive bids for a route with that exact label prior to entering into a contract for it with S & E Transportation Co., Inc. Straight route N2

had been the subject of bidding. The actual route J4 was the subject of bidding under the designation MA1. The Essex County Superintendent approved the contract for the combined route J4-N2 on May 5, 1982. (See P-5). Reimbursement for Route N2 was approved by the Bureau of Pupil Transportation. (See R-5).

11. The Board submitted all of its contracts with S & E Transportation Co., Inc. to the Essex County Superintendent for approval. Thereafter, the County Superintendent's office notified the Board that the contracts for Routes 41 CHS and PMK-SM were technically defective since they had not been approved by Board resolution pursuant to N.J.A.C. 6:21-16. The County Superintendent orally recommended that the Board retroactively approve the two contracts. On April 26, 1982, the Board adopted a resolution approving the contracts for 41 CHS and PMK-SM (See P-4). On May 5, 1982, the Essex County Superintendent approved the transportation contracts for 41 CHS, PMK-SM, AMK-M, PMK-M, N1 and J4 and N2. Approval for transportation contracts for combined routes MA1 and JF1, MA2 and JF2, and MA3 and JF3 had already been granted on April 19, 1982. (See P-5).

12. Pursuant to N.J.S.A. 18A:58-7, the Board applied to the State Department of Education, Bureau of Pupil Transportation, for reimbursement for all its contracts with S & E Transportation Co., Inc. as approved by the County Superintendent.

13. On June 16, 1982, Sandra Fox of the Bureau of Pupil Transportation informed the Board that she would not recommend reimbursement for routes 41CHS and J4 because they were not the subject of public bid. A meeting was held on June 18, 1982, regarding this issue at the Essex County Superintendent's office. Sandra Fox was in attendance. On June

21, 1982, the Acting County Superintendent wrote to the Director of Pupil Transportation recommending that routes 41 CHS and J4 be approved for reimbursement as contracted. (See P-2). He stated that at the June 18, 1982 meeting "it was determined that the two routes were not bid according to technical specifications of the State of New Jersey; however, it was also determined that there was no willful violation of the bidding statutes." The Acting Superintendent also stated that "it appears that compliance with technical specifications would not have reduced the cost of these routes. Therefore, it is apparent that the intent of the bidding statute was preserved."

14. The Bureau of Pupil Transportation determined to deny reimbursement for the following routes for the reason that they were not publicly advertised for bid and were not in accordance with N.J.S.A. 18A:39-3 and N.J.A.C. 6:21-15.1:

41 CHS	$24,705.00 (R-1)
J4	$19,895.00 (R-2)
PMK-SM	$ 5,267.50 (R-3)
	$49,867.50

(See July 18, 1982 letter from Director, Bureau of Pupil Transportation, R-4). Thereafter the parties corresponded in accordance with the attached letters (R-6; R-7).

DISCUSSION

The Board argued again, as it had before under OAL Dkt. No. EDU 11083-82, that it was entitled under N.J.S.A. 18A:58-7 to the State aid reimbursement applied for because of mandatory language in the statute that:

> Each district shall also be paid 90 percent of the costs to the district of transportation of pupils to a school when the necessity for such transportation and the cost and method thereof have been approved by the county superintendent of the county in which the district paying the costs of such transportation is situate. . . [emphasis added].

That approval, the Board urged again, was given by the county superintendent on May 5, 1982 (P-5).

But, as the administrative law judge suggested before, county superintendent approval of transportation contracts under N.J.S.A. 18A:58-7 does not necessarily and sufficiently validate otherwise illegal contracts under N.J.S.A. 18A:39-3 and thus qualify districts for State aid reimbursement under N.J.S.A. 18A:58-7. That which is paramount and supervening between the two statutes, that is to say, is the simple, clear and express legislative injunction that contracts in excess of $4,500 must be advertised and awarded to the lowest responsible bidder. N.J.S.A. 18A:39-3; N.J.A.C. 6:21-16.5. The principle was recently restated by the State Board of Education in Bd. of Ed., Borough of Fairfield v. Bur. of Pupil Transportation, 1984 S.L.D. — (State Bd. dec., Dec. 5, 1984, slip op. at 5):

> In sum, we hold that a superintendent's approval merely renders a contract eligible for a determination by the state as to the amount of aid, if any, that is payable to a local board of education. The ultimate responsibility for determining who receives state aid pursuant to N.J.S.A. 18A:58-7 lies with the Department of Education, which has plenary responsibility for school transportation matters. [citation omitted]. Thus, all pupil transportation contracts, notwithstanding county superintendent approval, remain subject to scrutiny by the Division of Finance, or its Bureau of Pupil Transportation, for compliance with all relevant directions, regulations and statutes. Only if the contract is consistent with law and is approved by the county superintendent is the school districteligible to receive state pupil transportation aid.

The Board argued next the Commissioner's determination to deny all State aid reimbursement in the case of the three unbid district pupil transportation contract was a "draconian" penalty unreasonably imposed upon taxpayers of the district. The Board pointed to finding no. 5:

> There has been no allegation that (1) fraud, favoritism or, dishonesty was a factor in the selection of the S & E Transportation Company as contractor for any of the transportation routes; (2) that costs would have been reduced had all routes, as ultimately contracted, had been included in the advertisement for bids and the submisstion of proposals; (3) that the Board acted in other than good faith.

Because the bidding statutes do not require complete denial of state aid for deviation from bidding laws, argued the Board, and in view of the Board's admitted good faith in letting unbid contracts, the occasion is presented for equitable indulgence by the Commissioner in favor of district taxpayers and at most, the Board suggested, a nominal "fine" instead.

But the Board's concern for district taxpayers in the loss of state aid reimbursement can plausibly be matched, one may suggest, by a reasonable concern for interests of statewide taxpayers whom the Board here by logical implication suggests should bear financial responsibility for the Board's omission. While the Board may thus seek to protect its district taxpayers, it does so at the expense of all other taxpayers in the state. It may even be suggested, moreover, the Board's invocation of equity for its district taxpayers runs counter to a familiar equitable maxim that equity follows the law. In Camden Trust Company v. Handle, 132 N.J. Eq. 97 (E. & A. 1942), New Jersey's highest court said:

> Equity follows the law. While it will provide means of enforcement not to be had at law, it is bound to regard the rights of the parties as established at law unless a countervailing equity calls for relief. The maxim is applicable to the interpretation of statutes and as well to matters of public policy. [Citations omitted; id. at 108. See also Giberson v. First Natl. Bank, 100 N.J. Eq. 502, 507 (Chanc. 1926-7); and 30 C.J.S. Equity §103, at 1065-69].

Respondent argued there were no new or substantially different findings of fact from those stipulated findings made under OAL Dkt. No. EDU 11083-82 beyond, perhaps, finding no. 5 specifically exonerating the Board of dishonesty or actions taken in bad faith. The admitted facts still clearly demonstrated the Board had let three contracts for pupil transportation without first having publicly advertised them: contract PMK-SM (P-3(i); finding nos. 4, 7); contract 41-CHS (P-3(h); stipulation nos. 4, 8); and contract J4-N2 (P-3(d); stipulation nos. 4, 10). Application for State aid reimbursement for such contracts was denied by the Bureau of Pupil Transportation (R-3, R-1 and R-2, respectively).

As said in the initial decision under OAL Dkt. No. EDU 11083-82, public school bidding laws and their strictures and limitation are designed to prevent dishonesty, chicanery and fraud. Rankin v. Bd. of Ed. of Egg Harbor Twp., 134 N.J.L. 342, 344 (Sup. Ct. 1946); aff'd, 135 N.J.L. 299, 301-2 (E & A 1947). State Board of Education rules, moreover, take careful note that policy. N.J.A.C. 6:21-15.2(c) provides:

> It has been held by the courts that the enactment of N.J.S.A. 18A:39-3 et seq. pertaining to bidding for transportation evinces a state policy to encourage free and intelligent competitive bidding. The purpose of bidding is to prevent fraud, favoritism and extravagance, to safeguard the taxpayers, and to protect the lowest responsible bidder. To accomplish this purpose, the specifications must be definite and precise. Common standards must be set up. In order that all bidders shall be on an equal basis, the same information must be furnished to all. Numerous bidders create competition. Therefore, the specifications must not restrict healthy bidding and make competitive bidding difficult.

Seen in that light, one may readily suggest, the Board's argument that its failure to seek bids before awarding three pupil transportation contracts totaling $49,867.50 was minor and inconsequential, or indeed not probably damaging to interests of the district's taxpayers, becomes specious. In a word, the omission to seek bids and the determination to award contracts without them is no mere irregularity but, instead, is a clear violation of law and is of sufficient gravity, perhaps, as to give standing to district taxpayers

to set aside award of such contracts as ultra vires powers of the district. Cf., in another context, Scatuorochio v. Jersey City Incinerator Authority, 14 N.J. 72, 94 (1953), a case in which public bodies at behest of taxpayers were enjoined from appropriating monies for certain contracts let without public bidding on the ground of an alleged emergency.

While it may be that the Board's intention in awarding three unbid contracts was good, it remains clear, nevertheless, the Board's omission to seek bids publicly and determination to award without bid was no mere technical irregularity or deviation from public school bidding laws. As urged by respondent, the Department of Education has broad powers and responsibilities to supervise public education in this State and to effectuate legislative policies concerning it. Piscataway Twp. Bd. of Ed. v. Burke, 158 N.J. Super. 436, 440-1 (App. Div. 1978). One of the supervisory and administrative responsibilities pursuant to legislative mandate in N.J.S.A. 18A:58-7 is responsibility for administration of school aid reimbursement for transportation costs. The evidence here remains clear the Commissioner's determination in denying such school aid reimbursement to the Board was proper and in full compliance with legislative mandate. It was in no sense arbitrary or unfair. It is neither technical nor inequitable since equity follows the law. It should be sustained.

CONCLUSION

Based on the foregoing, I hereby **CONCLUDE** again denial by the Commissioner of the Department of Education through the Bureau of Pupil Transportation of State aid reimbursement for pupil transportation costs of $49,867 for 1981-82 to the Board of Education of South Orange-Maplewood, Essex County, under N.J.S.A. 18A:58-7 was properly issued for non-compliance with contract bidding requirements of N.J.S.A. 18A:39-3 and regulations promulgated thereunder in N.J.A.C. 6:21-15.1 et seq. The denial was consistent with law and regulations and was neither technical, arbitrary nor

inequitable. As a result, therefore, the petition of appeal herein should be, and it is hereby, **DISMISSED** with **PREJUDICE**. All findings and conclusions hereinbefore made under OAL Dkt. No. EDU 11083-82 are adopted herein by reference.

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

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

March 7, 1985
DATE

JAMES A. OSPENSON, ALJ

3/11/85
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 12 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
SAUL COOPERMAN, COMMISSIONER OF EDUCATION,	:	
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision on remand rendered by the Office of Administrative Law.

It is observed that the Board's exceptions to the initial decision have been filed pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner is constrained to observe that the Board's exceptions to the initial decision are essentially those arguments discussed in detail by the judge in his findings and conclusions of law. However, the Board additionally argues that the State Board's affirmance on December 5, 1984 of the Commissioner's prior decision in Board of Education of the Borough of Fairfield v. Bureau of Pupil Transportation (March 12, 1984) specifically noted the inherent unfairness of denying state aid where the review of legal sufficiency is not provided before the transportation contract is executed. The Board relies, therefore, on the specific language of the State Board in Fairfield which directs that a revision of its regulations be undertaken.

The Commissioner, however, observes that the illegal actions of the Board controverted herein occurred during the 1981-82 school year which predates the State Board's December 1984 decision in Fairfield.

Consequently, it is for this reason that the Commissioner finds and determines that the State Board's decision in Fairfield is controlling in the instant matter notwithstanding its directive to effect a prospective revision of its regulations.

Accordingly, for the reasons stated above, which supplement those findings and conclusions in the initial decision affirmed by the Commissioner, it is found and determined that the instant Petition of Appeal can be and is hereby dismissed.

APRIL 25, 1985

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
SAUL COOPERMAN, COMMISSIONER OF EDUCATION,	:	
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, February 14, 1984

Decided by the Commissioner of Education on remand, April 25, 1985

For the Petitioner-Appellant, Greenwood and Sayovitz (Monica E. Olszewski, Esq., of Counsel)

For the Respondent-Respondent, Regina Murray, Deputy Attorney General, for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

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

September 4, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5753-84
AGENCY DKT. NO. 251-7/84

KAREN HANSEN,
Petitioner,
v.
RED BANK BOROUGH
BOARD OF EDUCATION,
Respondent.

Thomas W. Cavanagh, Jr., Esq., for petitioner (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys)

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Bruno & Barger, attorneys)

Record Closed: January 26, 1985 Decided: March 12, 1985

BEFORE **DANIEL B. MC KEOWN,** ALJ:

Karen Hansen (petitioner), formerly employed by the Red Bank Borough Board of Education (Board) as a teacher who had not acquired the legislative status of tenure, claims that a determination of the Board not to continue her employment for 1984-85 which would have assured the acquisition of tenure is arbitrary and capricious because the reasons afforded her by the Board for that determination are without a basis in fact and, consequently, its action is an abuse of its discretion. Petitioner seeks reinstatement to the Board's employ together with back pay. After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a hearing was conducted on January 4, 1985 at the Monmouth County Hall of Records, Freehold. The record closed January 26, 1985, upon receipt of the Board's reply memorandum.

BACKGROUND FACTS

The background facts of the matter are not in dispute between the parties and are as follows. Petitioner was first employed by the Board for 1981-82 as a teacher of special education assigned to teach perceptually impaired students in the lower elementary grades. Petitioner was reemployed by the Board for 1982-83 and again for 1983-84. Petitioner's performance was formally observed and evaluated by the building principal on three occasions during 1981-82 (P-1, P-2, P-3); on four occasions during 1982-83 (P-4, P-5, P-6, P-8); and, on six occasions during 1983-84 (P-12, P-13, P-14, P-15, P-16, P-17).

The superintendent, by letter (P-18) dated April 10, 1984, advised petitioner that

> I am sorry to inform you that at its meeting of April 5, 1984 the Red Bank Borough Board of Education did not re-employ you for the 1984-85 school year because of average classroom performance. The board has determined to tenure only people with an outstanding performance record.
>
> In addition, your attendance has caused us some concern.

Thereafter, petitioner directed a letter to the Board by which she requested from it the reasons why her employment was not continued for 1984-85. In addition, petitioner requested of the Board the opportunity to meet with it in regard to her nonreemployment. (P-19). The superintendent, by letter dated May 8, 1984 (P-20) on behalf of the Board, advised petitioner that she could meet with it on May 29. Petitioner's request to the Board for its reasons why it determined not to reemploy her was not acknowledged by the Board or by the superintendent. Nonetheless, the "reasons" already given petitioner by the superintendent are considered by petitioner to be the Board's reasons which the Board does not dispute. After the Board granted petitioner an informal opportunity to be heard, it advised her that it affirmed its earlier determination not to continue her employment for 1984-85 (P-21).

In the present appeal, petitioner alleges that the Board has no formal policy in regard to allowing only teachers with an outstanding performance record to achieve tenure in its employ as is asserted by the superintendent. That being so, petitioner urges that such an asserted policy "* * * is artifical at best and illusory at worst * * *"

(Pb., p.3) with the potential for unequal application upon the class of nontenured teachers whose employment contracts are subject to renewal. Petitioner also alleges that the superintendent's assessment of her performance as "average" cannot be justified by her formal observations and evaluations prepared by the building principal. Petitioner suggests that the real reason her employment was not continued was not because of her performance but because of her absences from school duties. Petitioner contends that with the exception of her first year of teaching when she was absent for approximately 30 days for major surgery, her absences during the remaining two years were within the amount statutorily authorized all employees at N.J.S.A. 18A:30-1.

In regard to petitioner's absences during her employment with the Board, she was absent from school for eight weeks during 1981-82 as the result of major abdominal surgery. Petitioner says that at that time she was not criticized by anyone for her absence. During 1982-83, petitioner was absent 9.5 days due to illness and for each absence petitioner signed a certification in regard to the fact she was ill. During 1983-84, petitioner was absent due to illness on seven days and she missed school on another day because of a death in her family. Petitioner's absences, it is clear, was a source of concern to the superintendent. According to testimony given during a deposition (P-24), the superintendent explained:

> * * * I had a concern about her attendance and her physical condition, based upon the fact that in the classroom she [petitioner] seemed to lack vitality. And, when I spoke with [petitioner] she indicated to me — when I spoke with her about her attendance I should say, she indicated to me that there were many other days that she really should have stayed home but didn't. So, that her attendance record didn't reflect completely the state of her health.
>
> (P-24, at p. 53)

At a meeting between the superintendent and petitioner during March 1984 the superintendent and petitioner agreed that the school physician would be allowed by petitioner to contact her private physician to secure an assessment of petitioner's state of health. The school physician, it appears, became ill and did not, or could not, contact petitioner's physician. The superintendent took it upon herself, without prior approval of petitioner, to contact petitioner's physician in order to discuss petitioner's state of health. The superintendent identified herself to petitioner's physician and was told that petitioner

would allow only the disclosure that she was taking certain medication. (P-24, at pp. 56-57). Consequently, the superintendent made the determination that petitioner should not be reemployed by the Board because of her attendance record and continuing health related problems.

In regard to petitioner's classroom teaching performance, the building principal was solely responsible for preparing formal written observations and evaluations thereon. The superintendent would, from time to time, informally visit petitioner's classroom and observe her teaching performance. However, the superintendent did not exercise direct daily supervision over petitioner's teaching methods. On one occasion, it is noted, the superintendent did send a memorandum to petitioner in regard to the conduct of one of petitioner's pupils during class while petitioner was absent from school. A copy of each formal written observation and evaluation prepared upon teachers performances, including petitioner's, by each building principal was forwarded to the superintendent. The superintendent would review each such observation and evaluation submitted and, if necessary, discuss such reports with the preparor during her "cabinet" meetings with all administrative staff.[1]

It is noted that an integral part of the educational process in the Red Bank schools is referred to as "mastery learning". Mastery learning appears to be an approach for the transfer of knowledge from teacher to pupil predicated upon a systematic introduction of skills, attitudes, and values in both the cognitive and affective domains. It is an approach to learning that presupposes all children can learn so long as the knowledge to be acquired is presented in a sequential, organized manner. Petitioner was expected to demonstrate the use of the mastery learning approach in class and in her lesson plans.

A review of the observation forms used by the building principal discloses five major categories: a description of the lesson observed; commendatory practices of the teacher; suggestions for improvement; a narrative in regard to the evidence of mastery learning procedures; and a rating of satisfactory, needs improvement or unsatisfactory.[2]

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1 The superintendent's "cabinet" consists of building principals and personnel at the director level.

2 A distinction is made between an observation and an evaluation. An observation is a report on a specific observed segment of a teacher's performance, while an evaluation is an assessment of the teacher's performance over a period of time.

Each observation of petitioner's performance during the entire course of her employment with the Board is rated satisfactory. Each observation reports commendatory practices observed by the building principal and each observation records suggestions for improvement. The evaluation form has five major categories: program, professional participation, students, operations and public relations. The evaluation reports upon petitoner's performance in each of those areas.

An evaluation of petitioner's performance on February 4, 1982, her first year with the Board, states that petitioner has made an "excellent beginning" in her teaching assignment (P-11). During 1982-83, petitioner's second year of employment with the Board, petitioner's performance was observed on four occasions and her performance was evaluated on two occasions. The first evaluation, December 21, 1982, points out that petitioner's "attendance" is of some concern to the building principal. In all other respects, the evaluation merely reports that petitioner was performing in regard to the program, her professional participation with colleagues, her ministerial obligations, and public relations (P-8). A second evaluation prepared on March 4, 1983 records the same criticism of petitioner's attendance and, in all other respects, reports that petitioner is performing her obligations within the same major categories (P-9). Each observation of petitioner's performance contains some suggestion for improvement which, it is noted, is not an uncommon practice of the building principal. That is, the principal is of the view that every person may improve their performance in some manner. However, beginning in the observation of October 1983 notations began to appear in regard to an absence of mastery learning units in petitioner's plans. (P-12) (P-13) (P-14) (P-15).

On December 19, 1983, petitioner's performance evaluation reports that she is performing her obligations under the major categories and this evaluation concludes that her performance is "satisfactory." (P-16). On March 20, 1984 another evaluation reports that petitioner needs to improve her use of "formative and mastery learning tests" (P-17) and that petitioner was then "keeping better records of individual pupil achievement of grade objectives". This evaluation does record the building principal's concern in regard to petitioner's attendance or, more properly, her absence from school.

The superintendent testified that the determination not to recommend petitioner for reemployment was reached after her review of the preceding observation and evaluation reports and after discussion with members of her cabinet. However, it is noted that petitioner was not made privy to the substance of the superintendent's

discussions with her cabinet. The superintendent explains that a satisfactory rating on the observation report merely means that the affected persons's performance is within acceptable bounds. To be an outstanding teacher, the superintendent explains the evaluation reports would indicate superiority in conjunction with letters in the affected person's file attesting to the performance of teaching duties in a superior fashion. The director of special services, Betty McClendon, notwithstanding the fact that she did not formally evaluate petitioner's performance, explained her concern in regard to petitioner's greater use of the "holding room" for unruly children compared to other teachers of special education. Ms. McClendon participated in the superintendent's cabinet discussion of petitioner's performance and while she, Ms. McClendon, claims she discussed petitioner's performance with her, petitioner denies such discussion occurred.

This concludes a recitation of the background facts of the matter as agreed upon but for the minor difference in regard to whether Ms. McClendon discussed criticisms of petitioner's performance with her.

DISCUSSION

Petitioner, in her letter memorandum filed in support of her position in the matter, contends that the issues to be decided are:

> First, whether the respondent Board of Education abused its discretion in concluding that the substantive academic reasons were sufficient to justify a nonrenewal of petitioner's contract. Secondly, it is imperative that consideration be given to the attendance question which is also posed to some degree in the notice and, therefore, becomes a part thereof.

Petitioner anchors her argument the Board abused its discretion on the grounds that the Board has no formal policy with respect to allowing only superior performing teachers to acquire tenure in its employ and, moreover, that the observations and evaluations of her performance do not justify merely a satisfactory rating. In regard to the reason of her attendance, or absence from school duties, petitioner points to the fact that with the exception of the first year when she was absent as the result of major surgery, she did not exceed the statutorily allowed ten sick days per year at N.J.S.A. 18A:30-2.

It is noted that prior to the New Jersey Supreme Court's ruling in Donaldson v. North Wildwood Bd. of Ed., 65 N.J. 236 (1974), a board of education was under no obligation to afford a nontenured teacher reasons why it determined not to continue their employment. Following that case, boards of education which determined not to continue the employment of nontenured teachers are obligated to honor the affected persons request for a statement of reasons. Id. at 241. The purpose for the statement of reasons to be afforded a nontenured teacher whose employment is not continued by the board is, as Justice Jacobs speaking for the majority of the Donaldson court explained:

> If [the affected employee] is not reengaged and tenure is thus precluded he is surely interested in knowing why and every human consideration along with all thoughts of elemental fairness and justice suggest that, when he asks, he be told why. Perhaps the statement of reasons will disclose correctable deficiencies and be of service in guiding his future conduct; perhaps it will disclose that the non-retention wad due to factors unrelated to his professional or classroom performance and its availability may aid him in obtaining future teacher employment; perhaps it will serve other purposes fairly helpful to him * * *

This very language was quoted in Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 456 (App. Div. 1982) where that court held:

> Implicit in this language [of Justice Jacobs] is the recognition by the court that absent constitutional contraints or legislation effecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board.

In this case, petitioner does not allege constitutional violations nor statutory prohibitions. Rather, petitioner contends that the Board abused its discretion by first not having a policy to require outstanding performance of those who are to be placed on tenure. While it is clear the Board has no such policy, the fact remains that the determination not to continue petitioner's performance is within its discretion and so long as petitioner's teaching performance is perceived by the Board, through the judgment of its superintendent, to be satisfactory as opposed to something more, its judgment not to continue her employment must be affirmed. Because a board of education wishes to continue a search for outstanding teachers, as opposed to granting tenure to average or merely "satisfactory" teachers, does not translate into an abuse of its discretion.

In regard to petitioner's attendance record, or her absences, it is immaterial that during her last two years of employment with the Board she did not exceed the statutorily allowed ten days annual sick leave. The Board may certainly consider one's attendance record prior to the acquisition of tenure, together with the likelihood of such absences to continue in the future if tenure is acquired, to arrive at a determination whether to grant a nontenured teacher a tenure status. There is no allegation in this record that petitioner suffers a "physical handicap" as is contemplated under the Law Against Discrimination, N.J.S.A. 10:5-1 et seq. That being so, the superintendent made a reasoned judgment based on petitioner's attendance during her probationary period of employment that petitioner simply did not demonstrate the qualities necessary to acquire a tenure status of employment with the Board.

In the final analysis, I can find no basis upon which the Board abused its discretion in the instant matter with respect to its determination not to continue the employment of Karen Hansen. That being so, I **CONCLUDE** that Karen Hansen has no cause of action against the Red Bank Borough Board of Education. Petitioner was a nontenured employee whose employment was not continued and she was afforded reasons neither of which are prohibited by law. No further obligation of the Board exists. The petition of appeal is **DISMISSED.**

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

OAL DKT. NO. EDU 5753-84

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

March 12, 1985
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

3/12/85
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 15 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

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KAREN HANSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision have been reviewed. Exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

Petitioner argues, that because the judge herein focused on the language of Dore, supra, his overview was unduly constrictive resulting in an extremely narrow evaluation of petitioner, inappropriate in light of salient legal authority. Petitioner bolsters her argument by reference to Moore v. Board of Education of the Township of Plumsted, decided by the Commissioner May 26, 1981. The Commissioner finds no merit in such argument.

A thorough examination of the record, the testimony of witnesses and the documents submitted in evidence convinces the Commissioner that Judge McKeown properly considered the tenets of Donaldson, supra and Dore, supra, as applicable to the present case. This being so, petitioner can gain no further support from Moore, supra, a case in which the Commissioner stressed the importance of the underlying reasoning in Donaldson, supra, as properly done by the court herein. The fact that petitioner, as a teacher with no tenure, desires that a board of education consider a broader and more lenient basis when considering nonreemployment of the teacher does not detract from the prevailing standard as cited in Dore, supra, and appropriately cited by the ALJ herein.

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

Accordingly, the Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

APRIL 26, 1985

KAREN HANSEN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 26, 1985

For the Petitioner-Appellant, Chamlin, Schottland, Rosen, Cavanagh and Uliano (Jay R. Schmerler, Esq., of Counsel)

For the Respondent-Respondent, Reussille, Mausner, Carotenuto, Bruno and Barger (Martin M. Barger, Esq., of Counsel)

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

August 7, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5750-84
AGENCY DKT. NO. 220-6/84

KEVIN BYRNE,
Petitioner,
v.
THE BOARD OF EDUCATION,
BERNARDS TOWNSHIP,
Respondent.

Richard J. Schachter, Esq., for petitioner (Schachter, Wohl, Cohn & Trombadore, attorneys)

Michael E. Rodgers, Esq., for respondent Board of Education (Lucid, Jabbour, Pinto & Rodgers, attorneys)

Record Closed: Decided: March 13, 1985

BEFORE **JOSEPH LAVERY,** ALJ:

This is an appeal by Kevin Byrne, petitioner, from a refusal by the Board of Education, Bernards Township (hereinafter "Board") to award him a high school letter in recognition of his performance on the Ridge High School Wrestling Team during the 1983-84 season. Petitioner contends that the Board's action violated its own rules and regulations, and is arbitrary, discriminatory, and capricious.

PROCEDURAL HISTORY

This appeal was initiated by a petition filed with the Commissioner of Education on June 18, 1984. The Board submitted its answer on July 11, 1984.

Thereafter, the Commissioner declared the matter a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1, and filed it for plenary hearing with the Office of Administrative Law (OAL). OAL scheduled the matter for prehearing conference which convened by telephone on September 26, 1984. A prehearing order followed on October 4, 1984. The case was then calendared for a plenary hearing, which opened before this administrative law judge on January 3, 1985, in the Warren Municipal Court. On that date, the hearing was completed, but the record remained open for receipt of briefs over legal issues raised. The final brief of counsel was filed in the OAL January 28, 1985, on which date the record closed.

ISSUES

There are two issues for resolution in this dispute:

Issue No. 1 - Whether petitioner is barred from a decision on the substance of this petition because he failed to observe the 90-day limit for filing imposed by N.J.A.C. 6:24-1.2.

Issue No. 2 - Whether the Board, through its coach and administrators at Ridge High School, was arbitrary, discriminatory or capricious in denying petitioner his varsity letter for performance while a member of the wrestling team.

BURDEN OF PROOF:

By a preponderance of the credible evidence, petitioner must show that the Board's denial of a varsity letter was arbitrary, capricious or discriminatory.

As to the issue of timely filing, the Board must establish the relevant facts by a preponderance of the credible evidence. It must then argue successfully that controlling law and rules require dismissal of the petition, without addressing the substance of the complaint.

Undisputed Facts:

A considerable number of material facts are not in dispute. They provide an outline to the controversy which lends clarity to the arguments:

Petitioner, (hereinafter "Kevin"), is today a freshman at the University of North Carolina (Greensboro). During the preceding school year, 1983-84, he was a senior at Ridge High School (Ridge), in the Bernards Township School District. During all of his four year stay at Ridge, he was a member of the wrestling team. In that time he had earned at least one varsity letter. While a senior, he served as a co-captain with two other wrestlers. Kevin's father and mother were substantially active in their support of the wrestling program. During this time, Michael J. Byrne assisted the team and Coach Welch personally. Mr. Byrne himself had helped to coach the "peewee" wrestlers. His wife, Angela Jean Byrne, was the cheerleader advisor. Notwithstanding all this, at the end of the 1983-84 season an incident occurred which precipitated denial of Kevin's varsity "letter" in wrestling:

On Thursday, February 16, 1984, Ridge had lost to Delaware Valley High School in its last full-team competition with a rival school on the schedule for sectional meets, or "Sectionals." All that now remained in the wrestling season was the District meets, or "Districts." The Districts were scheduled to be held on Friday, February 24, 1984. Districts differ from the usual school-to-school competition during the year. High schools participating in the Districts were permitted to have only the top wrestler in each weight class actually compete. On the other hand, points garnered by the individual wrestler were credited to the high school team which he represented. In the end, team scores were tallied and each school taking part in the Districts was ranked. Coach John K. Welch, the Head Wrestling Coach at Ridge, demanded that all team members stay active in the preparation and practices leading up to the Districts. This was compulsory. It did not depend on whether the individual wrestler was chosen to actually compete as a Ridge representative for his particular weight class. The whole team prepared for and attended the districts, in a supportive gesture.

Practices for the 1983-84 district were scheduled as follows:

Friday, February 17
Saturday, February 18
Monday, February 20
Tuesday, February 21
Wednesday, February 22
Thursday, February 23

The Thursday, February 23 practice was intended to be light, culminating in the "ceremony of the ropes." The latter was a traditional closing of the season, in which each boy performed the daily routine rope climb exercise for the final time. As noted above, on Friday, February 24, Districts began. It is significant that, during the week of February 20, Ridge High School had closed for regular classes. The entire school was on its winter vacation.

On the evening of Ridge High School's elimination from the sectionals by Delaware Valley High, Kevin's troubles began. His father, Michael J. Byrne, with the agreement of his wife Jean, informed the whole family that it would travel south almost immediately. The purpose of the trip was to obtain an interview in Kevin's behalf at Clemson University. Kevin had been accepted at all the schools he applied to, except Clemson, his first choice. Kevin's brother, Terence, was then and is now a student at Clemson. It was Mr. Byrne's hope that if Kevin met face-to-face with Clemson officials, he might be reconsidered. Mr. Byrne had been encouraged to make this last-ditch effort by phone conversations with son Terence.

Kevin himself was reluctant to go to Clemson that week for a number of reasons. The trip was sure to be long and wearisome. He now was uncertain that he wanted to enroll in a school that far from home. Finally, he would have to miss three wrestling practices: Saturday, February 18, as well as the following Monday and Tuesday. He would not return to practices for the Districts until Wednesday, February 22. Kevin's concern over missed practices was realistic. Although the uniformity of its enforcement is at issue, no one disputed that Coach Welch had a known and clear policy with respect to absences. The policy was that wrestlers would not miss practice. The coach had reduced it to writing in the Wrestler's Guide, which all the wrestlers received (Exhibit J-4). Kevin as well as Mr. and Mrs. Byrne knew of its contents (Exhibit J-5). Coach Welch reiterated this policy each year verbally to the team as a whole, and the captains individually. Notwithstanding his misgivings because of the coach's rule, Kevin had no choice but to conform to his father's wishes.

Anticipating difficulty, Kevin informed Coach Welch of his father's decision the following day. On February 17, at the end of the Friday practice, he told Coach Welch that he would miss three practices because of the Clemson trip. The Coach objected to this decision unmistakably at that time. He told Kevin he would have to speak to his father. Who had responsibility to initiate that talk is in dispute. Nevertheless, on

Saturday morning, while the family was packing for the trip that day, Coach Welch called the Byrne home from wrestling practice. He spoke first to Kevin, then continued the discussion with Mr. Byrne, who had taken the receiver from his son. The conversation thereafter was acrimonious, and ended when Mr. Byrne abruptly hung up. Mrs. Byrne, upset by this turn of events, then tried to reach the Superintendent, Dr. Fanning. Failing this, she eventually located the principal of Ridge High School, Michael Pennella. Responding to Mrs. Byrne's emotional distress, Mr. Pannella was sympathetic. He promised to discuss the matter with Coach Welch the following week, and then get back to her. On this note, the Byrnes left by car for Clemson that Saturday morning, February 18. The entire family, which included Kevin as well as two younger brothers and a sister, made the trip. On the way, they visited three of the schools in which Kevin had been accepted: the Universities of North Carolina, Alabama and Tennessee. By February 21, Tuesday, they had completed their interview at Clemson. By Wednesday, February 22 at about 2:00 a.m. they had returned home. Thus, Kevin was able to be present at the Wednesday morning practice for the Districts, as he had promised. He went there, and while changing to wrestling togs in the locker room, encountered Coach Welch. After asking briefly about whether the trip had gone well, the Coach requested that Kevin not participate in the remaining two practices for the Districts. The following day, the Coach had a team member call and ask Kevin to participate in the final traditional "ceremony of the ropes," described above. Kevin did so. Additionally, he was invited to attend the "Regionals" which followed the Districts, as well as the wrestling banquet. There he would receive a "certificate of participation." Kevin chose not to attend either.

These events culminated with imposition of the penalty appealed from here. Coach Welch determined that the appropriate sanction for Kevin's absence from three practices for the Districts was denial of a varsity wrestling letter. The Byrnes protested this decision, after learning from Mr. Pennella by phone Thursday, February 23 that Superintendent Fanning had decided to support Coach Welch's stand. The parents' complaint eventually came before the Board, which treated it first through an Ad Hoc committee. On May 29, 1984, the Byrnes appeared before the Board, asking for a statement of reasons for denial of Kevin's letter. The Board ruled it would take no further action in the case. It also authorized issuance of a letter explaining why the wrestling letter was not awarded to Kevin (Exhibit J-2). Within the next 30 days, the Byrne petition was filed with the Commissioner, and these proceedings ensued.

ARGUMENT OF THE PARTIES:

Petitioner's Argument:

Overall, Kevin and his parents contend that their trip was compelled by the exigencies of the moment. The priority was to gain Kevin's admittance to Clemson, the school of his choice. The family made this effort during a vacation, when class time would be unaffected. They returned as quickly as possible. Moreover, the Coach had used this discretion to let others miss practice, despite the Wrestling Guide rule, without loss of letter.

MICHAEL J. BYRNE was certain that his decision to go to Clemson was not made until February 16, 1984. When the last team match with Delaware Valley drove Ridge out of the remaining full-team competition, Mr. Byrne knew that Kevin would not wrestle again that year. John Durso, a wrestler who had been victorious over Kevin in a "wrestle-off" was the wrestler slated to represent Ridge in the Districts. Kevin himself testified that he thought it highly improbable that he would wrestle in the Districts, under any circumstances. Other wrestlers who had beaten him would have to be chosen first. Against this background, Mr. Byrne decided to work on Friday, February 17 and leave thereafter. Monday, February 20, was a holiday. Additionally, since all that week Ridge High was on vacation, Kevin would not miss any classes. He would also return in time for Wednesday and Thursday practices as well as the Districts, on Friday, February 24.

Both Mr. Byrne and **ANGELA JEAN BYRNE**, his wife, stressed that the impetus for the trip was the February 13 call from their son Terence, phoning from Clemson. They had hopes that a face-to-face discussion and perhaps a changed major would win entrance for Kevin. They were also influenced by the sense of urgency which Terence conveyed. **TERENCE BYRNE** testified that the school officials he spoke to said to come right down. Time was short, because the admissions office's final and irrevocable decision was imminent. Mrs. Byrne observed that they had already made their exploratory college visit to Clemson long before the wrestling season, in October of 1983. The purpose of this trip was emergent. Once Terence called on February 13, the pressure was on. The actual decision to go was made the evening of February 16.

Mr. Byrne stated that he had not spoken to the Coach about the trip on Thursday night. He had purposely avoided it. This was Kevin's sole responsibility, as part

of the relationship between coach and team member. Mr. Byrne did not want to use his influence. Petitioner, KEVIN BYRNE, recalled that he did speak to Coach Welch at practice on Friday, the following day. At that time, the Coach never suggested Mr. Byrne should call, or that a penalty would follow. He merely told Kevin he would have to talk with his father.

Kevin recounted the phone call from Coach Welch on the Saturday morning that the family was preparing to leave. Coach Welch told him he would take away his co-captaincy, his letter and any awards if he went. Mr Byrne testified that, on overhearing the tenor of the conversation, he took the phone from Kevin. Confronted with an angry coach issuing threats, Mr. Byrne urged reason. Having no success with this approach, Mr. Byrne recalled telling the coach "what he could do with them" (the threats), and hung up.

Mrs. Byrne remembers that she was much alarmed by the outcome of the phone conversations. Her distress impelled her to immediately call Ridge principal Michael Pennella. Mr. Pennella was sympathetic; he told her not to worry, to go on the trip, and to enjoy herself. He, in the meantime, would try to contact Mr. Welch, and get back to her the following week. However, when Kevin was dismissed from practice the following Wednesday (amid derisory remarks from his teammates, according to Kevin) Mrs. Byrne again called Mr. Pennella. This time he could only say that his hands were tied. Superintendent Fanning and Coach Welch were adamant. Kevin would not be awarded a letter. Kevin recalled that after this rebuff, wrestling "was lost" to him. He took no further part, except for the final "ceremony of the ropes" on Thursday, the day preceding the Districts.

At hearing, Kevin pointed to the precedent that other wrestlers had missed practice without loss of letters. He personally recalled three examples. Kevin had no insight as to why these exceptions were granted, however. Kevin also thought it significant that on Tuesday, February 28, Coach Welch told him that he now understood Kevin had no choice about making the trip. For that reason, his co-captaincy had not, and would not, be taken away. However, Kevin would be denied a letter, even though he had accumulated the requisite nine points in competition. Finally, in an effort to resolve the matter, Mr. Byrne spoke to Athletic Director Smith. He also wrote two letters to the Board of Education, before which he appeared. Both he and Mrs. Byrne were certain that they first knew of the final decision by the Board on May 29, 1984.

Letter briefs on behalf of petitioner argued that the verified petition had been timely filed with the Commission, within the meaning of N.J.A.C. 6:24-1.2. Additionally, (a) the Wrestling Guide "Rules of Practice" give no indication of what penalty would be imposed for their infraction, (b) Ridge's overall attendance policy was to permit college visitation, (c) Kevin had no choice but to obey his father, and (d) given all the circumstances surrounding the trip, loss of the letter was unreasonable, arbitrary and capricious.

The Board's Argument:

The Board argued that the true concern here should be uniform application of a policy which the parents and wrestlers on the Ridge High varsity had agreed in writing to comply with. If one wrestler were to be released from his commitment not to miss a practice, it would be unfair to the other team members. Moreover, Kevin could not logically argue that, because his parents kept him from practice, he should not be held responsible.

In keeping with this defense, Coach **JOHN K. WELCH** stressed "commitment." He himself had spent his life in wrestling, from captain of his high school wrestling team, to college wrestler, through a wrestling program in the military. At the time of hearing, Coach Welch, a teacher of Health and Physical education, had completed 13 years as a wrestling coach. Even now, he attends yearly seminars on administration of wrestling programs, and discusses similar problems with other coaches there. He personally had written the extensive Wrestling Guide (Exhibit J-4). The Wrestling Guide contained "Rule of Practice No. 1"

> Never miss a practice. In case of emergency, call Coach Welch or the school secretary to put a message in the coach's mailbox.

In the face of this primary rule, the coach was "awestruck" by Kevin's announcement on Friday, February 17 that he would not be coming to practice because his father was requiring him to visit colleges the following week. Kevin had told him his father had been waiting to see how the Sectionals turned out. Coach Welch also recalled warning Kevin that he could not go. The coach needed to find out whether John Durso was medically fit at the time of the Districts. Moreover, it was the end of the season, and the Districts were very important. He cautioned Kevin that he could be jeopardizing his co-captaincy, his letter, or other awards if he took the trip. He did not specify which penalty would

apply. The coach then directed Kevin to have his father call him at home that evening. Mr. Byrne never called.

The next morning, Saturday, February 18, Coach Welch called Kevin at home. He reiterated the list of potential penalties to him, then ultimately to his father. Mr. Byrne complained to the coach that he was disrupting his household. The coach apologized and indicated that he was in sympathy with their predicament. Nevertheless, he suggested that the Byrnes wait until February 24, when it would be known whether Kevin would be needed in the Districts. He felt bound to impress on Mr. Byrne the jeopardy in which Kevin's awards were being placed. Mr. Byrne responded "you mean the letter?" When told by the coach that this was one of the possibilities, Mr. Byrne told the coach "You can take the letter and shove it up your ass." Then Mr. Byrne abruptly hung up.

MICHAEL PENNELLA, Principal of Ridge High, described his conversation with Mrs. Byrne, which followed immediately thereafter. He remembered that she was very upset. She outlined the background to her trip, and asked him to intervene. Mr. Pennella answered that he could not, without hearing both sides of the story. He testified however, that he adopted a sympathetic posture with her. He perceived the sitation as a "breakdown in communications" between the Byrnes and Coach Welch. Further, he may well have told Mrs. Byrne not to worry, to go on the trip, and to enjoy herself. She was in an emotional state, and Mr. Pennella felt that she had made up her mind anyway. More to the point, the problem could not be resolved then. He was some twenty minutes distant from the school, on a Saturday morning.

In any event, the coach, now fearful of the impact of Kevin's absence on practices for the Districts, talked to the team as a whole on Monday, February 20. He told them Kevin would be absent for the rest of the week, for reasons which were not Kevin's fault. He would deal with the problem when Kevin returned. At the same time, he warned them of the penalty options which existed for absence from practice. The coach recalled that he was surprised when Kevin returned to practice Wednesday, February 22. No one had told him Kevin would return on that date. On seeing Kevin, he informed him that neither he nor the team were expecting his participation. Rather than distract them from their workouts, he suggested that Kevin leave, but return after completion of the practices for the last "ceremony of the ropes." When Kevin came to the ceremony, the coach took his vote for next year's captains, and invited him to the wrestling dinner (where he would have gotten the "certificate of participation"). He also invited him to the "Regionals." Kevin came to neither.

The coach was certain that it was not until the Monday following the Districts, February 27, that he decided to deny Kevin's letter, as a fitting response to the incident. He did so for the following reasons:

1. The letter was symbolic. It represented fulfillment of a "commitment." Some boys never wrestled in a varsity match, or scored a victory. Yet, they satisfied their team obligations.

2. The end of the season practices for the Districts were most important.

3. Kevin had won a letter before.

4. Other penalties such as "obligations" (pushups, jump rope, strength exercises) were fruitless, because it was the end of the season.

5. Kevin was a co-captain. No one in that position of leadership had failed to show up for practice.

6. John Durso, the captain, who had resumed wrestling on January 18, after an injury, was scheduled for the Districts in Kevin's weight class. However, he had a volatile knee injury, which remained to be examined on the morning of the Districts. Replacement might be necessary. Kevin would have been in no shape to "back-up," after missing four days of practice.

7. The achievement of "9 points", as noted in the Wrestling Guide, was only one objective element considered together with "standards of conduct" when deciding whether to award a letter.

In his testimony, the coach stressed the importance of the "never miss a practice" rule on a team with 43 boys. Unless this rule were strictly enforced, the sport might as well be intramural. All parents and team members (which included the Byrnes) literally "sign off" on this condition at the beginning of the year. Commitment is promised by the team as a whole, and accepted by the captains during an individual interview with the coach. The Wrestling Guide is in everyone's possession. Faithful adherence to "commitment" in the coach's view, was the cornerstone of his effort to develop the boys into reliable adults.

Recalling the absences of other wrestlers which were raised by Kevin, coach Welch responded that one boy, a senior, had acted out, and left practice in the midst of confusion over a wrestle off. He was a special education student whose handicap underlay this inappropriate behavior. The coach, who has a masters degree in special education, construed the absence as a flareup arising from disability. He saw it as akin to absence for illness or injury. Nevertheless, he warned the boy that such conduct would not again be tolerated. Additionally, he imposed "obligations" as a form of penalty. The coach released the second boy, a sophomore, because of an out-of-state family reunion, coupled with the death of his father within the past two years. The boy had little experience, and was not a varsity contender. Another sophmore wrestler was released because his father compelled him to accompany him on a trip to Chicago. Had he been a junior, he would no longer have been permitted to wrestle. The coach distinguished between varsity and lesser plateaus of performance, as well as differences in age.

Adverting to his discussions with Kevin, the confrontation with Mr. Byrne, and the controversial absences, Coach Welch disclosed that, at the time, he had been without the full background. No one had told him the objective of the trip. He had no idea that it was to pursue a final appeal at Clemson, Kevin's first choice college. Had he known, he might have been able to contact the school to arrange an accommodation which would have allowed Kevin's continued presence at practice. The coach agreed that scholastic considerations precede wrestling. He admitted, though, that if Kevin had traveled south after the Districts, he would have had to miss classes the following week. Finally, the coach conceded Kevin was bound by a "commitment" to obey his parents, as well.

In its letter brief, the Board argued that petitioner failed to file his brief timely within the meaning of N.J.A.C. 6:24-1.2. Treating the substance of the case, it contended there can be no substitution of judgment by the Commissioner to overturn its decision. This is permitted only when the Board's action is found to be arbitrary, capricious or unreasonable. Highlighting the pertinent facts, the Board suggested that here no such finding was possible. Petitioner failed to give any advance notice; his absence was demoralizing to the team; Kevin would have been deconditioned, and thus not in shape to relieve John Durso, and, finally, Kevin could not rely on parental coercion as a reasonable excuse.

FINDINGS OF FACT

Therefore, after considering the testimony previously set forth and independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following **FINDINGS OF FACT:**

As **UNDISPUTED** facts, I **FIND** those designated on pages 2 through 5 of this opinion.

As to matters which are disputed or **CONTESTED**, pursuant to N.J.A.C. 1:1-16.3(c)7, I **FIND:**

1. Michael J. Byrne first concluded, after his son Terence's phone call of February 13, that it would be worthwhile to visit Clemson for a last appeal.

2. Michael J. Byrne finally decided the dates he would visit Clemson on Thursday, February 16. He believed, as Kevin did, that after the Delaware Valley defeat, there was no reasonable likelihood that Kevin would be called on to wrestle again while at Ridge.

3. There was only a remote possibility that Kevin would wrestle in place of John Durso, since other wrestlers had defeated Kevin in prior "wrestle-offs."

4. Kevin's mother, Angela Jean Byrne, was certain her family had received authority to go on the trip to Clemson. She acquired this impression during her phone conversation with Ridge Principal Michael A. Pennella on Saturday morning, February 18.

5. Mr. Pennella, in an effort to comfort a distraught Mrs. Byrne, advised her not to worry, to go on the trip, and to enjoy herself. The matter would be dealt with on their return.

6. Mr. Penella's evaluation of Mrs. Byrne's mood during the Saturday morning phone conversation was that she was determined to go, despite what he might say.

7. Mr. Pennella did not attempt, through his phone comments to Mrs. Byrne, to pass ultimate judgment on a controversy between Mr. Byrne and Coach Welch. He intended to review both sides of the story when the Byrnes came back from Clemson.

8. The Board gave its final notice and determination on that controversy at its meeting of May 29, 1984 (Exhibit J-2).

ANALYSIS

As set forth at the outset on page 2 of this initial decision, there are two issues for resolution here. The first is whether Kevin filed his appeal in time. The second addresses the heart of the matter: should Kevin have been awarded his letter.

Since the timeliness question is jurisdictional, it must be disposed of as a threshold problem.

Issue No. 1 - Whether petitioner is barred from a decision on the substance of this petition because he failed to observe the 90-day limit for filing imposed by N.J.A.C. 6:24-1.2.

This defense occasions little comment. Petitioner clearly filed within the period required by N.J.A.C. 6:24-1.2.

Petitioners are appealing from the final actions of the Board. The final administrative determination at the local level was rendered by the Board on May 29, 1984 (Exhibit J-2). The Board did two things at their meeting on that date: (a) it accepted its Ad Hoc committee's recommendation to support the coach, stating it would take no further action on petitioner's appeal, and (b) it directed its school staff to issue a statement of reasons why Kevin did not receive his letter. This less than formal approach to administrative adjudication is acceptable in school boards. Mears v. Boonton Bd. of Ed., 1968 S.L.D. 108.

Moreover, the coach, the principal, and the superintendent are all employees of the Board. The Board was actively engaged in reviewing their conduct of the affair until May 29, 1984. The Commissioner of Education is called on here to serve in primarily an appellate capacity. Were the time for appeal to be measured from the last act of Ridge personnel, the Commissioner would effectively displace the Board from its statutorily mandated control. N.J.S.A. 18A:11-1. Neither the briefs of the parties nor independent research of the school laws disclose any statute or ruling supportive of such a result.

The verified petition in this dispute was filed with the Commissioner on June 26, 1984. That filing was well within the 90 day limitation of N.J.A.C. 6:24-1.2.

> Issue No. 2 - Whether the Board, through its coach and administrators at Ridge High School, was arbitrary, discriminatory or capricious in denying petitioner his varsity letter for performance while a member of the wrestling team.

The scope of review which may be exercised by the Commissioner while scrutinizing final actions taken by Board of Education has often been adjudicated. From those decisions, certain fixed tenets have arisen:

Administrative actions by a Board of Education are accompanied by a rebuttable presumption of correctness. Only an affirmative showing that the Board's decision is arbitrary, capricious or unreasonable will upset a Board's decision. Quinlan v. Bd. of Ed. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962); Ruth Ann Singer v. Bd. of Ed. of the Borough of Collingswood, 1971 S.L.D. 594; Thomas v. Morris Twp. Bd. of Ed., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd 46 N.J. 581 (1966).

Also well-settled is the extent to which the Commissioner may adjudicate disputes centering on extracurricular activities. Ferrara v. Scotch Plains-Fanwood Reg. Sch. Dist. Bd. of Ed., 1977 S.L.D. 997, 1007, accurately describes the state of the law on that point:

> The role of the Commissioner in determining such matters is found in Ruth Ann Singer et al. v. Collingswood Board of Education, et al., as cited in Reiss and Celia Tiffany, parents and guardian ad litem of Maria Tiffany, a minor v. Board of Education of the Township of Cinnaminson, et al., 1974 S.L.D. 87, 89. The Commissioner stated the following:

> the scope of the Commissioner's review is not to substitute his judgment for that of the local board but to determine whether their conclusions had a reasonable basis.
>
> The Commissioner has in numerous instances been called upon, in his quasi-judicial capacity, to make determinations regarding the reasonableness of the actions of local boards of education. The Commissioner will, in determining controversies under school laws, inquire into the reasonableness of the adoption of policies, resolutions, or by-laws, or other acts of local boards of education in the exercise of their discretionary powers*** See 62 C.J.S. Municipal Corporations, 203 Cf. Kopera v. West Orange Board of Education, supra (60 N.J. Super. 288, App. Div. 1960).

In a previous decision, Clinton F. Smith et al. v. Board of Education of the Borough of Paramus, et al., 1968 S.L.D. 62 Aff'd State Board of Education 69, dismissed New Jersey Superior Court, Appellate Division, September 8, 1969, the Commissioner found and determined, inter alia as follows:

> ***extracurricular or cocurricular activities comprise all those events and programs which are sponsored by the school and may reasonably be characterized as a supplement to the established program of studies in the classroom in order to enrich the learning and self-development opportunities of pupils***.

Yet, in a cautionary note, it cannot be forgotten that the Commissioner is not remote in his appellate review function. He cannot abandon his responsibility to assure a "thorough and efficient" education, through enforcement of the school laws. East Brunswick Tp. v. Tp. Council, East Brunswick, 48 N.J. 94, 106 (1966). Any analysis must proceed with these holdings in mind.

Turning to the circumstances, it is plain that one key argument of petitioner must be rejected. Specifically, he points to the "Ridge High School Attendance Policy" Exhibit J-3, as superseding the Wrestling Guide. Ridge adopted the Wrestling Guide as a valid school policy. Its authority to do so is subsumed within the general powers of the Board itself. N.J.S.A. 18A:11-1. The Board found no fault with the Wrestling Guide in the investigation conducted through its Ad Hoc committee. The Board, in disposing of this appeal, clearly adverted to the Wrestling Guide when it said ". . . that there were well established rules, that these rules are not arbitrary, and were fairly enforced (Exhibit J-2). Neither does review of the "Ridge High School Interscholastic Athletic Rules and

Regulations" (Exhibit J-1) disclose any articles seriously at variance with the Wrestling Guide.

Turning to the testimony, Coach Welch, in both his demeanor and the content of his testimony, conveyed an unimpeachable air of credibility. He projected as a dedicated, conscientious, thorough wrestling coach of vast experience with impeccable credentials. The Wrestling Guide itself is a workmanlike, detailed effort by the coach to leave no team member or his parents in doubt as to what is expected of a participant (see Exhibit J-5). It is a Board-authorized policy which must be followed. Mindful of this, it is useful to reprint the two specific portions of the Wrestling Guide which are most relevant to this dispute:

> 1. AWARDS
>
> Letters of achievement are awarded to each wrestler who carries forth a proper attitude and a high standard of conduct, and meets the specified achievement requirements. If a boy contributes nine team points to the varsity team in dual meets, he is eligible for a varsity award. . . .
>
> These awards are fine remembrances of achievement; however, let us remember that the letter is just a symbol and the real award from participation is in the form of intangibles: physical development, emotional maturity, and pride in being part of the most demanding sport.
>
> 2. RULES OF PRACTICE
>
> Never miss a practice. In case of emergency, call Coach Welch or the school secretary to put a message in the coach's mailbox.

These guidelines are perfectly valid exercises of policy, which were upheld by the Board in its decision of May 29, 1984. However, like any administrative rule, their interpretation is subject to the test of reasonableness, Elizabeth Lodge No. 289, etc. v. Legalized Games, etc., 67 N.J. Super. 239, 246 (App. Div. 1961). It is on this point that the entire case turns. Scrutiny of the actual circumstances in relation to the above quoted sections of the Wrestling Guide demonstrates how that is so.

First, it must be determined whether the standard for award of the letter has been violated. Aside from the quandary caused by Kevin's trip, no testimony by Board witnesses suggests that Kevin did not, during the 1983-84 wrestling season, or at any other time, pursue the sport with anything short of the proper attitude or a high standard of

personal conduct. He contributed nine points to the varsity team, and met the achievement requirements. Before the controversial trip, he had never missed a practice without permission in four years. He was obviously developed physically, and was emotionally mature enough to warrant election by his peers and acceptance by his coach as a co-captain. If Kevin did not have pride in being part of wrestling, it is unlikely that he would be in the present forum. Even Coach Welch's testimony affirms Kevin's wrestling ability. Thus, there is but one drawback to Kevin's eligibility for a letter under the foreoing standard asserted by the Board: violation of the "never miss a practice" rule. The Board's entire rationale inheres in this defense.

Second, then, the circumstances of the violation of the "never miss a practice" rule must be evaluated. Following that, a conclusion may be drawn as to whether Kevin, by virtue of his absences, fell below the minimum standard for award of a wrestling letter:

The root of this controversy may be traced to where Ridge High School Principal Michael Pennella found it on the tumultuous Saturday morning of the Clemson trip. It resides in a regrettable "breakdown in communications." The record discloses that the breakdown began when Mr. Byrne determined to take the trip without discussing the matter with Coach Welch. That oversight is puzzling. Mr. Byrne actively participated in the wrestling program. He must have known of the coach's policy as well as his personal attitude on missing practices. Leaving that chore to Kevin was at the very least, a mistake in judgment. Yet, Mr. Byrne was believable when he explained that he thought this was a responsibility which Kevin should assume. It is against this backdrop that the full breach of communication finally occurred, during the controverted Saturday morning phone call. Mr. Byrne, a corporate executive, displayed during testimony a demeanor pervaded by an honest, but strong-willed and forthright personality. His intemperate close to the phone conversation with Coach Welch, notwithstanding the Coach's ostensible instigation, was inappropriate. As a result, the Coach was left without full knowledge of the facts which would have alerted him to the motive underlying the trip. The Superintendent and the Board were then faced with what appeared as gratuitious abuse of a first-rate coach and teacher, simply because of his enforcement of a valid school policy. The ultimate result should not have been difficult to predict.

Nevertheless, the inquiry here cannot end with this history of an angry phone call and a partially-informed coach. The full record is available now. That record must

be the basis for this decision. What must be determined is whether the "never miss a practice" rule was reasonably interpreted and applied, or whether the ultimate response by the Board must be rejected. The conclusion must be that the Board, in the purely legal sense, was arbitrary, capricious and unreasonable in its final ruling:

The focus in this matter has been misplaced. The question to be answered is whether Kevin Byrne met the standard for a wrestling letter, not his father. The demeanor of the Byrne family, including Kevin, was totally credible. So was their testimony: Kevin did not want to take the trip. He accompanied his family as a reluctant, but dutiful, minor child. The Board's witnesses, understandably, made no attempt to refute the obvious. Instead, the Board concentrated its argument on the shortcomings of the father's deportment during this affair. If Mr. Byrne, rather than Kevin, were in competition for the letter that argument might give pause. Mr. Byrne, however, is not. He is, on the contrary, the determined head of what appears to be a close-knit, model family. He moved, in part unwisely and perhaps too well, in one final emergency effort to redeem his son in the eyes of Clemson University. Significantly, he did so during what he perceived as the eleventh hour, and during a vacation week when Kevin would miss no classes. Mr. Byrne believably observed that he was also influenced by the thought of Kevin missing only three practices. Additionally, in the mind of Mrs. Byrne, Principal Pennella had approved the trip. Finally, Mr. Byrne knew that the family would return two days before a District meet in which it was virtually certain Kevin would not wrestle.

But again, the real question is whether Kevin himself has satisfied the requirements of the Wrestling Guide. The Board insists that Kevin should not be able to take refuge in the excuse that he was obeying his father, as he must. Carrying that concept to a logical extreme, the Board argues that any child could skip classes, miss exams, be absent from wrestling meets themselves, and still claim the fruits of labors which they did not perform, i.e. graduation or a letter. Although this concern is thought provoking, it is reminiscent of the harsh commandment which would have the sins of the fathers visited on the heads of their sons. If this doctrine is still alive, there is serious doubt that the Board or the Commissioner have jurisdiction to enforce it. See Exodus 20:5; Deuteronomy 5:9. More relevant is the observation of Justice Holmes that the life of the law is not logic, it is experience. This is a fact-sensitive case, replete with ambiguities, which would not serve well as a precedent. The conflict was born of fast moving events and mutual pressures which were atypical. Conflicts of this stripe must be

analyzed in their own odd settings, case by case. JBA and AMA v. Bernardsville Bd. of Ed., 4 N.J.A.R. 136, 152.

The decisions cited by the Board are not apposite. The Board relies heavily on Dennis v. Holmdel Bd. of Ed., 1977 S.L.D. 388, 390, 392; M.H. v. Cherry Hill Bd. of Ed., 1979 S.L.D. 320-324. In both those cases the students involved had taken prohibited overt actions of their own accord. Here, Kevin was powerless to do anything other than adhere to his father's instructions.

CONCLUSION

I CONCLUDE, therefore, after review of the entire record, including the credibility of witnesses, and for the reasons set forth in the ANALYSIS portion of this opinion that:

As to Issue No. 1: Petitioner is not barred from a decision on the substance of this petition because he failed to observe the 90-day limit for filing imposed by N.J.A.C. 6:24-1.2.

As to Issue No. 2: Respondent Board was arbitrary, capricious and unreasonable in denying petitioner his varsity letter for performance while a member of the Ridge High School Wrestling Team.

ORDER

I ORDER, therefore, that the varsity wrestling letter denied petitioner, Kevin Byrne, now be awarded to him and made part of his school record. The effective date of that award shall coincide with the effective date for all other wrestling letter awards for the 1983-84 season.

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

OAL DKT. NO. EDU 5750-84

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

March 13, 1985
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

3/13/85
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 15 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

ml

KEVIN BYRNE, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY, : DECISION

RESPONDENT. :

:

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were received from the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

The Board contends that the judge ignored the definition of "arbitrary, capricious and unreasonable" articulated in Bayshore Sew. Co. v. Dept. of Env. Prot., 122 N.J. Super. 184, 199 (Ch. 1973) which reads:

> "***In the law, 'arbitrary' and 'capricious' means having no rational basis.*** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.***"

More specifically, it contends that the decision to withhold petitioner's varsity letter cannot be said to have "no rational basis." Nor does the Board believe that there is no room "for two opinions". It enumerates at length a series of considerations which it believes provides a rational basis for the coach's decision. The Board again cites Dennis v. Holmdel Bd. of Ed., 1977 S.L.D. 388 and M.H. v. Cherry Hill Bd. of Ed., 1977 S.L.D. 320 in support of its position and it strongly excepts to the judge's dismissal of these two cases as inapposite because they involved circumstances wherein the students in question had taken prohibited actions on their own accord while, herein, petitioner was powerless to do anything but adhere to his father's instructions. (Initial Decision, ante)

Further, the Board argues that the judge's reliance on parental coercion creates a dangerous precedent, not justified by common experience or case law. It avows that such a ruling could have a devastating negative impact on a broad range of school rules and programs. It also contends that the judge's citing of the principle that the sins of the father are not to be visited upon the

heads of their sons is not fairly applicable in the instant matter. It asserts that petitioner is not being punished for something his father did, rather the letter was denied because Kevin did not meet the standards nor did he complete a commitment that had been set for the awarding of a varsity letter. As such, the Board believes the judge has ignored and thwarted one of the major purposes and benefits of the high school wrestling program, namely, a high level of commitment, dedication, and, if necessary, sacrifice.

Petitioner's exceptions affirm the correctness of the judge's decision that denial of a letter was unreasonable under the factual circumstances of the case. Petitioner states, inter alia:

> "***As Judge Lavery points out in his opinion, rules are subject to interpretation and to the test of reasonableness. The interpretation of the rule must be made in the light of the applicable circumstances. Coach Welch himself testified that academics came before wrestling, and it is clear that in the minds of the Byrnes, this trip, made on an emergency basis, was important for Kevin's academic future. Fortuitously, it also meant that Kevin would not miss any classes.***"
>
> (Petitioner's Exceptions, at p. 2)

Further, petitioner points out that it is undisputed that the coach had on other occasions exercised his discretion to permit others to miss practice. He agrees with the judge's determination that Dennis, supra, and M.H., supra, are inapposite as the factual circumstances are not similar to the instant matter. Petitioner also raises the issue that, notwithstanding support of the judge's decision awarding him a varsity letter, he believes that the Ridge High School Attendance Policy (J-3) is controlling in this matter.

The Commissioner is fully cognizant that coaches must make rules that set a framework for building discipline, teamwork, commitment, team spirit and morale. Rules with respect to attendance at practice sessions certainly fall within such a framework.

The Commissioner is also fully cognizant of the standard of review imposed upon him not to substitute his judgment for that of a board of education unless an action is found to be arbitrary, without rational basis or induced by improper motives. Kopera v. Bd. of Ed. of West Orange, 60 N.J. Super. 228 (App. Div. 1960) In the sense that Dennis, supra, and M.H., supra, reiterate this standard of review, they are applicable herein. Beyond that, the Commissioner concurs with the judge's conclusion that they are inapposite because the factual circumstances are clearly distinguishable.

What must be determined, in the instant matter, is whether there was a rational basis for the decision made by the Board upholding the denial of petitioner's varsity letter. According to

the judge, the Wrestling Guide (J-4) was adopted by Ridge High School as a valid school policy. (Initial Decision, ante) The record is barren, however, as to the Board having adopted the Guide as policy. Notwithstanding the fact that the ad hoc committee of the Board determined that the rules under dispute here were "well established rules" and that they "are not arbitrary and were fairly enforced," the wrestling rules do not rise to the level of official adopted Board policy. Also of importance is the fact that the Guide does not address the issue of excused absences from practice versus unexcused absences which certainly must be considered in this matter. It would appear from the record that the Board does have an adopted policy with respect to attendance procedures. (J-3) In order for the Board to render a decision in regard to absence from athletic practice that has a rational basis, it is not unreasonable to expect that it look to its formal policy dealing with class attendance for guidance, given the absence of adopted policy/procedures for attendance at athletic practice. Surely, some guidance needed to be sought as to what would constitute reasonable cause for missing athletic practice in that no one would rationally argue that "Never Miss a Practice" is to be taken literally.

In J-3, guidance is provided as to what constitutes "reasonable cause for absence"; one such reasonable cause is "visitation to post-secondary institutions of learning." (at p. 2) The policy does call for advance approval. In the instant matter, Mrs. Byrne did seek and thought she had received approval from the principal before leaving when resolution was not reached with the coach. In view of the fact that college visitation constitutes "reasonable cause" for absence from class and a prior approval of sorts was given by the principal, it would, in the Commissioner's opinion, be unreasonable and irrational for the Board to determine that such visitation does not constitute justifiable absence from athletic practice.

Also to be considered is the fact that the judge states:

> "***[N]o testimony by Board witnesses suggests that Kevin did not, during the 1983-84 wrestling season, or at any other time, pursue the sport with anything short of the proper attitude or a high standard of personal conduct. He contributed nine points to the varsity team, and met the achievement requirements. Before the controversial trip, he had never missed a practice without permission in four years.***" (Initial Decision, ante)

Given this and the determination rendered herein with respect to reasonable cause for absence, the Commissioner concurs with the recommended order of the Office of Administrative Law that petitioner be awarded a varsity wrestling letter for the 1983-84 season and that it be made part of his school record.

Further, the Commissioner directs the Board to examine its attendance policy and all of the "Guides" and "Rules and Regulations" with respect to athletics, or any extracurricular activities for that matter, to insure that disparate attendance standards do not exist. It is critical that consistency prevail so that conflicting decisions are not made by administrative, instructional staff or the Board itself. Disparate standards by their very nature give rise to allegations of arbitrary and capricious treatment.

The Commissioner is constrained to emphasize that he does not seek to substitute his judgment for the Board's in this decision; nor does he seek to diminish recognition that coaches must make rules that enable athletes to develop discipline, commitment and teamwork. Rather, he seeks to reinforce that such rules must reasonably and rationally be consistent with Board policy on attendance/absence.

Having so determined, the Commissioner does not find it necessary to reach to the issue of parental coercion as justification for missing athletic practice.

COMMISSIONER OF EDUCATION

APRIL 29, 1985

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8113-84
AGENCY DKT. NO. 433-10/84

SALVATORE LEGGIO,
Petitioner
v.
BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL-VOCATIONAL HIGH SCHOOL DISTRICT,
Respondent

Sheldon H. Pincus, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Edward G. O'Byrne, Esq., for respondent

Record Closed: March 1, 1985 Decided: March 15, 1985

BEFORE **WARD R. YOUNG,** ALJ:

Petitioner alleged his termination of employment as a custodian by the Board of Education of the Passaic County Technical-Vocational High School District (Board) was in violation of his tenure rights pursuant to N.J.S.A. 18A:17-3. He seeks to have said action set aside and to be reinstated with back pay and all other lost emoluments of employment.

The Board denies it acted improperly and asserts that petitioner was employed for a fixed term and did not acquire tenure, and further avers its action was not a termination but a non-renewal of employment.

The matter was transmitted to the Office of Administrative Law on November 2, 1984 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on December 20, 1984 at which the parties agreed to submit the matter for summary decision. The parties briefed the matter after discovery demands were met and the record closed on March 1, 1985, the date established for the filing of simultaneous responses.

The issues framed at prehearing are as follows:

1. Is petitioner a tenured employee?

2. Was the action of the Board in terminating petitioner's employment in violation of N.J.S.A. 18A:17-3 and/or N.J.S.A. 18A:6-10 et seq.?

The gravamen of this dispute is whether petitioner was employed for a fixed term, which, if affirmative, would negate his claim for a tenured status pursuant to N.J.S.A. 18A:17-3 and a subsequent hearing pursuant to N.J.S.A. 18A:6-10.

Petitioner was initially employed on May 4, 1983 on a part-time basis. At the Board's November 21, 1983 meeting, petitioner was appointed to a full time custodial position, effective November 16, 1983.

Petitioner was terminated, or non-renewed, effective July 31, 1984, by the Board at its July 19, 1984 public meeting following an executive session at which petitioner and his representative were heard and apparently failed to persuade the Board not to act as it did.

The Board's action was based on the recommendation of the School Business Administrator (SBA), in concurrence with that of the Chief Custodian, due to "chronic absenteeism, personal intimidation of his supervisors, verbal abuse of his immediate supervisor and the Business Administrator . . ." and a belief that "Mr. Leggio was a non-tenured employee subject to reappointment on an accrued basis July 1 of each year." See Interrogatory No. 4.

A review of the entire case file in this matter could easily lead one to conclude that petitioner's conduct as an employee was indeed below a reasonable minimum standard of performance. Nevertheless, although petitioner's conduct triggered the nonrenewal recommendation and Board action, said conduct is not at issue here. That would only be so upon the certification of tenure charges by the Board and a subsequent hearing prusuant to N.J.S.A. 18A:6-10.

The resolution appointing petitioner to a full time custodial position reads as follows:

> BE IT RESOLVED that the Board of Education of the Vocational School in the County of Passaic, upon the recommendation of the Board Secretary/Acting Business Administrator, hereby appoints the following part-time custodian to full time positions, effective November 16, 1983, as follows:
>
> | NAME | STEP/SALARY |
> |---|---|
> | Salvatore Leggio | I $10,520 (prorated) |
>
> * * *
>
> and
>
> BE IT FURTHER RESOLVED that these appointments are subject to all rules and regulations of this Board of Education.

It is not disputed that no contract document exists. Nor can it be disputed that no relevant language exists in the Agreement between the Board and Maintenance and Custodial Association.

The Chief Custodian and SBA filed certifications that they each told petitioner in the employment interviews that there would be a probationary period of ninety days and contract renewal would be on a year to year basis until tenure (three years of employment) had been reached by him.

> N.J.S.A 18A:17-3 provides:
>
> 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 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 of article 2 of chapter 6 of this title . . . . (emphasis supplied)

The court in Wright v. Bd. of Educ. of City of East Orange, 194 N.J. Super. 181 said: "The manner in which a school district may grant tenure under the statute is by appointing a janitor for an indefinite term." (at 184). It would appear reasonable that the manner in which a school district may avoid the acquisition of tenure by a janitor would be by appointment for a definite term.

In Harold Smith v. East Brunswick Bd. of Ed., 1983 S.L.D. _____ (decided August 15, 1983), aff'd State Bd. of Ed., 1984 S.L.D. _____ (decided April 6, 1984), the Commissioner said:

> It is further observed that the Board's minutes fail to set forth specific commencement and termination dates of employment for petitioner. This is a necessary ingredient and a requirement when an employment contract is for a definite term. Lacking such specificity, the term of employment may be viewed as indefinite rather than definite. (slip opinion at 12)

In the instant matter, I **FIND** no specific date of employment termination in the appointing resolution, and must **FIND** that petitioner's employment was for an indefinite period.

I **CONCLUDE**, therefore, that petitioner is a tenured janitor employed by respondent. I **ALSO CONCLUDE** that petitioner's termination or nonrenewal of employment by the Board was in violation of N.J.S.A. 18A:6-10.

The Board is hereby **ORDERED** to reinstate petitioner to his former position of employment with all salary and emoluments otherwise owing and due him since his termination, mitigated by other earnings.

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

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

15 March 1985
DATE

WARD R. YOUNG, ALJ

3/19/85
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 20 1985
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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SALVATORE LEGGIO,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL-VOCATIONAL HIGH SCHOOL DISTRICT, PASSAIC COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT.	:	
	:	

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

It is noted for the record that no exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Commissioner finds and determines that the judge properly concluded that petitioner had acquired a tenure status in the Board's employ pursuant to the provisions of N.J.S.A. 18A:17-3 and therefore his termination from employment by the Board was ultra vires.

Accordingly, the Board is hereby ordered to reinstate petitioner to his former position of employment as custodian with all salary and emoluments otherwise owing and due him since his termination, mitigated by other earnings.

COMMISSIONER OF EDUCATION

MAY 1, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3814-84
AGENCY DKT. NO. 167-5/84

PHILLIP CAPODILUPO,
Petitioner,
v.
BOARD OF EDUCATION
OF WEST ORANGE,
Respondent,
and
MARILYN SAVAGE,
PATTI VAN CAUWENBERGE,
Intervenors.

Richard A. Friedman, Esq., for petitioner
(Ruhlman, Butrym & Friedman, attorneys)

Samuel A. Christiano, Esq., for respondent

Alfred F. Maurice, Esq., for intervenor Margaret Savage

Gregory T. Syrek, Esq., for intervenor Patti Van Cauwenberge
(Bucceri & Pincus, attorneys)

Record Closed: January 23, 1985 Decided: March 19, 1985

OAL DKT. NO. EDU 3814-84

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

Statement of the Case

This case presents questions of tenure and seniority. Petitioner Phillip Capodilupo, a physical education teacher, alleges that the West Orange Board of Education ("Board") acted wrongfully when it terminated his employment for the 1984-85 school year as a result of a reduction in force. First, Capodilupo claims that the Board violated his tenure rights under N.J.S.A. 18A:28-5 by terminating his employment while retaining nontenured teachers in a position for which he was fully qualified. Second, Capodilupo challenges the application and validity of the new seniority standards for teaching staff members. These standards became operative on September 1, 1983. N.J.A.C. 6:3-1.10. [See 15 N.J.R. 464 (adopted June 1, 1983).]

Procedural History

On May 10, 1984, Capodilupo filed his verified petition seeking reinstatement and back pay with the Commissioner of Education. The Board filed its answer on May 18, 1984. Subsequently, on May 24, 1984, the Commissioner of Education transferred the matter to the Office of Administrative Law for handling as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. Thereafter, the Clerk of the Office of Administrative Law served notice of the pendency of this matter on other teachers whose interests might be adversely affected by the outcome, namely Margaret Savage, Patti Van Cauwenberge and Kevin Reilly. Savage and Van Cauwenberge sought and obtained leave under N.J.A.C. 1:1-12.1 to intervene in the proceedings. Their applications were granted on October 2, 1984. Reilly chose not to apply for intervention.

Meanwhile, the Office of Administrative Law held a hearing on August 7, 1984. At the hearing, Capodilupo and the Board placed on the record a joint stipulation of facts. Later, it became necessary to reopen the record in order to take supplementary

testimony.[1] A second hearing was held on November 13, 1984. Witnesses who testified and documents considered in deciding this case are listed in the appendix. Upon receipt of further information, the record closed on January 23, 1985. Time for preparation of the initial decision has been extended to March 19, 1985.

Findings of Fact

The basic facts are simple and undisputed. I **FIND:**

Phillip Capodilupo has been employed by the Board for five consecutive school years from 1979-1980 through 1983-1984. During this period, he worked as a physical education teacher at a high school consisting of grades 10 to 12. He has never taught at the elementary level. On February 27, 1984, the Board adopted a resolution terminating Capodilupo's employment for 1984-1985 as the result of a reduction in force. For seniority purposes, the Board compared Capodilupo's length of service with that of other physical education teachers at the secondary level.

Two nontenured physical education teachers remain on the staff. Margaret Savage began working for the Board in 1982-1983 and continued in 1983-84. Throughout her service, she was assigned to teach adaptive physical education to handicapped students in the elementary grades (Kindergarten to six). Also, she taught a swimming course for mentally retarded students at the high school. When the reduction in force occurred, Savage had taught for less than two years and, consequently, had not yet acquired tenure in her position. The second teacher, Kevin Reilly, began his employment as a physical education teacher for the Board in 1981-1982. His contract was renewed for 1982-1983 and 1983-1984. Reilly served exclusively in the elementary schools. He too had not attained tenure at the time of the reduction. Both Savage and Reilly are currently employed as physical education teachers by the Board for 1984-1985.

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[1]Originally, this case was consolidated for hearing with a companion case, Hill v. West Orange Bd. of Ed., 1985 S.L.D. ___ (Comm'r of Ed. 1985), involving similar questions of law and fact. When the record in Capodilupo was reopened, the Hill case was severed so as not to delay the decision. An initial decision in Hill was issued on December 5, 1984 and adopted by the Commissioner on January 22, 1985.

Additionally, Capodilupo claims seniority over another tenured teacher in the district. Patti Van Cauwenberge started working for the Board as a physical education and health teacher in late October 1980. By the time of the reduction in force, her length of service totaled 3.8 years. Unlike Capodilupo, Van Cauwenberge's assignment was always to an elementary school.

At all relevant times, all four teachers either possessed or were eligible to receive an instructional certificate endorsed as "teacher of health and physical education."[2] Such certificate authorizes its holder to teach physical education in any grade from kindergarten to the senior year of high school.

Much of the proof was directed to the difference between adaptive and regular physical education. At least nine other states require a special certification before a teacher becomes eligible to teach adaptive physical education. Currently New Jersey does not impose a similar requirement. Instead, anyone with a certificate endorsed for physical education is authorized to teach handicapped students. Savage's own expert, Professor Timothy Sullivan of Montclair State College, lamented the absence of any special certificate for adaptive physical education. Unhappy with the existing system, he indicated that groups in favor of stricter certification requirements were lobbying for a change in the regulations.

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[2]Although Capodilupo was qualified to obtain a New Jersey certificate as a teacher or physical education at the time of his initial employment, the certificate was not actually issued to him until January 1, 1983. None of the parties has argued that lack of certification constitutes a ground for depriving Capodilupo of the benefit of his prior service. Capodilupo points to a line of cases standing for the proposition that service by a person eligibile for certification may be counted for tenure and seniority purposes. Hausser v. Ewing Bd. of Ed., 1983 S.L.D. ___ (Comm'r of Ed. 1983); Saad v. Dumont Bd. of Ed., 1982 S.L.D. ___ (Comm'r of Ed. 1982); Kane v. Hoboken Bd. of Ed., 1975 S.L.D. 12 (Comm'r of Ed. 1975). But see Fischbach v. North Bergen Bd. of Ed., 1983 S.L.D. ___ (Comm'r of Ed. 1983), limiting that reasoning to situations where the lack of a proper certificate was due to administrative delay beyond the control of the teacher. Since the issue was neither argued nor briefed by the parties, it will not be addressed.

The Board has never adopted a formal resolution establishing the position of adaptive physical education. Nor did it obtain the approval of the County Superintendent of Schools for the creation of the job title. Apart from its general job description applicable to any teacher in the district, the Board has not adopted a specific job description setting forth the qualifications of a teacher of adaptive physical education. Despite the absence of a specific job description, the duties of a teacher of adaptive physical education are outlined in a series of internal memoranda distributed among school administrators. These duties include screening of children referred for evaluation; working with the Child Study Team to plan an appropriate program; consulting with parents; and teaching small classes adapted to meet the children's individual needs. Many of the children enrolled in the West Orange adaptive physical education program are so severely handicapped that they would be unable to participate in a regular program. Savage's present caseload includes some children afflicted with spina bifida, cerebral palsy, neurological or perceptual impairments and mental retardation. Improper instruction by someone unfamiliar with the treatment of these conditions can not only cause educational damage, but can actually result in physical harm to the child. Serious complications could occur if the shunt on the head of a child with spina bifida became blocked in the course of sports activities. An epileptic child might drown if his lungs filled with water during a swimming exercise.

Originally, the Board hired Savage for the position because of her impressive credentials in the field of physical education for handicapped students. Savage has a postgraduate degree with a concentration in special physical education. While still an undergraduate, she began to specialize in adaptive physical education. She is the co-author of various published articles about the topic. Before coming to West Orange, she had extensive experience teaching physical education to handicapped students in other districts. In marked contrast, Capodilupo has almost no background in adaptive physical education. His prior training in that area was limited to a single introductory undergraduate course.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board violated Capodilupo's tenure rights by dismissing him from employment and retaining two nontenured teachers in positions for which he was qualified.

Tenure is a status designed to protect teachers "from dismissal for unfounded, flimsy or political reasons," Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 73 (1982), and to afford teachers "a measure of security in the ranks they hold after years of service." Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super. 215, 218 (App. Div. 1949). Its benefits are conferred by statute rather than contract. Shelko v. Mercer Cty. Sp. Services Bd. of Ed., 97 N.J. 414 (1984). Under N.J.S.A. 18A:28-5, a teacher acquires tenure by (1) working in a position for which a teaching certificate is required; (2) holding the appropriate certificate; and (3) serving the requisite period of time. Spiewak, at 74. N.J.S.A. 18A:28-5 specifies that tenure attaches to a "position," such as teacher, principal or superintendent. Howley v. Ewing Bd. of Ed., 1983 S.L.D. ____ (Comm'r of Ed. 1983). Having earned tenure, a teacher may not be dismissed except for cause after certification of tenure charges, N.J.S.A. 18A:6-10, or as the result of a reduction in force for reasons of economy and efficiency, N.J.S.A. 18A:28-9. Without tenure, a teacher has no right of reemployment and may be terminated for virtually any reason not expressly prohibited by law. Dore v. Bedminster Bd. of Ed., 185 N.J. Super. 447, 456 (App. Div. 1982); In re Englewood Bd. of Ed., 150 N.J. Super. 265 (App. Div. 1977), certif. den. 75 N.J. 532 (1977). As distinguished from tenure, seniority accrues in "fields or categories" fixed by regulation, N.J.S.A. 18A:28-10. Seniority provides a mechanism for ranking all tenured teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accordance with sound educational policies. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362, 368 (1983). Hence, seniority must be regarded as a consequence of tenure. Put another way, seniority becomes relevant only after tenure has already been achieved.

It is axiomatic that boards of education may not treat nontenured teachers more favorably than tenured teachers. Tenure "would be little more than a gesture" if persons

without coverage had greater job security than those falling within its protection. Downs v. Hoboken Bd. of Ed., 12 N.J. Misc. 345, 350, 17 A. 528 (Sup. 1934), aff'd sub. nom. 113 N.J.L. 401 (E. & A. 1934). In Kearny Bd. of Ed. v. Horan, 11 N.J. Misc. 751, 753, 168 A. 132 (Sup. Ct. 1933), the court declared that a teacher protected by tenure "may not be dismissed for reasons of economy while other teachers not so protected, whose assignments such [tenured] teacher is competent to fill, are retained under employment." Accord, Seidel v. Ventnor City Bd. of Ed., 110 N.J.L. 31 (Sup. Ct. 1932). Coming to a similar conclusion, the Appellate Division recently upheld a reduction in the amount of hours of employment where a nontenured teacher "received no better treatment" than a tenured one. Klinger v. Cranbury Bd. of Ed., 190 N.J. Super. 354 (App. Div. 1982), certif. den. 93 N.J. 277 (1983.

All parties have stipulated that Capodilupo has tenure, whereas Savage and Reilly do not. As between Capodilupo and Reilly, that stipulation ends our inquiry. Clearly, under Downs and the other cited cases, it was illegal for the Board to dispense with Capodilupo's services while keeping Reilly in a position which Capodilupo was qualified to hold. Nobody has suggested that Capodilupo was not perfectly capable of teaching the elementary physical education classes assigned to Reilly for 1984-85.

More troublesome is the contest between Capodilupo and Savage. There are indications in the case law that a nontenured teacher may displace a tenured teacher who is unfit for a particular position. Illustratively, in Lichtman the Supreme Court went out of its way to observe that "[t]enure, as such, can attach to each individual based on distinctions in particular jobs (eg. full-time and remedial teachers)." 93 N.J. at 368, fn. 4. While Lichtman dealt essentially with seniority rather than tenure, the Court placed great emphasis on the critical fact that the job duties performed by the two rival teachers were "identical." Closer to the point, in Horan the trial-level court stated that tenure protection extends only to those assignments which the tenured teacher "is competent to fill." 11 N.J. Misc. at 753.

Certainly Savage has made a persuasive showing of the desirability of special certification for teachers of adaptive physical education. Nevertheless, Capodilupo is fully qualified under New Jersey law, as it currently exists, to teach any physical education class, including those comprised of severely handicapped students. Pursuant to N.J.S.A. 18A:6-38, the State Board of Examiners has the power to "issue appropriate certificates to teach or to administer, direct or supervise the teaching, instruction or educational guidance of . . . pupils in the public schools[.]" Furthermore, N.J.A.C. 6:11-3.3 provides that the State Board of Education "may make and enforce rules and regulations for the granting of appropriate certificates or licenses to teach[.]" In the exercise of its rule-making authority, the State Board has promulgated N.J.A.C. 6:11-8.4(c)(11) for issuance of an endorcement in "physical education." When the State Board wants to establish a distinct endorsement for the teaching of handicapped children, it knows exactly what to do. Compare N.J.A.C. 6:11-8.4(c)(4) establishing a "teacher of the handicapped" endorsement for academic instruction of handicapped students. Added support for this view derives from the fact that other states issue separate certificates for teacher of adaptive physical education. If Savage is dissatisfied with the certification regulations in their present form, her remedy is to petition the licensing authority for a revision. Professor Sullivan acknowledged as much when he mentioned that efforts are currently underway to upgrade the certificate requirements for adaptive physical education. As matters now stand, Capodilupo is legally authorized to teach adaptive physical education. Therefore, he is entitled to the position occupied by Savage.

Lastly, Capodilupo argues that he should have more years of seniority credit than Patti Van Cauwenberge, the other teacher who has tenure. Exactly the same arguments were also made in Hill v. West Orange Bd. of Ed., 1985 S.L.D. ___ (Comm'r of Ed. 1985). The outcome of that case must necessarily control the present case as well. In Hill, the Commissioner of Education rejected petitioner's contention that her seniority rights vested under the old regulations. Instead, he ruled that seniority determinations made after September 1, 1983 are governed by the new seniority rules. See also, Camilli v. Northern Highlands Reg. High Sch. Dist., 1985 S.L.D. ___ (Comm'r of Ed. 19885).

Applying the new rules to our own case, Capodilupo's five years of service are credited in the category of secondary physical education teacher. N.J.A.C. 6:3-1.10(l)(15). But Van Cauwenberge's 3.8 years of service are credited in the different category of elementary physical education teacher, N.J.A.C. 6:3-1.10(l)(16). Capodilupo has no seniority credit in the elementary category. Accordingly, the Board correctly concluded that he did not have greater seniority than Van Cauwenberge.

Order

It is hereby **ORDERED** that the West Orange Board of Education immediately reinstate Capodilupo to the full-time position of physical education teacher.

And it is further **ORDERED** that the Board promptly pay to Capodilupo any lost salary and other benefits from the date of his termination to the date of reinstatement; provided, however, that the amount of lost salary shall be offset by the amounts of income, in any, earned by Capodilupo during the period of his termination.

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

OAL DKT. NO. EDU 3814-84

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

March 19, 1985
DATE

KEN R. SPRINGER, ALJ

Receipt Acknowledged:

MAR 19 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 21 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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PHILLIP CAPODILUPO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
MARGARET SAVAGE AND PATTI VANCAUWENBERGE,	:	
INTERVENORS.	:	
	:	

The record and initial decision have been reviewed. No exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c. The Commissioner notes that in this case, possibly because of the number of intervenors involved, six sets of exceptions were filed. In each case the time span of ten (10) calendar days from receipt of the initial decision was carefully determined from postal receipts for each of the parties involved. Primary exceptions not falling within this ten (10) day span were not considered by the Commissioner, nor were reply exceptions considered which were made to such untimely submissions.

In the presently controverted matter the basic facts are these:

Petitioner has been employed by the Board for five consecutive school years as a physical education teacher at a high school consisting of grades 10 to 12. On February 27, 1984 the Board adopted a resolution terminating petitioner's employment for the 1984-85 school year as the result of a reduction in force. It is undisputed that petitioner has tenure and five years' seniority as a physical education teacher in the secondary category.

The Commissioner takes note of the presence of another tenured physical education teacher, Patti VanCauwenberge, who, at the time of the RIF, had service of 3.8 years, all at an elementary school.

In summary, the Commissioner lists the following physical education teachers, all properly certified:

1. Capodilupo, tenured, secondary only, 5 years

2. VanCauwenberge, tenured, elementary only, 3.8 years

3. Savage, nontenured, elementary only

4. Reilly, nontenured, elementary only

For ease of reference the Commissioner herewith sets down in pertinent part the new seniority standards operative September 1, 1983 as they delineate elementary and secondary categories:

"6:3-1.10 Standards for determining seniority

***

15. Secondary. The word 'secondary' shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction. Any person holding an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject area endorsement(s) under which he or she has actually served. Whenever a person shall be reassigned from one subject area endorsement to another, all periods of employment in his or her new assignment shall be credited toward his or her seniority in all subject area endorsements in which he or she previously held employment. Any person employed at the secondary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such educational services certificate or special field endorsement. Persons employed and providing services on a district-wide basis under a special subject field endorsement or an educational services certificate shall acquire seniority on a district-wide basis.

16. Elementary. The word 'elementary' shall include Kindergarten, grades 1-6 and grades 7-8 without departmental instruction. District boards of education who make a determination to reorganize instruction at grades seven and eight pursuant to these rules must do so by adoption of a formal resolution setting forth the reasons for such reorganization. Any person employed at the elementary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the elementary category and only for the period of actual service under such educational services certificate or special [subject] field endorsement. Persons employed and providing services on a district-wide basis under a special

> subject field endorsement or an educational services certificate shall acquire seniority on a district-wide basis.***" (Emphasis Supplied.)

The Commissioner notes but cannot agree with Judge Springer's Conclusions of Law:

> "Based on the foregoing facts and the applicable law, I CONCLUDE that the Board violated Capodilupo's tenure rights by dismissing him from employment and retaining two non-tenured teachers in positions for which he was qualified."
> (Initial Decision, ante)

The Commissioner, in applying the new seniority standards, finds that petitioner, at the time of the RIF, had acquired tenure and seniority of five years in the secondary category only and held no eligibility on the elementary level, never having served there. Accordingly, the order by the judge reinstating petitioner to the full-time position of physical education teacher is set aside. The Commissioner observes that petitioner is eligible for reinstatement in the secondary category only, as properly determined by his service of five years in a high school of grades 10-12

COMMISSIONER OF EDUCATION

MAY 3, 1985

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5117-84
AGENCY DKT. NO. 217-6/84

SONDRA SHAPIRO,

Petitioner,

V.

BOARD OF EDUCATION OF THE TOWN OF GUTTENBERG, HUDSON COUNTY,

Respondent.

Howard Schwartz, Esq., for petitioner

John Tomasin, Esq., for respondent

Record Closed: February 15, 1985 Decided: March 21, 1985

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

Sondra Shapiro, certified as learning disabilities teacher/consultant under N.J.A.C. 6:11-12.15 and employed by the Board of Education of the Town of Guttenberg, Hudson County, from December 15, 1980 to date on a regular and continuous basis for two days a week at per diem compensation, alleged the Board has failed to recognize her tenure status and has failed to compensate her as a regular teaching staff member or to accord her benefits and emoluments granted and paid to other regular full-time teaching staff members, contrary to her tenure rights under N.J.S.A. 18A:28-5. She sought judgment declaring and affirming her tenure rights, awarding her compensation for unpaid benefits, lost salary and other emoluments to which she was and is entitled. While admitting petitioner's regular, recurring and part-time employment since December 15,

1980 and her certification, the Board denied petitioner's other allegations, contending her employment on a contract per diem basis since inception was subject to her express disavowal of any rights to tenure or to pension fund, medical insurance or sick leave benefits.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on June 14, 1984. The Board's answer was filed there on July 3, 1984. Accordingly, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on July 13, 1984, for hearing and determination as a contested pursuant to N.J.S.A. 52:14F-1 et seq.

On notice to the parties, a prehearing conference was conducted and concluded in the Office of Administrative Law on September 18, 1984 and an order entered establishing, inter alia, the parties were to confer with a view towards establishing by stipulation all relevant and material propositions of fact, including employment record, employment contracts, negotiated agreement, certifications and academic credentials. Thereafter, it was ordered, the matters at issue were to be addressed and resolved as if on cross-motions for summary decision in accordance N.J.A.C. 1:1-13.1 et seq., on pleadings, admissions, stipulations, documentation, and memoranda of law, examination and cross-examination of witnesses having been waived. At issue in the matter fundamentally was whether petitioner had acquired tenure under criteria in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982). All submissions on motions having been made, the record closed.

ADMISSIONS, STIPULATIONS, AND FINDINGS OF FACT

The parties having so admitted and/or stipulated, I make the following findings of fact:

1. Petitioner commenced employment with the Board on or about December 15, 1980.

2. Petitioner is certified as a learning disabilities teacher/consultant. The certificate was issued in January, 1979 (J-1).

3. Petitioner has worked two days per week on a regular basis as a learning disabilities teacher/consultant in the district to the present time.

4. Petitioner holds a bachelor of arts degreee issued in June, 1959 (J-2), and a master of education, special education degreee issued January, 1979 (J-3).

5. Petitioner took the requisite oath of office prior to commencing employment (J-4).

6. Petitioner was offered and signed contracts of employment dated December 2, 1980 (J-5), September 9, 1981 (J-6), and September 8, 1982 (J-7).

7. Petitioner originally made application for employment on a form prescribed by the Board (J-8) and also submitted a resume (J-9).

8. The Guttenberg Board of Education and The Guttenberg Educational Association entered into a collective negotiations agreement for the period July 1, 1983 - August 31, 1986 (J-10).

9. The Board has compensated petitioner in accordance with the terms of J-5, J-6 and J-7. The compensation paid was daily compensation, without any other benefits.

DISCUSSION

Not reasonably contestable in this matter, in view of stipulations and findings of fact above, is whether petitioner's employment as LDT/C from December 2, 1980 to date is tenurable under N.J.S.A. 18A:28-5 and N.J.S.A. 18A:1-1. Duly certified as LDT/C

under N.J.A.C. 6:11-12.15, petitioner is a teaching staff member within the meaning of N.J.S.A. 18A:1-1 and has been continuously employed since 1980 for a periods of time sufficient to render her eligible for tenure under N.J.S.A. 18A:28-5(b) or (c). In Spiewak v. Borough of Rutherford, 90 N.J. 63 (1982), the court said:

> We hold that all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked the requisite number of years, are eligible for tenure unless they come within the explicit exceptions in N.J.S.A. 18A:28-5 or related statutes such as N.J.S.A. 18A:16-1.1. The remedial and supplemental teachers in the cases decided today are covered by the statutory language. We find no exception in any statute that would deny them eligibility for tenure. [Id. at 81; and cf. Bollerman v. Bd. of Ed. of Riverdale, 1983 S.L.D. — (Comm'r's dec. July 11, 1983)].

But the Board here urged petitioner's employment was on a contract per diem basis and even though recurrent and continuous was subject to her express disavowals of rights to tenure during, at least, the years 1980-81, 1981-82 and 1982-83 (J-5, J-6 and J-7). It argued in effect petitioner had waived any right to tenure eligibility. The contracts were identical and provided as follows (e.g., J-7):

> September 8, 1982
>
> BOARD OF EDUCATION
>
> TOWN OF GUTTENBERG, N.J.
>
> I, the undersigned, do hereby understand and agree to be employed as Learning Disability Teacher in the Guttenberg School System at the salary of $115.00 per diem.
>
> I will perform all the duties of a Learning Disability Teacher subject to the rules and regulations of the Board of Education of the Town of Guttenberg, N.J., as authorized by the said Board of Education and by applicable law.

I further understand and agree that I shall remain as a Learning Disability Teacher on a per diem basis, without any right to tenure, Pension Fund, Medical Insurance or sick leave days during the entire time I am employed in the Guttenberg School System and that I could never become a permanent staff teacher until I am confirmed as such by resolution of the Board of Education.

Signed:

(Petitioner)

Learning Disability Teacher Consultant

Even if the successive employment contracts not be construed as contracts of adhesion,[1] and even if they were fully and fairly entered into at arms' length by her and the Board, their legal consequence is nugatory, in my view, since the tenure statutes and N.J.S.A 18A:28-5 are mandatory or imperative enactments whose statutory rights are not susceptible of waiver. In I/M/O Bd. of Ed. of West Morris Reg. High Sch., Morris Cty, 1981 S.L.D. —(Comm'r's dec. June 18, 1981), a declaratory judgment action, the question considered was whether a public school employee might, under particular circumstances, waive his tenure eligibility by formal agreement with his employer. It appeared a certified principal had completed two years in a position of vice-principal. In an agreement struck with the Board, he agreed to defer his right to acquire tenure by further continuous service under N.J.S.A. 18A:28-6. He proceeded to be employed in probationary service. The Commissioner held, against arguments by the board, that just as certain statutory imperatives could not be modified by a collective bargaining agreement because they are terms and conditions set by law, so too is tenure eligibility invariable under its

1 'Contract of adhesion' signifies a standardized contract that, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. See Vasquez v. Glassboro Service Assn., Inc., 83 N.J. 86, 101-4 (1980); and 17 C. J. S. Contracts §10, p. 581.

statutory imperative. N.J.S.A. 18A:28-5 sets down precise conditions for tenure. When those precise conditions have been met, tenure attaches. The agreement purported to have been reached by the principal and the board was held to be invalid and unenforceable. [Slip op. at 11-13]. Cf. State v. State Supervisory Employees' Assn., 78 N.J. 54 (1978), in which the court said:

> Mandatory or imperative statutes ordinarily are those enactments which set up a particular scheme which "shall" be handled as directed. An example of such a statute is N.J.S.A. 18A:28-5(b), which provides that teachers "shall be under tenure during good behavior and efficiency and shall not be dismissed. . . after employment in such district or by such board for . . . three consecutive academic years, together with employment at the beginning of the next succeeding academic year," except for specifically enumerated reasons [id. at 82, ftn. 7].

In short, and I so FIND, the purported disavowals of tenure eligibility contained in contracts signed by petitioner (J-5, J-6 and J-7) are invalid and unenforceable to the extent of impeding her acquisition of tenure. Cf., in another context, Whidden v. Bd. of Ed., City of Paterson, 1977 S.L.D. 1312, 1313 (App. Div. 1977), noting that while N.J.S.A. 18A:29-9 authorized a school district to place a newly employed teacher at such initial place on the salary schedule as might be agreed upon between the member and the employing board, nothing in the language of that section suggested the Legislature intended to authorize a waiver of or a departure from the requirement of N.J.S.A. 18A:29-11 that credit be given for military service. See Bd. of Ed. Englewood v. Englewood Teachers, 64 N.J. 1, 7 (1973).

Accordingly, I FIND petitioner acquired tenure under N.J.S.A. 18A:28-5(c), during the school year in December 1983. In addition, it is evident from stipulated facts and findings there cannot be said to have been clear recognition or acceptance by both sides prior to initiation of litigation in June 1984 that petitioner was by law a teaching staff member eligible to obtain tenure. The negotiated agreement in J-10 cannot be said

to be expressive of arms' length, knowledgeable negotiation between Guttenberg Educational Association and the Board; and, to that extent, any terms or conditions in such operative agreement covering compensation for per diem teachers do not operate to interfere with petitioner's claim for salary and benefit parity. See Odenwald v. Bd. of Ed. Oakland, 1984 S.L.D. — (Comm'r's dec., March 19, 1984, slip op. at 19-21). I **FIND**, further, that petitioner, were she to have been employed full time for 1984-85 and were she to have been placed on the 1984-85 salary guide according to her educational attainments and years of experience, would have been placed on the fifth salary step, with a masters degree, at a salary of $17,700. I **FIND** that since petitioner was employed two days per week, she is entitled to a prorationing factor of 40 percent of salary of full-time teachers on the salary guide. She is entitled, therefore, and it so **ORDERED**, she be granted such salary parity at the prorated level to date of filing petition herein, less any offset to the extent of monies paid under her per diem rate since then. Finally, I **FIND** and **DETERMINE** she is entitled to the same benefits, pro rata, as other teaching staff members in accordance with the 1983-86 collective bargaining agreement (J-10). Those benefits include personal days (J-10 at 19); sick days (J-10 at 20), health insurance, prescription plan and dental plan (J-10 at 27); and any inchoate rights to terminal leave pay (J-10 at 31). Cf. Odenwald v. Bd. of Ed., Borough of Oakland, 1984 S.L.D. — (Comm'r's dec. Aug. 6, 1984; slip op. at 24-26); and Timpson v. Bd. of Ed., Ramapo-Indian Hills Reg. High Sch., 1984 S.L.D. — (Comm'r's dec. Nov. 13, 1984; slip op. at 21-2).

The Board is **ORDERED** to effectuate all such salary and benefit equalizations for petitioner forthwith, retroactively to date of filing of petition herein, and consistently with the terms hereof.

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

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

March 24, 1985
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

MAR 25 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 26 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

SONDRA SHAPIRO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF GUTTENBERG, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the Board within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

The Board excepts to the determinations reached by the judge, arguing that tenure induced by misrepresentation, fraud and false employment agreement cannot form the basis for a valid tenure claim, thus petitioner is estopped from asserting such a claim. It asserts that cases such as Spiewak, supra, and the "waiver" cases cited by the judge are inapposite.

Further, the Board avows that the collectively negotiated contract between the Guttenberg Educational Association and itself affords additional cause to deny tenure and enforce the contract of the parties as written. It asserts that the judge had no support or basis for the finding that the negotiated contract (J-10) "cannot be said to be expressive of arms' length, knowledgeable negotiation between the Guttenberg Educational Association and the Board." (Initial Decision, ante)

The Commissioner finds the Board's legal arguments to be without merit for the following reasons. The record of this matter clearly establishes that the Board did not recognize petitioner as a teaching staff member with statutorily granted tenure rights. This is in direct contradiction to the New Jersey Supreme Court decision in Spiewak, supra. Further, the judge is entirely correct in his reliance on West Morris, supra, which articulated that an individual may not waive his or her statutory right to tenure by formal agreement with a board of education. Hence, the Board herein is misguided in its efforts to characterize petitioner's actions in this matter as fraudulent or misrepresentative. The Board had no power to enter into employment contracts such as contained in the record herein (J-5-7), contracts which contradicted or disclaimed statutorily mandated requirements.

As regards the Board's contention that the judge erred in holding that the collective bargaining agreement/contract could not be said to be expressive of arm's length, knowledgeable negotiation, the Commissioner determines that the judge was correct in his

finding. As previously stated, it is unquestionably clear that the Board failed to recognize that petitioner was a teaching staff member with statutory rights. It was therefore reasonable for the judge to find as he did. In the absence of any separate, collectively negotiated contract covering petitioner's employment, there is no alternative but to order that petitioner be afforded prorated salary and benefits provided to other teaching staff members in the Guttenberg School District pursuant to the agreement in effect between the Board and the Association (J-10).

Further, the Commissioner determines that the judge's order with respect to prorated salary and benefits is not in conflict with the recent State Board of Education decision in Hyman et al. v. Board of Education of Teaneck, decided by the Commissioner August 15, 1983, aff'd in part/rev'd in part State Board March 8, 1985, because the factual circumstances in the instant manner are distinguishable. Unlike the circumstances in Hyman, the Board has failed to demonstrate that it recognized petitioner as a tenured teaching staff member and that it engaged in collective negotiations to adopt a separate agreement with respect to her salary and benefits.

Accordingly, the Commissioner orders that petitioner be granted prorated salary and benefits for 1984-85 as determined by the sole teacher collective bargaining agreement in effect in the Guttenberg School District [Exhibit J-10]. She is to be placed at the step and degree level indicated in the Initial Decision. Back salary would consist of any differential that exists between monies already received and her prorated salary guide entitlement. Because the pleadings in this matter were not joined until after the 1984-85 school year commenced, the Commissioner modifies the judge's order with respect to retroactive compensation to be September 1, 1984 rather than the date of filing of the Petition of Appeal.

COMMISSIONER OF EDUCATION

MAY 7, 1985

INITIAL DECISION
OAL DKT. NO. EDU 3139-84
AGENCY DKT. NO. 72-4/84

DONALD P. ECHEVARRIA
Petitioner,
v.
BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL, CAPE MAY COUNTY,
Respondent.

Barbara E. Riefberg, Esq., for petitioner (Selikoff & Cohen, attorneys)

John T. Barbour, Esq., for respondent (Barbara & Costa, attorneys)

Record Closed: March 6, 1985 Decided: March 21, 1985

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

Petitioner, a tenured teaching staff member in the employ of the Board of Education of the Cape May County Vocational-Technical School (Board) commencing in September 1977, alleges that the Board denied awarding petitioner military service credit to which he was due and eligible, pursuant to N.J.S.A. 18A:29-11, and seeks an order issued by the Commissioner of Education (Commissioner) directing the Board immediately to advance petitioner two steps on its adopted salary guide. The Board denies the allegation and requests that the petition of appeal be dismissed.

PROCEDURAL ASPECTS

Petitioner's Petition of Appeal was received by the Commissioner on April 5, 1984. On May 3, 1985, the matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

Prior thereto, on January 27, 1984, where the undersigned opened the record in the matter of Cape May Cty. Vo-Tech Ed. Ass'n et al. v. Bd. of Ed. of the Cape May Cty. Vo-Tech School Dist., OAL DKT. EDU 1312-83, decided, Comm'r of Ed. (Sept. 14, 1984) petitioners therein moved to amend their Petition of Appeal to include Count 12 on behalf of Donald P. Echevarria, petitioner herein. Subsequent to oral argument on the motion to amend, heard on January 30, 1984, the undersigned denied the motion, grounded, in part, upon petitioner's failure to file this motion in a timely manner, which visited prejudice upon the Board with insufficient time to prepare its defenses. See, Cape May Cty. Vo-Tech Ed. Ass'n v. Bd. of Ed. Cape May Cty. Vo-Tech School Dist.

In the instant matter, prehearing conferences were held on May 31, 1984 and September 27, 1984. The parties agreed to hold the herein matter in abeyance until a final decision was rendered by the Commissioner in the matter cited above. The Commissioner issued his decision on September 14, 1984, and, thereafter, the Board appealed the decision before the New Jersey State Board of Education. The State Board of Education rendered its determination on March 6, 1985, and this matter is now ripe for decision.

This matter comes on by way of duly executed Stipulations and exhibits advanced by the parties for summary decision.

STIPULATIONS

Petitioner, DONALD P. ECHEVARRIA, and Respondent, CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL BOARD OF EDUCATION, hereby stipulate to the following facts:

1. Petitioner, Donald P. Echevarria, is a teaching staff member employed by Respondent since September, 1977.

2. Petitioner served a total of one (1) year, six (6) months on active duty in the United States Marine Corps. from December 3, 1968 through June 23, 1970. (See Exhibit "A" attached).

3. Petitioner was issued a permanent Certificate as a Teacher of Industrial Arts in February, 1974. (See Exhibit "B" attached).

4. Petitioner taught for three (3) years in the Upper Freehold Regional School District prior to being employed by Respondent. (See Exhibits "C", "D" and "E" attached). He also had three (3) years of industrial experience. (See Exhibit "F" attached).

5. Upon being hired by Respondent, Petitioner was placed [sic] at Step 3 on Guide B. (See Exhibit "C" attached).

6. Respondent is the public body charged by the school laws of the State of New Jersey with administering the Cape May County Vocational-Technical Schools.

7. It is the position of Petitioner that his initial placement on Step 3B was in recognition of prior teaching and industrial experience.

8. It is the position of Respondent that Petitioner's initial placement on Step 3B was in recogniztion of military service credit.

9. A copy of the 1977-78 Salary Guide for Respondent's School District is attached as Exhibit "H".

DISCUSSION

The Board's adopted salary guide policy for the 1977-78 school year, petitioner's initial appointment, provided, among other things, for prior credit allowed and afforded to new hires in the school district, as follows:

> 3. New employees may be placed on the salary guide according to their teaching experience and/or industrial experience including military experience beyond the certification requirements on a ration of two such years of experience for one salary step to a limit of step four on the guide. [Exhibit H]

It is observed that the policy contains the word "may" rather than "shall," which connotes a "permissive" rather than "mandatory" construction. When the word "shall" appears in a statute, regulation, rule or policy, it creates a presumption that what is thus commanded must be done. Diodato v. Camden Cty. Park Comm., 136 N.J. Super. 327 (App. Div. 1975). However, such a presumption is not necessarily conclusive and may be overcome. Union Terminal Cold Storage Co. v. Spence, 17 N.J. 162, 166 (1954). Similarly, the word "may" connotes an obligation or function with the force of "must" or "shall" in statutes, deeds, and other legal documents. American Heritage Dictionary of the English Language, 1979. Black's Law Dictionary, (1979 5th ed.), also expresses an interpretation of "may" by stating that:

> Regardless of the instrument, however, whether constitution, statute, deed, contract or whatever, courts not infrequently construe "may" as "shall" or "must" to the end that justice may not be the slave of grammar. . . .

This definition is further qualified where it continues with:

> However, as a general rule, the word "may" will not be treated as a word of command unless there is something in context or subject matter of act to indicate that it was used in such sense.

The Board's authority to establish a policy concerned with its treatment of new hires is authorized pursuant to N.J.S.A. 18A:11-1, which provides, in pertinent part, as follows:

> c. Make, amend and repeal rules, not inconsisent 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.
>
> 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.

Such authority to enact rules and regulations embraces the power to administer them. The Commissioner has held that he will not substitute his judgment for that of a board of education when a board acts in good faith and where such acts are neither arbitrary, capricious or unreasonable. Boult and Harris v. Bd. of Ed. of Passaic, 1939-49 S.L.D. 7, aff'd, State Board, aff'd, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd, 136 N.J.L. 521 (E.&A. 1948).

It is clear that a stated policy of a board of education must be reasonable. In the Matter of the Tenure Hearing of William Lavin, Sch. Dist. of the Lower Camden Cty. Reg. H.S. Dist. No. One, Camden Cty., 1976 S.L.D. 796, 800. It follows that the interpretation and implementation of a policy also be reasonable. The Commissioner set forth guidelines for the interpretation of a board of education policy in Harry A. Romeo, Jr. v. Bd. of Ed. Tp. of Madison, Middlesex Cty., 1973 S.L.D., 102, 106 as follows:

> In ascertaining the meaning of a policy, just as of a statute, the intention is to be found within the four corners of the document itself. The language employed by the adoption should be given its ordinary and common significance. Lane v. Holderman, 23 N.J. 304 (1957). Where the wording is clear and explicit on its face, the policy must speak for itself and be construed according to its own terms. Duke Power Company, Inc. v. Edward J. Patten, Secretary of State, et al., 20 N.J. 42, 49 (1955); Zietko v. New Jersey Manufacturers Casualty Insurance Company, 132 N.J.L. 206, 211 (E.&A. 1974); Bass v. Allen Home Development Company, 8 N.J. 219, 226 (1951); Sperry and Hutchinson Company v. Margetts, 15 N.J. 203, 209 (1954); 2 Sutherland, Statutes and Statutory Construction (3rd ed. 1943), Section 4502. . .

Assuming, arguendo, that the Board treats all new hirees evenhandedly to account for their prior "teaching experience and/or industrial experience including military experience" to grant "two such years of experience for one salary step to a limit of step four on the guide" (Exhibit H), it is necessary now to examine the applicable salary guide for the 1977-78 school year under which petitioner herein commenced his employment with the Board. Only that portion of the salary guide pertaining to the instant matter is set forth below as follows:

Schedule 10A 1976-77

B. BACHELORS DEGREE OR EQUIVALENT

(Step)	
1.	$9,750.
2.	10,200.
3.	10,650
4.	11,100
5.	11,550

[Exhibit H]

Pursuant to the salary policy, had petitioner evidenced no prior teaching, industrial or military experience, the Board would have placed him at Step 1. The Board placed petitioner at Step 3, which reflects credit for four years' previous experience. The facts demonstrate, however, petitioner had three years' prior teaching experience, three years' industrial experience, together with one year and six month's military experience which, in accord with the Commissioner's decision in Lavin*, grants petitioner two full years' military experience. Petitioner's total prior experience, therefore, equals eight years.

* Majorie A. Lavin v. Bd. of Ed. of the Borough of Hackensack, Bergen Cty., 1979 S.L.D. 237 at 240. "It is the Commissioner's determination that military service of six months or more shall be construed to be one year's salary credit. Conversely, military credit of less than six months shall not be recognized." See also, Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 at 148-149, where the Supreme Court said: "Upon appeal . . . the State Board awarded petitioner two years' military service credit to be applied. . . . The Appellate Division affirmed, except that it held that petitioner was entitled to three years' credit, 178 N.J. Super. 221 (1981). . . . The Board of Education did not seek review of the Appellate Division's determination of the number of years of service credit to which she is entitled and that issue is not before us."

Applying the Board's policy calculation at a ratio of 2 to 1 (two years' prior experience for every step placement on the salary guide), petitioner was eligible for placement at step 5 on the salary guide at the time of his initial hire, but for the four-step limitation. Even so, the Board placed petitioner at step 3, reflecting only four of petitioner's eight years prior experience eligibility. The Board argues, moreover, that its placement of petitioner at step 3 was in consideration of his prior military experience. There is nothing in the record to support this argument.

The Board's salary policy for new employees must now be examined in the context of its construction and applicability to N.J.S.A. 18A:29-11, the credit for military services statute. N.J.S.A. 18A:29-11 provides:

> Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States or of this state, including active service in the women's army corps, the women's reserve of the naval reserve, or any similar organization authorized by the United States to serve with the army or navy, in time of war or an emergency, or for or during any period of training, or pursuant to or in connection with the operation of any system of selective service, shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other state or territory of the United States, except that the period of such service shall not be credited toward more than four employment or adjustment increments.
>
> Nothing contained in this section shall be construed to reduce the number of employment or adjustment increments to which any member may be entitled under the terms of any law, or regulation, or action of any employing board or officer, of this state, relating to leaves of absence.
>
> [emphasis added]

In view of the unambiguous language of the statute, N.J.S.A. 18A:29-11, emphasized above, a strict construction of the Board's policy for new employees renders it ultra vires. This is so because the policy provides only for a ratio of two years' military service credit to one step on the salary guide. The policy fails to speak of "full military service credit up to four years," which is required by statute. Rather, the policy lumps all prior experience to be considered for placement on the salary guide, "including military

experience," together with "teaching and/or industrial experience" calculated at the 2 to 1 ratio and only to step 4. This is a clear violation of the statutory provisions embodied at N.J.S.A. 18A:29-11. In no instance does the statute provide, or even suggest, that a board of education be permitted to reduce an employee's earned military service credit by one-half.

A closer examination of the Board's policy further demonstrates it is ultra vires with respect to compliance with the clear mandate in N.J.S.A. 18A:29-11. For example, in order to afford a new employee with four years' entitlement for military service credit, as mandated, the placement on the salary guide should be a Step 5, rather than a Step 4. This is evidenced by the fact that Step 1 on the guide is the entry level reflecting "zero" prior experience. Dismissing the Board's 2 to 1 ratio for the moment, Step 2, therefore, reflects one year's prior military service credit; Step 3, two years; Step 4, three years; with Step 5 equal to four years' military service credit to be applied to an eligible veteran at the time of initial employ.

Thus, the conflict between the clear and unambiguous language in N.J.S.A. 18A:29-11 and the Board's enuniciated policy cannot sustain the Board's interpretation of the statute nor the implementaition of its policy. As the Commissioner said in Leroy Lynch et als. v. Bd. of Ed. of the Essex Cty. Vocational School Dist, Essex Cty., 1974 S.L.D. 1308, aff'd, State Bd. 1975 S.L.D. 1098, at 1314: "It is clear that any rules or policies adopted by local boards of education which relate to employment may not be inconsistent with the school laws, Title 18A, Education." Where the Legislature has promulgated a statute, there is a presumption that it expresses the legislative wisdom of that body and local boards of education may not speak in a contrary manner nor add or delete the legislative prescription. John Cervase v. Bd. of Ed. of the City of Newark, Essex Cty., 1972 S.L.D. 10 at 14, aff'd, State Bd. at 15.

CONCLUSIONS

For the reasons expressed in the discussion set forth hereinbefore, I **CONCLUDE** that the Board's policy of granting one year on the salary guide for every two years prior military service credit is void and ultra vires as being in violation of the provisions set forth in N.J.S.A. 18A:29-11.

I further **CONCLUDE** that, from the stipulated facts set forth herein, there is nothing in this record to demonstrate that the Board did, in fact, award petitioner the military service credit for which he was eligible and entitled at the time of his initial hire.

Accordingly, I **CONCLUDE,** consistent with Lavin, that petitioner has demonstrated his eligibility for two years' military service credit prospectively from April 5, 1984, the date his Petition of Appeal was received by the Commissioner, pursuant to N.J.S.A. 18A:29-11. Jacob Laurie, et al. v. Bd. of Ed. of Pemberton, OAL DKT. EDU 0797-80, decided, Comm' of Education (March 4, 1983); Warr et al. v. Bd. of Ed. of Mahwah, (N.J. App. Div., October 20, 1983, A-268-81Ti) (unreported).

ORDER

It is hereby **ORDERED** that the Board of Education of the Cape May County Vocational-Technical School compute the military service credit of petitioner Donald P. Echevarria prospectively from April 5, 1984, and credit him on its salary guide commensurate with two full years of military service credit for which he is eligible and entitled.

Accordingly, summary judgment is hereby entered on behalf of petitioner Donald P. Echevarria and respondent Board of Education's application for summary disposition is hereby **DENIED.**

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

OAL DKT. NO. EDU 3139-84

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

21 March 1985
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 26 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

ks

DONALD P. ECHEVARRIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

It is observed that no exceptions to the initial decision were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Accordingly, the Commissioner finds and determine that the judge properly concluded that petitioner is entitled to be awarded two full years of military service credit on the Board's salary guide prospectively from April 5, 1984.

The Board is hereby directed to comply with this determination.

COMMISSIONER OF EDUCATION

MAY 7, 1985

DONALD P. ECHEVARRIA,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CAPE MAY COUNTY VOCATIONAL-TECHNICAL SCHOOL, CAPE MAY COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, May 7, 1985

For the Petitioner-Respondent, Barbour and Costa
(John T. Barbour, Esq., of Counsel)

For the Respondent-Appellant, Selikoff and Cohen
(Barbara Reifberg, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We note that the decision of the Commissioner is supported further by Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982), and Campbell v. Bd. of Ed. of the City of Newark, decided by the Appellate Division on February 24, 1984, Docket No. A-1470-82T3.

November 6, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DOCKET NO. EDU 7117-84
AGENCY DKT. NO. 329-7/84

THOMAS C. MC HUGH,
Petitioner,

v.

BOARD OF EDUCATION OF THE
TOWN OF WESTFIELD, UNION COUNTY,
Respondent.

Ricardo M. Ryan, Esq., for petitioner

William D. Peek, Esq., for respondent
(Nichols, Thomson, Peek & Meyers, attorneys)

Robert M. Schwartz, Esq., for Intervenors Florence Senyk and Richard Konet

Record Closed: March 25, 1985 Decided: March 25, 1985

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

Thomas C. McHugh, a tenured junior high school assistant principal employed by the Board of Education of the Town of Westfield, Union County, was not employed by the Board for the 1984-85 school year following notice to him on April 25, 1984 that his position of junior high school assistant principal was being abolished due to a reduction in

force. His service in the district included service as principal of the Westfield senior high school summer session from June 26, 1978 to August 4, 1978 and service as assistant principal of the Westfield senior high school summer session from June 22, 1983 to July 29, 1983. In a petition of appeal filed with the Department of Education, he alleged the Board improperly continued in its employ for 1984-85 two untenured teaching staff members in positions as assistant principal in the high school, contrary to his tenure and seniority rights under N.J.S.A. 18A:28-10, 12 and N.J.A.C. 6:3-1.10. The Board admitted petitioner's tenure as junior high school assistant principal but denied any other tenure and denied petitioner had acquired any seniority that would entitle him to the position of assistant principal at the high school under N.J.A.C. 6:3-1.10(b),(i), the categories of high school assistant principal (N.J.A.C. 6:3-1.10(l)(11)) and junior high school assistant principal (N.J.A.C. 6:3-1.10(l)(12)) being different.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on July 26, 1984. The Board's answer was filed there on September 7, 1984. Accordingly, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on September 19, 1984 for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On notice to parties, a prehearing conference was conducted in the Office of Administrative Law on November 2, 1984, establishing, inter alia, the parties were directed to confer with a view towards establishing by stipulation all relevant and material propositions of fact, including documentation such as employment contracts, job descriptions, certifications and employment records, which should thereafter be filed in the cause. Thereafter, it was provided, the matters at issue herein should be addressed and resolved as if on cross-motions for summary decision pursuant to N.J.A.C. 1:1-13.1 et seq. on pleadings, stipulations, admissions, documentation and memoranda of law. All such submissions having been filed, the record closed on March 25, 1985.

By order of the administrative law judge on January 23, 1985 the Board was directed to give notice to Richard Konet and Florence Senyk, assistant principals at the high school, of pendency of the present action, outcome of which might affect their positions as assistant principals at the high school, informing them of their opportunity to intervene or participate in the present action under N.J.A.C. 1:1-12.1. On February 11, 1985, they so applied. By order of the administrative law judge on February 11, 1985, their application was GRANTED, good cause having been shown pursuant to N.J.A.C. 1:1-12.1, 3. By their attorney, they filed a memorandum of law joining the Board in opposition to the petition.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so admitted and/or stipulated, I make the following findings of fact:

1. Petitioner holds the following certifications from the Department of Education:

   a. Secondary school teacher of social studies, issued July 1968 (J-7)

   b. Student personnel services, issued August 1968 (J-5)

   c. Director of student personnel services, issued July 1969 (J-6)

   d. Secondary principal, issued January 1969 (J-2)

   e. Elementary School Principal, issued February 1970 (J-3)

   f. Supervisor, issued February 1971 (J-8)

   g. School administrator, issued December 1972 (J-4)

2. On December 1, 1969, petitioner was appointed assistant junior high school principal.

3. On December 2, 1972, petitioner acquired tenure as assistant junior high school principal.

4. In addition to his assignment as assistant junior high school principal, petitioner served as principal of the Westfield senior high school summer session from June 1978 to August 1978 and as assistant principal of the Westfield senior high school summer session from June 1983 to July 1983. Both summer school sessions lasted approximately six weeks. Both assignments were collateral to petitioner's duties as assistant junior high school principal.

5. By letter dated April 25, 1984, petitioner was advised by the Board a position of junior high school assistant principal was being abolished due to a reduction in force and he was not being offered a contract for employment as assistant junior high school principal for the 1984-85 school year.

6. On receiving notice of termination, petitioner applied for the position of assistant high school principal but was rejected.

7. Richard Konet, assistant high school principal, was appointed October 1, 1981 and achieved tenure in the position October 1, 1983.

8. Florence Senyk was appointed assistant high school principal by the Board on August 15, 1983, and is not tenured in that position.

DISCUSSION

N.J.S.A. 18A:28-9 provides generally that nothing in tenure laws shall limit the right of any board of education to reduce the number of teaching staff members or to abolish employment positions for reasons of economy. N.J.S.A. 18A:28-10 provides any dismissals resulting from any such reduction shall be made on the basis of seniority according to standards to be established by the Commissioner with the approval of the State Board. Pursuant to N.J.S.A. 18A:28-13, such standards have been adopted in N.J.A.C. 6:3-1.10(b), which provides:

> Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. . . [Emphasis supplied].

N.J.A.C. 6:3-1.10(i) provides:

> Whenever any person particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority.

N.J.S.A. 18A:28-12 provides:

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

Even though petitioner's principalship certification authorizes his employment as principal or vice-principal under N.J.A.C. 6:11-10.4(b), petitioner's seniority, or bumping rights to the position of high school assistant principal, depend more narrowly on the

number of academic or calendar years of employment in specific categories, under N.J.A.C. 6:3-1.10(b). The categories of high school assistant principal (N.J.A.C. 6:3-1.10(l)(11)) and junior high school assistant principal (N.J.A.C. 6:3-1.10(l)(12)), it may be seen, are different. As a result, therefore, petitioner has no seniority as high school assistant principal and thus no bumping rights to such a position held by someone else whether tenured or not. In Greenberg v. Bd. of Ed., Borough of Highland Park, 1984 S.L.D. — (Comm'r's dec. December 31, 1984), a tenured middle school assistant principal alleged a violation of his seniority rights resulting from Board action in abolishing his position and assigning another to the position of assistant high school principal. The Commissioner determined petitioner's seniority fell within the category of elementary assistant principal under N.J.A.C. 6:3-1.10(l)(13). He could not therefore lay claim to a seniority entitlement as assistant high school principal under N.J.A.C. 6:3-1.10(l)(11) because the latter was a separate seniority category in which he had not at any time been employed by the Board. [Slip op. at 10].

Petitioner's collateral service as high school principal during summer school in 1978 and as high school assistant principal during summer school in 1983 conferred rights neither of tenure nor seniority. Since seniority follows tenure, petitioner's rights must be gauged against the tenurability of his employment in those two summer school sessions as principal or assistant principal, under N.J.A.C. 18A:28-6. In Strangia v. Bd. of Ed., Jersey City, 1984 S.L.D. — (Comm'r's dec. Apr. 9, 1984) it was held:

> An academic year, under N.J.S.A. 18A:1-1, is the period between the time school opens in any school district after the general summer vacation until the next succeeding summer vacation. The term does not expressly include summer school employment service and, therefore, it has been held excludes such service. In Braverman v. Bd. of Ed., Twp. of Franklin, 1971 S.L.D. 460, a teacher alleged acquisition of tenure under N.J.S.A. 18A:28-5(c), a tenure provision cognate to N.J.S.A. 18A:28-6(c). He asserted some four months' summer service added to his academic years' service of 29 months, 10 days, was sufficient to satisfy the tenure eligibility requirement. The Commissioner held summer service could not be included within the meaning of academic year service. His petition was dismissed. At

462-463. To similar effect, see Kennedy v. Bd. of Ed., Twp. of Willingboro, 1972 S.L.D. 138, 139-40. Nor, it has been ruled, can a teacher gain credit for summer teaching for purposes of seniority. In Blitz v. Bridgeton Bd. of Ed., 1980 S.L.D. 825, aff'd State Bd., 1981 S.L.D. — (Feb. 4, 1981), the Commissioner held a teacher's service for a single summer school session was part-time, temporary employment and as such was not within the intendment of N.J.S.A. 18A:28-5 or N.J.A.C. 6:3-1.10. Id. at 830. See also Moses v. Bd. of Ed., City of Newark, 1981 S.L.D. — (Comm'r's dec. Oct. 13, 1981, slip op. at 7)("nor did petitioner meet the conditions of N.J.S.A. 18A:28-5(c) since his summer work was not part of his yearly contract and his substitute work in 1972-73 cannot be counted toward tenure").

Even if petitioner's two summer session periods of service were to be counted towards tenure under N.J.S.A. 18A:28-6, both periods together totaled only some 12 weeks, far short of two academic years together with employment in the new position at the beginning of the next succeeding academic year or employment in the new position within a period of any three consecutive academic years for the equivalent of more than two academic years.

Here, as the Board and intervenors have pointed out, petitioner's reliance on Stranzl v. Bd. of Ed., City of Paterson, 2 N.J.A.R. 16 (OAL 1980) and Williams v. Bd. of Ed. of Plainfield, 176 N.J. Super. 154 (App. Div. 1980) is misplaced. Both cases dealt with rights of teaching staff members against the prerogative of a board of education to make transfers. Neither dealt with a reduction in force for transfer purposes, it was argued; all principals are of equal rank but, for seniority purposes, there exist different categories for each grade level principalship and service in one does not give rise to seniority in another.

CONCLUSION

Based on the foregoing, therefore, I **CONCLUDE** that petitioner, though tenured as junior high school assistant principal, has no tenure in any other position and therefore

no seniority that would entitle him to the position of assistant principal at the high school. Under N.J.A.C. 6:3-1.10(b), (i), the categories of high school assistant principal and junior high school assistant principal are different. N.J.A.C. 6:3-1.10(l)(11, 12). The motion by the Board for summary judgment in its favor, in which intervenors have joined, should be, and is hereby, **GRANTED.** The petition is **DISMISSED.** Petitioner's rights remain those given him under N.J.S.A. 18A:28-12 to preferred eligibility for reemployment as junior high school assistant principal.

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

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

March 25, 1985
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

MAR 27 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

March 29, 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

THOMAS C. MC HUGH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter which includes the recommended findings and conclusions set forth in the initial decision rendered by the Office of Administrative Law.

It is noted herein that no timely exceptions were filed with the Commissioner by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner finds and determines that, upon a careful examination of the undisputed facts set forth in the record of this matter, the judge properly found and concluded that petitioner's seniority entitlement falls within the separate category of junior high school vice-principal or assistant principal (N.J.A.C. 6:3-1.10(1)(12)); therefore, his seniority claim to the position of high school assistant principal (N.J.A.C. 6:3-1.10(1)(11)) must be rejected as being totally without merit.

Accordingly, the Commissioner affirms the findings and conclusions in the initial decision and adopts them as his own. The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

MAY 8, 1985

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6540-84
AGENCY DKT. NO. 352-8/84

RICHARD WALLDOV, JOSEPH ACITO, JOHN ALUSIK, JOSEPH FORTINO AND GERALD NESE,
Petitioners,
v.
EAST BRUNSWICK BOARD OF EDUCATION, MIDDLESEX COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioners

Martin R. Pachman, Esq., for respondent

Record Closed: February 14, 1985 Decided: March 25, 1985

BEFORE **BRUCE R. CAMPBELL,** ALJ:

Action for reinstatement of certain teaching staff members in the employ of the East Brunswick Board of Education to the chairmanships of specified departments in the Board's secondary schools.

The matter was filed before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held on October 19, 1984. Among other things, it was agreed that the issue to be tried was:

Was the reorganization of supervisory administrative structure adopted by the Board on or about May 21, 1984, effected properly and with recognition of the petitioners' certifications and tenure and seniority rights; is there any element of bad faith in the reorganization?

The matter was set down for hearing on January 16 and 17, 1985, at the Piscataway Township Municipal Court. Joint stipulations of fact were filed on January 11. A hearing was held and concluded on January 16. The record remained opened until February 7, 1985, for filing of post-hearing submissions. For good cause shown, time was enlarged to February 14, 1985.

I.

The stipulations are as follows:

1. Petitioner, Richard Walldov, is a tenured teaching staff member in the East Brunswick school system. He was initially hired in the position of classroom teacher on September 6, 1954. He was appointed to the position of department chairman of mathematics in 1966. He served continuously in that said position from the date of appointment in 1966 until June 30, 1984. On May 21, 1984, he was advised by the East Brunswick Board of Education that he would not be reappointed to the position of chairman of the mathematics department. On April 10, 1984, the Board of Education issued a notice of position vacancies in which it listed as one of the requirements for the position of department chairman the qualification that such individual have subject matter certification. The Board of Education states that its reason for not reappointing Mr. Walldov was because he did not have subject matter certification.

2. Mr. Joseph Acito is a tenured teaching staff member in the East Brunswick school system. Initially hired as a teacher on September 1, 1959, he was appointed to the position of department chairman for language arts in 1974. He served continuously in the position of department chairman from the date of his appointment until June 30, 1984. Mr. Acito was advised on May 21, 1984, that he would not be

reappointed as department chairman for language arts for the 1984-85 term. The reason given by the Board of Education for not reappointing Mr. Acito was that he did not possess an undergraduate or graduate major in the subject field.

3. Mr. Joseph Fortino was hired as a classroom teacher by the East Brunswick school district on September 1, 1962. In 1966, he was appointed to the position of department chairman for guidance. He served continuously in said position until June 30, 1984. On or about May 21, 1984, Mr. Fortino was advised that he would not be reappointed to the position of department chairman for guidance for the 1984-85 school term. The reason given by the Board of Education for not reappointing Mr. Fortino to the position of chairperson for guidance was because he did not possess a minimum of five years' guidance and counseling experience on the high school level.

4. Mr. John Alusik was hired as a classroom teacher by the Board of Education on September 1, 1962. In 1974, he was appointed to the position of department chairperson for science. He served continuously in said position until June 30, 1984. On or about May 21, 1984, Mr. Alusik was advised that he would not be reappointed to the position of department chairperson for science for the 1984-85 school term. The reason given by the Board of Education for not reappointing Mr. Alusik was that he did not possess the qualification for undergraduate/graduate major in the subject field of science.

5. Mr. Gerald Nese was hired as a classroom teacher by the Board of Education on September 1, 1968. He was appointed to the position of department chairperson for industrial arts in 1976. He served continuously in said position until June 30, 1984. On or about May 21, 1984, Mr. Nese was advised that he would not be reappointed for the 1984/85 school term to the position of chairman for industrial arts.

6. Pursuant to the reorganization adopted by the East Brunswick Board of Education, a Notice of Position Vacancy was issued on April 10, 1984, which related to the following positions:

Department Chairperson - Social Studies (Jr. High)
Department Chairperson - Science (Jr. High)
Department Chairperson - Guidance (7-12)
Department Chairperson - English (Jr. High)
Department Chairperson - Math (Jr. High)
Department Chairperson - Visual and Practical Arts (7-12)
Department Chairperson - Special Education (7-12)

II.

The assistant superintendent for personnel, called by the petitioners, testified concerning the establishment of new job descriptions for department chairman for the high school and the two junior high schools, to become effective in the 1984-85 school year. The Board acted to establish one department chair for the high school and the two junior high schools in the areas of guidance and practical and visual arts (incorporating the former position of industrial arts). The Board also acted to combine the separate department chairs for the two junior high schools in the areas of English, mathematics and science. The new job descriptions are basically the same as to duties as the former job descriptions. There were, however, some changes in the qualifications for these department leadership positions.

The assistant superintendent also testified that the Board, pursuant to new regulations on seniority promulgated by the State Board of Education, N.J.A.C. 6:3-1.10(l)(10), after study and recommendations from its administrative staff, significantly changed the scope of the department chairmanships for mathematics, science, guidance, language arts, and industrial arts. These changes were made to assure that there would be smooth and effective articulation of educational programs between the two junior high schools and the senior high school.

The witness testified that the Board, after study and discussion, effected the changes at issue so that instruction in the district's two junior high schools would be more uniform and thus aid both pupils and teachers when junior high school pupils reached the

senior high school. The assistant superintendent further stated that the reorganization was not related to the performance of the petitioners affected.

The witness testified that the reorganization was broader than the five departments represented in this case. All junior high school department chairman and some other supervisory positions were affected. Changes of this nature had been under discussion by the Board for some years. She was a part of those considerations over the years and was particularly concerned about articulation between two junior high schools on the one hand and one senior high school on the other. Some of the positions in controversy became grade 7-12 positions. The plan was effected solely for improvement of education in that district.

As to petitioner Acito, the witness testified that she did not evaluate him directly but had talked about his performance with his superiors from time to time. She could recall no specific conversations with the superintendent concerning Acito. Neither could she recall any specific conversations with Acito or his principal concerning Acito's performance. She never asked Acito's teachers to criticize his performance. She did not recommend that Acito not be appointed a department chairman.

As to petitioner Alusik, the witness recalled no specific conversations with him in the 1983-84 school year concerning his performance. She acknowledged that he did have a problem in that school year. She discussed the problem with Alusik's principal, Dr. Burnett of the Hammarskjold School. She did not recommend that Alusik not be appointed department chairman. She did not recommend the withholding of his increment.

The witness reiterated that the reorganization was not related to the performance of any individuals affected, but rather was related to what the Board saw as clear direction from the State Board of Education as to the certification requirements for subject field supervisors.

The Board submits that this testimony together with the actions it took conclusively establish that the five new positions are distinctively new positions, requiring the Board to seek out educators who could meet the Board's qualifications for the new positions.

III.

The petitioners allege that the Board acted in bad faith when it promulgated the reorganization which resulted in their dismissals from department leadership positions. However, the major thrust of the petitioners' argument is a legal one. The Board has taken the position that the current department chairmanships are distinct from those in which the petitioners served because of different qualifications. In the case of Fortino, the Board also argues that the new guidance chairmanship is distinct from the old position because now, unlike before, the chairman is also responsible for the supervision of grades 11 and 12.

In the petitioners' view, the Board's entire position is based on the language in the present seniority regulations, namely, N.J.A.C. 6:3-1.10(l)(10).

The petitioners also urge that note be taken that the seniority rules have been ostensibly discussed in recent years because of the pervasive problems presented by declining enrollments. At some time prior to 1983, the Commissioner of Education decided that certain inequities found in the seniority regulations had to be rectified. As a result, a study was undertaken to revise the seniority regulations. Among the provisions which were extensively revised was the provision relating to supervisors. Prior to the adoption of the 1983 amendments, N.J.A.C. 6:3-1.10(k) provided five categories in which supervisors could accrue seniority. These included general supervisor, general secondary supervisor, general elementary supervisor, general vocational supervisor and subject supervisor. In interpreting these provisions, the Commissioner found that service in the position of general supervisor entitled such teaching staff members to seniority in any general supervisory position, irrespective of subject matter. Flanagan v. Camden Reg'l School Dist., 1980 S.L.D. 1283, aff'd, State Bd. of Ed., December 2, 1981, aff'd, N.J. App., Div., January 24, 1983, A-1826-81-T1, certif. granted June 22, 1983, remanded, N.J. App. Div., August 31, 1983, A-1826-81-T1, rev'd, State Bd. of Ed. (September 5, 1984).

As a result, school districts were presented with the problem of having supervisors accrue seniority in other supervisory positions without service in such positions and irrespective of their knowledge of the subject areas which they would be required to supervise.

The revisions of the seniority regulations adopted by the Department of Education had as their basic tenet the requirement that experience was to take precedence over certification. In the Commissioner's position statement on the new seniority regulations, the Commissioner said that his recommendation to the State Board of Education would limit "seniority entitlement exclusively to the subject areas and levels at which a teacher has actually taught" (Position Statement, June 1983, at 3).

With respect to supervisors, the Commissioner stated:

> Existing regulations provide for four separate categories of supervision although their presently exists only one supervisor certificate. This disparity has required both the Commissioner and the State Board of Education reluctantly to issue case law decisions which have recognized the right of an individual having overall seniority has a supervisor - but no appropriate subject matter expertise - to "bump" less senior supervisors who have the specific expertise and experience in a particular field. In one instance, for example, this has meant that a person hired as an audiovisual supervisor may replace a less senior subject matter supervisor specifically trained in the area supervised (i.e., math supervisor). This educationally unsound situation has been remedied by the insertion of a clarifying statement into the proposed provisions which states that "each supervisory title shall be a separate category." [Questions and Answers on Seniority Regulations in Position Statement, above, at 2]

The petitioners maintain that the Board has given the 1983 amendments a much broader interpretation than the Commissioner intended. The Board argues that any change in a supervisory position compels a board of education to reclassify the position as a new and distinct position which results in the extinguishment of any and all seniority and tenure rights accrued by the former holder of the position. Specifically, the Board maintains that because Walldov is one course shy of subject certification in the position, and in spite of the fact that the Board did not give him an opportunity to obtain such subject matter certification within a specified period of time, his 17 years of service as the mathematics department chairman can be totally ignored. It holds a similar position with respect to Acito. As for Alusik and Nese, even though they meet all the requisite qualifications for the "new" positions, the Board maintains that they have no claim to the positions because the positions are now distinct from the ones in which Alusik and Nese served. Finally, in respect of Fortino, he also meets all the qualifications of the new position except for the fact that he does not have five years' experience at the high school level. The Board totally ignores his experience at the 7th, 8th, 9th and 10th grade levels.

The petitioners assert that the new seniority regulations do not support the Board's action. Experience or service in a position is the key to the seniority regulations. The 1983 revisions, if anything, sought to distinguish between mere certification and qualification, that is, having the experience and ability.

In Catano v. Woodbridge Tp. Bd. of Ed., 1971 S.L.D. 448, the Commissioner held at pages 458-59 that:

> The Board did not abolish a position of public employment.... Instead, the Board transferred the essential duties ... to another position.... It is not the intendment of the tenure provisions of the school laws that the measure of security afforded by those laws should thus be stripped away. The words of the Appellate Division of the Superior Court in Viemeister, supra, at page 219 bear particularly upon this point ...
>
> > If the procedure it (the Board) adopted were to be sustained, the tenure ... of (employees) generally would rest upon frail reeds; nothing would remain as a barrier to the removal of ... (an employee) no matter how long and efficient his service by the simple expedient of transferring his duties....

In the present case, the Board has not even gone so far as to transfer the petitioners' duties to other positions. Rather, it has simply added qualifications and thus reclassified the positions as new and distinct. Its action is even more bold and more violative of the general tenets of tenure than the situation addressed in either Catano or Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super. 215 (App. Div. 1949).

In spite of all the changes in the regulations, what has remained constant is the fact that the duties performed rather than the title of the position must be controlling in determining whether a position is protected by tenure. Quinlan v. North Bergen Bd. of Ed., 1959-60 S.L.D. 113.

Walldov testified that he was three credits short of obtaining the undergraduate diploma in mathematics that was required by the new position of subject supervisor for mathematics. The petitioners clearly imply that the Board knew that Walldov was three credits short of completion and had an affirmative duty to apprise him of this so that he could, presumably, acquire those three credits in time for the 1984-85 school year.

The assistant superintendent testified that at the time the changes in the qualifications for the positions were made, she was unaware of the extent of Walldov's educational deficiency. Walldov testified that at no time during the Board's reorganization of the five positions did he inform the assistant superintendent that he was only three points away from a diploma in mathematics. It is noted that the record does not show that Walldov at any time undertook to obtain the three credits.

The petitioners also assert that the Board failed to give notice to Acito that he lacked the subject matter certification needed to serve in the new position of subject supervisor for language arts. Acito, however, did not testify. The petitioners' assertion on this point remains just that: a mere assertion.

Petitioner Alusik testified that he obtained a teaching certificate in 1966 entitling him to teach any secondary physical science. It is uncontroverted that he has neither an undergraduate nor graduate degree in any of the physical sciences.

Alusik also testified that he began his college work as an elementary education major. He says he applied for a change to a science major program but his advisor failed to make the change. He subsequently communicated with the State Board of Examiners. It issued a Permanent Secondary Teacher's Certificate for grades 7-12 in the subjects of science. The certificate is endorsed to include "the subjects prescribed for the elementary grades" (P-2). His transcript from what was then the New Jersey State Teachers College at Newark shows 24 credits in science, exclusive of laboratory courses (P-4).

Alusik also testified that he never wrote to the assistant superintendent saying that he was qualified as a science major.

The Board submits that proposed regulations concerning teaching certificates which will become effective on September 1, 1985, denominate four different teaching endorsements for secondary science. N.J.A.C. 6:11-6.2(a)(21)(i, ii, iii, iv). The first of these, entitled "Comprehensive Science," will entitle the holder to teach general science to secondary grades. But to teach the more specialized and difficult physical sciences such as biology, zoology, geology and physics, will require one of the more specialized secondary science endorsements such as "biological science," "earth science" or "physical

science." The latter endorsements require more preparation and study. The petitioners, of course, resist consideration of regulations which are, at best, prospective.

Petitioner Fortino testified that he served as chairman of guidance at Hammarskjold Junior High School from 1966 until the end of the 1983-84 school year. He has a supervisor's certificate, a Master of Arts degree in administration and supervision and a Master of Arts degree in counseling plus 30 credits in that field. He does lack five years' experience of counseling at the high school level (J-3).

He began counseling grades six, seven and eight. As department chairman, he handled grades seven, eight and nine. At the tenth grade level, he supervised scheduling of ninth grade pupils into tenth grade classes. He also was in charge of parent-pupil orientation to the tenth grade. He stated he is familiar with the high school program.

On cross-examination, Fortino stated that he has not served in the East Brunswick High School guidance department. He never wrote to the assistant superintendent or made claim to the new position based on an argument that service to ninth grade pupils is equivalent to high school experience.

Petitioner Nese testified that from 1976-77 through 1983-84 he was chairman of industrial arts. He was named acting department chairman for fine and practical arts in December 1972. In or about 1974 he was made administrative assistant to the principal. The following year he was named administrative assistant for student activities. In 1976 he was reassigned as chairman, fine and practical arts.

Nese also testified that in early March 1984 he was summoned to the administrative offices of the district and told of reorganization plans. He attended all public Board meetings from then on. He claims Board members questioned the superintendent concerning the ability of the person now assigned as the K-12 supervisor.

On cross-examination, Nese stated that he was interviewed for the position. Other high school and junior high school persons applied for the position. He does not know who, if anyone, the interviewers recommended. He does not know how the Board made its choice. He spoke to Principal Burnett later. Burnett supposedly told him that the group spoke only generally and made no decision. Nese also testified that he was not interviewed by the superintendent of the district.

Testimony other than that summarized above was received. However, the points raised do not rise to a level to merit further consideration here.

IV.

The actions of the Board in reorganizing its subject supervisors are presumed to be valid and lawful. They will not be set aside unless the petitioners succeed in showing that the actions were in some manner arbitrary, capricious, unreasonable or in bad faith. Thomas v. Morris Bd. of Ed., 89 N.J. Super. 448 (App. Div. 1966), aff'd, 46 N.J. 581 (1966). The petitioners argue that the Board in fact acted in bad faith by setting up requirements for the five new subject supervisors' positions which the Board knew the petitioners could not meet. According to the petitioners, the Board did this with the intent to strip them of their tenure and seniority without having to resort to the formal procedures of increment withholding or tenure charges.

The petitioners urge that Viemeister and Catano control the present matter. Both of these cases hold that a board may not abolish a position and transfer the duties of that position to another post with merely a different label. Such abolishments, these cases hold, violate the tenure statutes and are unlawful. Petitioners urge that the actions of the Board in this case have been contrary to the holdings of Viemeister and Catano. The Board argues that it was acting pursuant to law. N.J.A.C. 6:3-1.10(l)(10) as amended speaks in the affirmative. It states that boards of education shall set forth the qualifications and specific endorsements required for each supervisory position. The Board argues that in establishing the five new positions here, it was doing no more or less than following this new mandate from the State Board of Education.

The Board also argues that the "qualifications and endorsements" which it specified for each position are educationally sound: an undergraduate or graduate degree in the subject matter to be supervised and experience in teaching that subject.

The record before me does not show that the selection of these qualifications was in any way a part of a plot to oust the petitioners from their department leadership positions. The evidence does show these qualifications to be educationally sound. It is also noted that there were other applicants, besides the petitioners here, who did not succeed of appointment.

I **FIND** the testimony of the assistant superintendent completely credible as to the reorganization being carried out without reference to the performance of the petitioners here. In addition to this finding and the stipulations set forth above, I further **FIND:**

1. The new mathematics and English chairman job descriptions are substantially the same as the former with the significant difference that the present chairman now is responsible for two schools and more duties of a coordinative nature.

2. Before the reorganization was effected, there were mathematics department chairmen at the high school and at each junior high school.

3. Since the reorganization there are two mathematics chairmen, one at the high school and one serving both junior high schools.

4. Similarly in the English or language arts area, the high school department leadership remained unchanged, but the junior high school chairman is now responsible for two schools rather than one.

5. In the science area, there were three department chairmen before the reorganization, one at the high school and one at each junior high school.

6. Since the reorganization, there is one department chairman at the high school and one department chairman for science in both junior high schools.

7. In the guidance area, there were three department chairmen prior to the reorganization.

8. Since the reorganization, there is one chairman responsible for grades 7-12.

9. All of the incumbent guidance chairmen applied for the new positions.

10. Neither of the junior high school chairmen could satisfy the requirement of five years' experience including grades 11 and 12.

11. In the area of visual and practical arts, including the area previously referred to as industrial arts, there were three chairmen prior to the reorganization.

12. There is now one position covering grades 7-12.

13. All of the former incumbents applied and met the qualifications established by the Board for the new position.

14. All applicants were interviewed by the assistant superintendent and the supervisor.

15. These persons recommended the appointment of the former high school chairman to the 7-12 position. The Board subsequently appointed him.

The petitioners' assertion that experience somehow takes precedence over certification in selecting persons to fill the new positions must be rejected (Petitioners' brief at 11-12). Under the former seniority regulations, reductions in force often led to anomalous results as mentioned above. The State Board of Education decided that this situation was educationally unsound. The seniority regulations were amended so that only actual experience would be honored in the case of a reduction.

The amended regulations also require local boards to spell out the qualifications, including endorsements, it will require for department leadership positions. I agree with the Board that it was not the intent of the State Board in revising the regulations to prevent a local board from specifying what educational qualifications it wanted its subject supervisors to have.

I further **FIND** that the Board's reliance on revisions of N.J.A.C. 6:11-6.2(a)(21) to become effective some six months hence is inappropriate. This finding, however, does not bear on the ultimate finding in this matter.

Having considered the whole record and the arguments of counsel, I **FIND** that the petitioners have failed to show that the reorganization of supervisory positions adopted by the East Brunswick Township Board of Education on May 21, 1984, was in any manner improper or effected in bad faith. I further **FIND** that the petitioners' tenure and seniority rights were not violated in or by the reorganization. N.J.S.A. 18A:28-9.

In consideration of the foregoing, I **CONCLUDE** that the petition of appeal must be **DISMISSED.** It is so **ORDERED.**

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

25 MARCH 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

3/26/85
DATE

Signature illegible
DEPARTMENT OF EDUCATION

Mailed To Parties:

March 28 1985
DATE

Ronald J. Parker/R.S.
OFFICE OF ADMINISTRATIVE LAW

ml/E

RICHARD WALLDOV ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

Petitioners contend that the judge failed to give appropriate weight to the testimony of the assistant superintendent in which she stated that the department chair positions for mathematics, English, science, and visual and practical arts were the same as those in existence prior to July 1, 1984 with the exception that they were now responsible for two schools rather than one and the only differences in the new positions related to qualifications.

With respect to the above exception, petitioners avow that the judge failed to provide adequate emphasis in the initial decision to at least two of them, Mr. Alusik and Mr. Neese whom they state had all the added qualifications required and yet were not reappointed. As regards Mr. Walldov and Mr. Acito, petitioners assert that, while they did not have the subject matter certification and a college major in their subject area, one has seventeen years of expertise in the subject area and is only three credits shy of subject area certification, while the other has some ten years of subject matter expertise.

Petitioners contend that, while the judge found the "new mathematics and English Chairmen job descriptions are substantially the same as the former with the significant difference that the present chairman now is responsible for two schools and more duties of a coordinative nature" (Initial Decision, ante), the same statement should have been made with respect to the other disputed positions. They allege that being responsible for more schools and more coordinative duties does not change the basic nature of the job description and it should not serve as the basis to ignore previously accrued seniority and tenure.

Further, petitioners allege that the judge failed to properly interpret and apply N.J.A.C. 6:3-1.10(1)(10)to the factual circumstances of the instant matter. They stress that this is not a Flanagan, supra, type situation. They are not trying to claim seniority in a position for which they have no previous service or expertise.

Petitioners believe that the judge has given the 1983 seniority regulations a much broader interpretation than was intended. Specifically, they state, inter alia:

> "***The common understanding of the 1983 amendments is that a supervisor of science cannot use his accrued seniority to claim seniority as a supervisor of math. What the respondent has done in this instance, is to take a supervisor of science position, add a qualification, and perhaps, add some more teachers to supervise within the department, and then call it a separate and distinct position negating all previously accrued seniority.***"
> (Petitioners' Exceptions, at p. 11)

Petitioners avow that N.J.A.C. 6:3-1.10(1)(10) was enacted to prevent future "Flanagan" type situations. Further, they argue:

> "***It was not meant to allow a Board of Education to maintain a position, maintain the duties of that position, but deny the seniority of individuals who served in such a capacity merely because there are additional teachers to supervise, or a grade level has been added or an additional qualification has been made. If this rational[e] is allowed to stand, then, as the Court stated in Viemeister [supra]***, the concept and principals (sic) of tenure indeed stand on 'frail reeds.'"
> (Petitioners' Exceptions, at pp. 12-13)

When the East Brunswick Board of Education acted in 1984 to reorganize its supervisory structure, a reduction in force occurred which served to trigger determination of seniority of those individuals affected by the reduction. N.J.A.C. 6:3-1.10 became controlling. Specifically subsection (1) 10 dictates that each approved supervisory title shall be a separate category. In addition, it mandates that district boards of education shall adopt job descriptions for each supervisory position which set forth the qualifications and specific endorsements required for such positions.

In the present case, the record reveals that there were several distinct categories for the various supervisory/department chairperson titles (positions) at the time of the reorganization and subsequent reduction in force. These include:

Category	Number in Category
• Department Chairperson Mathematics - Junior High School	2
• Department Chairperson Mathematics - Senior High School	1

Category	Number in Category
• Department Chairperson Language Arts - Junior High School	2
• Department Chairperson Language Arts - Senior High School	1
• Department Chairperson Science - Junior High School	2
• Department Chairperson Science - Senior High School	1
• Department Chairperson Industrial Arts - Junior High School	2
• Department Chairperson Industrial Arts - Senior High School	1
• Department Chairperson Guidance - Junior High School	2
• Department Chairperson Guidance - Senior High School	1
Total	15

As a result of the reorganization, the following seniority categories exist.

Category	Number in Category
• Department Chairperson Mathematics - Junior High School	1
• Department Chairperson Mathematics - Senior High School	1
• Department Chairperson English - Junior High School	1
• Department Chairperson English - Senior High School	1
• Department Chairperson Science - Junior High School	1
• Department Chairperson Science - Senior High School	1

Category	Number in Category
• Department Chairperson Visual and Practical Arts - Grades 7-12	1
• Department Chairperson Guidance Grades 7-12	1
Total	8

The Commissioner will first address the issue of whether the supervisory positions are essentially the same or different, after which he will address the change in qualifications.

Upon a careful review of the record in this matter, the Commissioner determines that the disputed mathematics, science, and language arts/English positions do not constitute different positions from the prior ones because the duties and responsibilities are virtually the same and the seniority categories remain unchanged. The fact that two junior high schools are involved versus one is not significant enough to warrant a determination that the positions are substantively different from those that had existed previously. As is argued by petitioners, a principal who has responsibility for one school and is then assigned two would not constitute a "new" position.

The above is not applicable to the visual and practical arts and guidance positions, however. There are substantive differences that exist, notwithstanding the fact that the duties and responsibilities stated in the job description are essentially the same. The "new" positions relate to two specific levels of schooling (both junior and senior high school) which encompass a broader grade span (7-12). Also of significance is the fact that the new positions constitute different seniority categories than previously which is unlike the first three supervisory positions addressed herein.

The judge and the Board are correct in stating that a board must specify the qualifications and endorsements for each separate supervisory category. One of the major reasons for amending N.J.A.C. 6:3-1.10 was to prevent individuals who do not possess training and expertise/experience in a given subject area or specialization from asserting seniority claims by way of general supervisory certification. However, the Commissioner does believe that there is merit in petitioners' argument that this case does not pose that type of situation which has come to be referred to as a "Flanagan" type of seniority claim. He does not believe that the regulation as amended was intended to displace individuals who have acquired tenure and served satisfactorily in a given subject matter supervisory capacity for many years as presented in this case for those positions which have not been determined to be new or different.

To change the qualifications for positions which are essentially the same as existed previously in such a way as to displace tenured personnel is deemed to be arbitrary and capricious.

Petitioner Walldov has served in the category of department chairperson-mathematics/junior high for eighteen school years and is reportedly three credits shy from obtaining a teacher of mathematics endorsement. Petitioner Acito has served as department chairperson - Language Arts/junior high for ten school years. Petitioner Alusik, who is subject matter certified, has served as department chairperson-science/junior high for ten school years. In no way can these facts constitute a "Flanagan" type seniority claim.

If the Board desired to require K-12 subject matter endorsement for the supervisory positions which have been deemed essentially the same as the prior ones, it would have been reasonable to expect that advance warning and sufficient time be provided to the tenured personnel who had seniority entitlement to the positions to meet the newly stated requirement. To do otherwise serves to fly in the face of the clear legislative intent of tenure protection. N.J.A.C. 6:11-6.3 which was effective February 1, 1985 pertains to the acquisition of additional instructional endorsements for an individual who holds a standard instructional certificate. It requires that the person pass a state test in the subject field. In order to be eligible to take the test, he or she must have completed 30 semester hours in a "coherent major" or have five years of experience in the subject field.

The Commissioner supports the Board's desire to upgrade the qualifications of its supervisory positions but he cannot accept an interpretation of N.J.A.C. 6:3-1.10(1)10 which unilaterally deprives personnel of their tenure rights to positions which are virtually the same as those previously held. While the requirement for subject matter endorsement is certainly sound, he does have concern about the requirement for subject matter undergraduate or graduate major in that an individual may be eligible for subject matter endorsement and yet may not qualify for a major at the institution of higher education attended. What constitutes a major is autonomously determined by the given college or university. More importantly, New Jersey has never nor does it now require that candidates for K-12 subject matter endorsement have a full academic subject matter major.

A locally determined requirement may exceed that of the State but it would be deemed arbitrary if found to be unreasonable, Eagan et al. v. Bd. of Ed. of Old Bridge, decided by the Commissioner dated July 5, 1983. Consequently, the Commissioner directs that the Board reexamine the requirement for a subject matter major so that any qualification regarding intensity or scope of subject matter preparation is more precise and reasonable given State requirements.

Accordingly, the Commissioner reverses in part the initial decision for the reasons stated herein. He orders that Petitioners Acito, Walldov, and Alusik be reinstated to the respective department chairperson positions to which they have seniority entitlement and that they be provided any differential in salary, benefits, and emoluments that may have arisen as a result of improper denial of said positions.

This decision is not intended to preclude the Board from requiring that Petitioners Walldov and Acito obtain subject matter endorsement within a reasonable period of time. Nor does it preclude the Board from requiring them to meet some specifically defined, reasonable number of credits in their subject field within an appropriate time frame.

COMMISSIONER OF EDUCATION

MAY 10, 1985

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 10, 1985

For the Petitioners-Appellants Joseph Fortino and Gerald Nese, Robert M. Schwartz, Esq.

For the Respondent-Respondent, Pachman and Glickman (Martin R. Pachman, Esq., of Counsel)

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

November 6, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8867-84
AGENCY DKT. NO. 463-11/84

CONSTANCE JOHNSON,
Petitioner
v.
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD,
Respondent

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

Suzanne Raymond, Esq., for respondent
(Gutfleish & Davis, attorneys)

Record Closed: March 18, 1985 Decided: March 25, 1985

BEFORE **WARD R. YOUNG**, ALJ:

Petitioner, a terminated tenured school social worker due to a reduction in force, seeks reinstatement due to allegation of a violation of her seniority rights when the Englewood Board of Education (Board) reemployed a less senior social worker as a bilingual social worker. The Board avers it acted properly in fulfillment of what it perceived to be a Title VII grant requirement as petitioner did not qualify for the position of bilingual social worker due to a lack of fluency in the Spanish language.

The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq., and was preheard on February 1, 1985, at which the parties agreed to submit the matter for summary decision. The record closed with the

submission of petitioner's reply brief on March 18, 1985, and the matter is ripe for summary decision based on the pleadings and evidentiary documents as a matter of law as no material facts are in dispute.

The gravamen of this dispute is whether the Englewood Board of Education may exercise its discretion as it did in this instance, in the absence of bad faith, or whether the regulatory scheme precludes such an exercise pursuant to N.J.S.A. 18A:11-1.

The facts in this matter are not disputed, and the scenario follows.

Petitioner Johnson and Olga Godinez, both tenured school social workers, were terminated in an undisputed reduction in force Godinez, indisputably less senior than Johnson as a school social worker, was recalled to serve in a position entitled "bilingual social worker," for which a job description had been created with the title approved by the County Superintendent.

The rationale of the Board in recalling Godinez, rather than Johnson, is basically a desire to have said social worker function in a Bilingual Education Program for Spanish speaking pupils and parents, for which a Federal Title VII grant had been approved, and kthe application for which had imposed a requirement of proficiency in English and Spanish for all personnel.

Johnson argues that the regulatory scheme provides for the use of interpreters when fluency in the foreign language is lacking, and the Board abused its discretion by its failure to recognize her seniority as a school social worker.

Numerous school law decisions were cited by the parties in their briefs, which are incorporated herein by reference. All are omitted herein as I perceive this matter to be one of first impression as no cited case is on point, nor could research identify one case on the specific issue.

I FIND the Board's action in recalling Godinez to be reasoanble in its attempt to achieve the goals of its bilingual program. Whether said action is consistent with the regulatory scheme remains to be determined, and a review of the regulations is therefore essential.

N.J.A.C. 6:3-1.10(g) states:

> (g) Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with the duties performed and not by title. Whenever the title of any employment shall not be found in the certification rules or in these rules, the holder of the employment shall be classified as nearly as may be according to the duties performed, pursuant to the provisions of N.J.A.C. 6:11-3.6.

The regulations concerning the assignment of titles are codified in N.J.A.C. 6:11-3.6, which provides:

> (a) School districts shall assign position titles to teaching staff members which are recognized in these regulations.
>
> (b) If a local board of education determines that the use of an unrecognized position title is desirable, or if a previously-established unrecognized title exists, such board shall submit a written request for permission making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his/her discretion regarding approval of such request, and make a determination of the appropriate certificate and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year.

N.J.A.C. 6:3-1.10(1) lists specific categories in the regulatory scheme governing standards for determining seniority, but does not specifically list school social worker. It is obvious that the State Board intended to incorporate unspecified categories into (1)17 which states: "Additional categories of specific educational service endorsements issued by the State Board of Examiners and listed in the State Board rules dealing with teacher certification (N.J.A.C. 6:11)."

Qualifications for eligibility for the endorsement for service as a school social worker are embodied in N.J.A.C. 6:11-12.10.

A review of the regulatory scheme cited above by a strict constructionist would appear to result in the conclusion that no category can exist for a bilingual social worker since the State Board of Examiners does not issue such an endorsement and no specific State Board rule deals with it. The petitioner would therefore prevail in the instant matter. However, a review of other regulations of the State Board appears warranted to determine if the respondent's action in this dispute is indeed inconsistent with the intent of the State Board in the promulgation of its regulatory scheme.

The State Board appears to have recognized the educational problems created by the influx of pupils whose native tongue is other than English. N.J.A.C. 6:28-2.4 requires communication with parents and such pupils "in the language used for communication" by them, and also requires foreign language interpreters "when necessary."

N.J.A.C. 6:31-1.3 appears to require a local board to establish a bilingual education program when there are "20 or more pupils of limited English speaking ability in any one language classification."

The State Board apparently also recognized the need for supportive services with the adoption of N.J.A.C. 6:31-1.6 which provides:

> (a) Pupils enrolled in bilingual and ESL education programs shall have full access to educational services available to other pupils in the school district.
>
> (b) School districts should use full or part-time bilingual personnel to provide supportive services (such as counseling) to pupils of limited English speaking ability.

Interestingly, N.J.A.C. 6:11-8.8 and N.J.A.C. 6:11-8.9 provide for instructional endorsements in bilingual/bicultural education and teaching English as a second language, respectively. Is the absence of a bilingual endorsement for education services by intent or oversight? I believe it to be the latter.

The State Board has demonstrated its desire to provide flexibility to local boards of education for the implementation of programs required by it. The intendment of the State Board in the promulgation of N.J.A.C. 6:29-7.1 concerning who may teach Family Life Education was addressed in Jeannette Johnson v. Board of Education of the Borough of Glen Rock, 1984 S.L.D. ____ (decided May 21, 1984). The issue therein, as in the instant matter, was an allegation of a violation of seniority rights associated with a board determination to assign a less senior teaching staff member to fulfill an instructional requirement of the State Board in the local board's program implementation.

A review of the documentary evidence in this matter reveals a sincere intent and attempt by the Englewood board to exercise its discretionary authority to do what it perceived to be a proper course of action pursuant to N.J.S.A. 11.1.

In its application for a Title VII grant, it was indicated that the bilingual social worker "will not only work closely with the teacher, but will establish a close working relationship with parents and community members." It also indicates that "All personnel in the Bilingual Education Program will be proficient in English and Spanish." See C-1.

A review of the bilingual social worker job description clearly reveals the need for one to be proficient in Spanish for effectiveness. See C-5.

It appears apparent that the County Superintendent also perceived such a need with the approval of the use of an unrecognized title. See C-7 and C-12.

The Manager of the Bureau of Bilingual Education, Division of Compensatory/Bilingual Education, also appears to be in agreement when she said:

> In reviewing the job description it is evident that a person unable to speak Spanish would be unable to meet the responsibilities of the position such as administering a native language inventory and interpreting the results. Also the requirements for the position are very specific, oral and written proficiency in Spanish and English as well as experience in bilingual education. (C-8)

The board's concern for acting properly was demonstrated in its March 1984 letter to the Bilingual Grant Section. Little weight can be given to the response, however, as it shifts the issue back to the local board for resolution with no indication of any impact on Title VII funding, whether it could be positive or negative. See C-9.

The good faith element was indeed demonstrated in a responsive letter which indicated the reimbursement policy reference relative to petitioner's possible professional growth in the pursuit of Spanish/English proficiency, and clearly did not preclude petitioner from consideration for recall as a bilingual social worker. See C-10

An exhaustive review of the entire record in this matter as well as the regulatory scheme having been made by the undersigned, I **FIND** the respondent Board did not abuse its discretionary authority in its recall of Olga Godinez, and that its action was not inconsistent with the spirit and intent of the regulatory scheme of the State Board of Education.

I **CONCLUDE** that summary decision is **DENIED** petitioner and **GRANTED** to the Board. It is therefore **ORDERED** that the Petition of Appeal shall be and is hereby **DISMISSED.**

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

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

25 March 1985
DATE

WARD R. YOUNG, ALJ

MAR 27 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

March 28, 1985
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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CONSTANCE JOHNSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision have been reviewed. Exceptions were filed by petitioner within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

Petitioner excepts to the conclusion by the judge herein that the Board could establish for seniority purposes a separate category of bilingual social worker, absent any provision by the State Board of Examiners for bilingual endorsements for educational services positions.

Further, petitioner submits that the Board failed to promptly comply with the appropriate regulations in seeking the approval of the County Superintendent of Schools for the use of the unrecognized title, Bilingual Social Worker. N.J.A.C. 6:3-1:10(g) and N.J.A.C. 6:11-3.6 The Commissioner finds merit in petitioner's arguments.

The Commissioner is aware that the standards for determining seniority are set down in N.J.A.C. 6:3-1.10, operative September 1, 1983.

N.J.A.C. 6:3-1.10(g) states as follows:

> "Where the title of any employment is not properly descriptive of the duties performed, the holder thereof shall be placed in a category in accordance with the duties performed and not by title. Whenever the title of any employment shall not be found in the certification rules or in these rules, the holder of the employment shall be classified as nearly as may be according to the duties performed, pursuant to the provisions of N.J.A.C. 6:11-3.6."

N.J.A.C. 6:11-3.6 Assignment of Titles reads as follows:

> "(a) School district shall assign position titles to teaching staff members which are recognized in these regulations.

> (b) If a local board of education determines that the use of an unrecognized position title is desirable, or if a previously-established unrecognized title exists, such board shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his/her discretion regarding approval of such request, and make a determination of the appropriate certificate and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year."

The Commissioner notes with approval the complaint by petitioner that the Board made no effort to comply with N.J.A.C. 6:11-3.6 for the first five years of employment by Ms. Godinez. Further, in the opinion of the Commissioner proof has not been made that the title, Bilingual Social Worker, is a prerequisite to the requirement of a Title VII Bilingual Grant. The Commissioner observes that there is provision for additional categories as set down herein in whole:

> N.J.A.C. 6:3-1.10
>
> "17. Additional categories of specific educational service endorsements issued by the State Board of Examiners and listed in the State Board rules dealing with teacher certification (N.J.A.C. 6:11)."

An examination of the aforesaid regulations relating to certification reveals no special endorsement entitled Bilingual Social Worker.

The Commissioner notes with approval petitioner's argument that she is fully certified as a school social worker and is capable of performing the work required as part of the district's Title VII Grant and that, if needed, the use of an occasional interpreter could be supplied.

For the foregoing reasons the Commissioner cannot agree with the decision by Judge Young that the Board did not abuse its discretion by employing a less senior social worker. Petitioner is a fully certified school social worker and senior in that category to Ms. Godinez who was wrongfully retained by Respondent Board in this matter. Accordingly the ALJ'S decision is set aside and the Board is ordered to reinstate petitioner to the position of School Social Worker with appropriate benefits and remuneration as mitigated.

IT IS SO DETERMINED.

MAY 13, 1985
Pending State Board

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6234-84
AGENCY DKT. NO. 230-6/84

CHARLES E. BEDNAR,
Petitioner,
v.
BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,
Respondent.

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

Mark Sullivan, Esq., for respondent (Sullivan & Sullivan)

Record Closed: February 19, 1985 Decided: March 28, 1985

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

On June 21, 1984, Charles E. Bednar, employed by respondent as a teacher of art, filed a petition of appeal with the Commissioner of Education, claiming that respondent's reduction of his position was in violation of his tenure and seniority rights. Respondent filed its answer to the petition on August 3, 1984 admitting that petitioner has been a tenured art teacher in its employ, but denying that it had violated petitioner's tenure and seniority rights.

On August 21, 1984, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held in this matter on October 24, 1984, at which time the following issues were isolated:

1. Does petitioner, an elementary school art teacher, with K-12 certification, have tenure and/or seniority rights as a secondary school art teacher?

2. If so, does he have greater rights than any other secondary school art teacher in respondent's employ?

Thereafter, and pursuant to an Order signed by this judge on January 11, 1985, Denise Salto, Michael Zontanos and Michael Spinella were joined as additional respondents in this matter, it being alleged by petitioner that they have less seniority than he does.

Pursuant to the prehearing order the parties provided this tribunal with the stipulation as to all pertinent facts. The Stipulation of Facts is incorporated by reference herein and constitutes this tribunal's findings of fact. Based upon these stipulated facts, the matter has been submitted on cross-motions for summary decision.

As may be gleaned from a review of the stipulation of facts filed in this matter, the relevant facts essential to a determination of the issues raised herein are essentially uncontroverted. Of particular import are the following facts: Petitioner holds an instructional certificate with a comprehensive subject field endorsement in art. A tenured teacher, he was continuously employed by respondent as a full-time teacher of art in its elementary schools (K-6) from September 1967 through June 30, 1984. On or about April 19, 1984, petitioner was advised that his position for 1984-85 would be reduced to half-time based upon a reduction in force. Petitioner is currently employed by the

respondent as a part-time teacher of art. Due to his distribution of hours, he is slightly more than half-time. For the 1984-85 school year, Harold Smalley was assigned as an elementary art teacher, teaching 30 hours per week, Denise Salto and Michael Spinella were assigned as high school teachers, teaching 35 hours per week, respectively, and Michael Zontanos was assigned as a middle school art teacher, teaching 35 hours per week. At the time of the reduction in force, respondent had in its employ two art teachers with experience solely in grades K-6: Harold Smalley (employed continuously since 1964) and petitioner (employed since 1967). Denise Salto has been employed continuously since 1971 as a high school art teacher, Michael Spinella has been employed since November 8, 1983 as a high school art teacher and Michael Zontanos has been employed since 1969 as a high school art teacher. Pursuant to the seniority regulations in effect prior to the operative date of September 1, 1983, petitioner would appear to have greater district-wide seniority than Salto, Zontanos and Spinella.[1]

Based on these facts, petitioner argues against the applicability of the new seniority regulations (specifically, N.J.A.C. 6:3-1.10) to the determination made in the instant matter. More particularly, petitioner contends that the new seniority regulations operate prospectively only and do not affect rights accrued prior to September 1, 1983 under the prior seniority regulations. In light of this, it behooves this tribunal to consider whether the application of the new seniority regulations to a seniority determination made after September 1, 1983 has an impermissible retrospective effect on seniority rights "accrued" prior to September 1, 1983.

[1] See generally, prior regulations N.J.A.C. 6:3-1.10(b) and N.J.A.C. 6:3-1.10(k)(27). More particularly, this conclusion may be gleaned from a review of N.J.A.C. 6:3-1.10(b), which provides that seniority shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as herein provided. In regard to those specific categories, and as provided by prior regulation N.J.A.C. 6:3-1.10(k)(27) (in effect until September 1, 1983), petitioner would have had seniority, if he held a secondary certificate, in all subjects or fields covered by his certificate. Inasmuch as he held an instructional certificate with a comprehensive subject field endorsement in art, apparently, petitioner would have accrued seniority in the secondary category.

In resolving this issue, it should be noted at the outset that N.J.A.C. 6:3-1.10(m)[2] expressly states that N.J.A.C. 6:3-1.10, the standards for determining seniority, shall apply prospectively to all future seniority determinations as of the operative date of the rule, i.e., September 1, 1983. Although this section appears clear on its face, as discussed above, petitioner contends that these regulations should not affect seniority "accrued" prior to the effective date of the amendment.

Precisely this issue has been considered in Hill v. Bd. of Ed. of West Orange, OAL DKT. NO. EDU 4113-84 (Dec. 5, 1984), aff'd, Comm. of Ed. (January 21, 1985), wherein the administrative law judge specifically discussed the issue of whether rights "accrued" under the old seniority regulation could be affected or changed by the new regulations. In so doing, the administrative law judge concluded that "[n]othing in the language of the new regulations suggests any intention to preserve obsolete seniority categories." Hill at 7. More to the point, and in response to petitioner's claim that she possessed "vested rights" to seniority, the administrative law judge correctly pointed out that "(t)eachers possess inchoate seniority rights until such time as a dismissal actually occurs." Hill at 11. Therefore, a tenured teaching staff member's seniority rights vest at the time of the reduction. Hill at 11. (See also, Edison Twp. Ed. Assoc. v. Bd. of Ed. of Edison, OAL DKT. NO. EDU 9523-83 (May 3, 1984), aff'd, Comm. of Ed. (June 18, 1984)). This legal analysis was confirmed by the Commissioner who stated that the conclusion that teachers possess inchoate seniority rights until such time as dismissal actually occurs is "unmistakably supported by the language of N.J.S.A. 18A:28-11." Commissioner Decision, Hill at 15. Citing that statute, which provides that in the case of any such reduction the board of education shall determine the seniority of the persons affected according to such standards and shall notify each such person as to his seniority status, the Commissioner concluded his decision as follows:

[2] It is to be noted that this section applied until July 2, 1984, at which time it was deleted and a new section (m) substituted, see 16 N.J.R. 785(a), 16 N.J.R. 1718(a).

> The foregoing is precisely what occurred in the instant matter. The reduction in force took place and petitioner was correctly accorded her seniority entitlement pursuant to the "standards . . . established by the Commissioner with the approval of the state board. (N.J.S.A. 18A:28-10) The standards utilized by the Board were the latest standards recommended by the Commissioner and approved by the State Board of Education for application prospectively from September 1, 1983. Ibid.

Despite the clear implication of the Hill decision, petitioner in the instant case argues that the Commissioner's determination in In The Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge and Edison Township Boards of Education, decided August 6, 1984, (brought for declaratory judgment) supports the argument that seniority rights "accrued" under the old regulations cannot be changed by applying the new regulations. Petitioner cites the following language in support of his argument:

> At no time did the new regulations intend to suggest that the years of elementary seniority which these teachers had earned under the old regulations were wiped out or somehow converted to secondary seniority rights. The clear intent of the State Board was to permit said elementary-endorsed persons to continue to accrue seniority in the elementary category.
>
> In reaching such a conclusion, the State Board recognized that as a matter of equity a redefinition of all categories had to take into consideration the years of service and experience both prior to and subsequent to the limitation of the regulations. While recognizing that an individual who had taught exclusively in a departmentally-organized grade 7 under an elementary endorsement did not fully meet the criteria of having had experience in a self-contained classroom situation, the State Board had to take cognizance, as a matter of fundamental fairness, that the service rendered in a departmentally-organized grade 7 or 8 was, prior to September 1, 1983, actually in the elementary category as then defined and that these teachers were actually earning experience within their elementary endorsement and in the elementary category as then defined. Old Bridge at 10-11.

Although at first blush this would appear to support, at least to some extent, petitioner's argument, the Commissioner in a subsequent decision explained that the above "language was meant to apply within that context only to persons serving in departmentalized grades seven and eight while holding elementary endorsements." Felper v. Bd. of Ed. of West Orange, OAL DKT. NO. EDU 5942-84 (Dec. 13, 1984), aff'd with modifications, Comm. of Ed. (Jan. 28, 1985) at 7.

In sum, it is clear, and this tribunal **CONCLUDES**, that the determination reached in Hill is applicable to the instant matter. Thus, for the reasons expressed in that decision, and as outlined above, this tribunal **CONCLUDES** that the application of the new seniority regulations to a seniority determination made after September 1, 1983 does not constitute an impermissible retrospective impairment of vested seniority rights. Rather, Bednar's seniority rights vested at the time of the reduction. Prior to that event, the Commissioner of Education adopted regulations, prospective in effect, which changed the categories for determining seniority. Bednar's rights are governed by the regulation in force on the date of respondent's action.

That being so, and it being clear that pursuant to the new regulations in effect at the time of the reduction in force, Bednar did not have seniority over Harold Smalley, Denise Salto, Michael Spinella, or Michael Zontanos, the relief requested by Bednar is **DENIED.**

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

OAL DKT. NO. EDU 6234-84

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

March 28, 1985
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

APR 02 1985
DATE

Seymour Weis
DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 03 1985
DATE

Ronald L. Lankenau
FOR OFFICE OF ADMINISTRATIVE LAW

tw/e

CHARLES E. BEDNAR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Upon review of the record and petitioner's exceptions, the Commissioner concurs with the determination rendered by the Office of Administrative Law for the reasons stated in the initial decision.

Accordingly, the Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

MAY 13, 1985

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 807-84
AGENCY DKT. NO. 413-11/83A

SHARON ROGAN,
Petitioner,
v.
EDISON TOWNSHIP
BOARD OF EDUCATION,
MIDDLESEX COUNTY,
Respondent.

Steven E. Klausner, Esq., for petitioner (Klausner and Hunter, attorneys)

R. Joseph Ferenczi, Esq., for respondent

Record Closed: February 25, 1985 Decided: April 3, 1985

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Action for an order directing reinstatement of Sharon Rogan (petitioner) to a full-time, tenure position and reimbursement of any salary wrongfully withheld, together with emoluments and benefits, by the Edison Township Board of Education (Board).

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held at which, among other things, it was agreed that the issue to be tried was whether the Board violated the tenure and seniority rights and/or the contract rights of the petitioner by failing to employ her in a full-time position following a reduction in force. After several unavoidable delays, the matter proceeded to summary judgment on cross-motions of the parties.

I

The petitioner asserts that she is a tenure teaching staff member in the Board's employ. On or about April 15, 1983, after more than nine years and seven months of continuous service, the petitioner was advised that her teaching services would not be required for the 1983-84 school year, ostensibly because of declining enrollment.

On or about July 18, 1983, the Board posted a "Notice of Available Positions" for a newly-created position of "In-house Suspension Teacher." The job description required that the person selected "must hold a valid New Jersey Instructional Certificate, with any appropriate endorsement" (Exhibit A). The petitioner was not chosen for the position. Rather, she was offered and accepted a four-tenths time position. On or about September 12, 1983, the respondent hired a non-tenured teacher to fill the position of In-house Suspension Teacher.

The petitioner maintains that as a result of the Board's actions, she sought to exercise her seniority in accordance with N.J.S.A. 18A:28-11, N.J.S.A. 18A:28-13 and N.J.A.C. 6:3-1.10. However, she was denied the request despite the fact that she has greater seniority than the non-tenure teacher hired by the Board. The petitioner further claims that the Board refuses to recognize her seniority and persists in its refusal to permit her to exercise her seniority rights. There is no indication that a written request to use the title "In-house Suspension Teacher" was submitted to the County Superintendent of Schools for approval and determination of appropriate certification pursuant to N.J.A.C. 6:11-3.6(b).

Based on these facts, the petitioner seeks judgment in her favor. She argues that the law in this area is settled. The petitioner relies on two cases, German v. Cape May Vocational-Technical School, OAL DKT. EDU 123-83 (Nov. 28, 1983), adopted, Comm'r of Ed. (Jan. 12, 1984), aff'd, St. Bd. (Aug. 10, 1984), and Furst v. Rockaway Bd. of Ed., OAL DKT. EDU 6617-83 (Apr. 2, 1984), adopted, Comm'r of Ed. (May 18, 1984), aff'd, St. Bd. (Oct. 24, 1984).

German involved a teaching staff member with instructional endorsement in distributive education-teacher coordinator, teacher of consumer education and family living, who was reduced in force (riffed) by the Cape May Vocational-Technical School

Board of Education. At the time of his termination, the Board had a position which it called "Job Success Orientation Teacher." This position was filled by an individual holding an emergency certificate who, by definition, had neither tenure nor seniority. In sustaining German's claim, the administrative law judge stated:

> Curiously, there is no basis upon which the Board justified its denial of petitioner's request made during August 1982 to exercise a superior claim by way of seniority to the position of job success orientation teacher other than its assumption that the endorsement, production, personal and service occupations, is a prerequisite for that position. Neither the Board, its superintendent, nor the Cape May County Superintendent, nor the Department of Education specified such an endorsement as a prerequisite for that teaching assignment. There is no evidence in this record to show that petitioner's present teaching certificates, with endorsements, are not acceptable for the position of job success orientation teacher. [German at 10]

The Commissioner adopted the initial decision as his own. On appeal, the State Board affirmed the holding. Among other things, the State Board held:

> As a result of Respondent's failure to determine the appropriate certificate for the position of Job Success Orientation Teacher, and its resulting improper placement of the teacher with only emergency certification in that position, the State Board of Education affirms the decision of the Commissioner ordering reinstatement of Petitioner and compensation, including credit for military service since 1981, less any mitigation.
>
> The State Board of Education directs that Respondent Board of Education of Cape May County immediately send a job description for the position of Job Success Orientation Teacher to the County Superintendent, who, in consultation with the State Board of Examiners, will determine what endorsement is required for the position. It is further directed that this determination be expedited by the parties involved. The State Board of Education directs lastly that a properly certified teacher be placed in the Job Success Orientation position no later than the beginning of 1985-86 school year. [Slip opinion at 1-2]

The Furst case, like the German case, and the case at bar also involved a reduction in force and an unrecognized title. Furst argued that the board of education had improperly reassigned him to a science teacher position after it had abolished his computer specialist/learning disabilities teacher consultant position (LTDC), while retaining a non-tenured LTDC. The Commissioner agreed, stating:

> Petitioner further contends that he is entitled to accrual of a full-year's seniority for 1982-83 rather than the .40 year's seniority determined by the judge because the only endorsements required for the LTDC/computer specialist position was that of an LTDC. He argues that in view of the fact that since no further certification was required for the position and since said position was an unrecognized title, seniority accrued under the LTDC position. Dedrick v. Bd. of Ed. of Hammonton, 1977 SLD 1043 and Quinlin v. Bd. of Ed. of North Bergen, 73 N.J. Super. 40 (App. Div. 1962) are cited in support of this.
>
> The Commissioner has carefully reviewed the record and legal arguments in the instant matter and is compelled to agree with petitioner's assertion that he accrued a full year's seniority as an LDTC for 1982-83. The computer specialist position is clearly an unrecognized title. There is nothing contained in the record to indicate that a written request to use said title was submitted to the county superintendent of schools for approval and determination of appropriate certification pursuant to N.J.A.C. 6:11-3.6(b). Therefore, tenure and seniority with respect to petitioner's assignment for 1982-83 must be attached to the LTDC position, a recognized tenurable position. [at 12]
>
> The State Board affirmed on appeal, stating:
>
> The Commissioner affirmed the ALJ's determination with the modification that, because Computer Specialist was an unrecognized title, Furst's service in that position be attached to the LTDC position. Thus, he concluded that by June, 1984, Furst's seniority accrual as an LTDC would be 3.5 years.
>
> The State Board agrees that Furst was entitled to the full-time LTDC position held by the non-tenure employee. We also agree that as of June, 1984, Furst had accrued greater seniority than Pecca and, further, that his service in the position of Computer Science Specialist/LTDC attached fully to his seniority as LTDC. [at 3]

Rogan urges that Furst and German, above, are identical to the case at bar. All three cases involve a reduction in force of a tenure teaching staff member and a non-tenure teacher being retained in an unrecognized title. Clearly, the petitioner met the qualifications for the In-house Suspension Teacher. She was the holder of a valid New Jersey instructional certificate with an appropriate endorsement as required by the job description. Hence, the most senior teacher reduced in force can assert seniority over the position. The Board could not terminate the petitioner or at least reduce her full-time position to four-tenths and keep a non-tenure teacher in a position for which the petitioner was qualified. The Board's action violates the petitioner's tenure. She

therefore seeks reimbursement for the difference in salary lost, seniority credit, interest from the date of the breach (Newark Bd. of Ed. v. Levitt and Sasloe, 197 N.J. Super. 239 (App. Div. 1984)), and all other emoluments of office.

By letter dated February 5, 1985, the respondent confirmed agreements reached during a telephone conference conducted on February 4. The Board's motion for summary judgment and brief in support thereof were due in the Office of Administrative Law on February 20, 1985. They were not received on or before that date. I allowed three working days for movement of the mails and closed the record herein on February 25.

Having reviewed the pleadings in this matter, I **FIND** the following to be uncontroverted and to be facts in this matter:

1. On or about April 15, 1983, Sharon Rogan was reduced in force effective school year 1983-84.

2. At the time of cessation of her services, the petitioner had ten years' continuous service in the district.

3. On or about July 18, 1983, the Board posted a notice of available positions concerning a newly created position entitled In-house Suspension Teacher.

4. The notice, which is exhibit A in this matter, sets forth as qualifications, "Must hold a valid New Jersey Instructional Certificate, with any appropriate endorsement."

5. The petitioner was not chosen for the position.

6. She was offered and did accept a four-tenths time position.

7. In September 1983, the Board hired a non-tenured teacher to fill the position of In-house Suspension Teacher.

It is first noted that nothing in the record indicates whether the Board, pursuant N.J.A.C. 6:11-3.6, submitted a written request to the County Superintendent of Schools for approval of the subject position and determination of the appropriate certification to be required of a holder of the subject position.

Preliminarily, therefore, if it has not already done so, the Board is **DIRECTED** to comport with the provisions of N.J.A.C. 6:11-3.6 as to the subject position.

The notice of available positions stated that any appropriate endorsement on a New Jersey Instructional Certificate would meet the qualifications for the job. (See finding 4, above.) The notice explains further that the In-house Suspension Teachers would assume responsibility for the efficient operation of the In-house Suspension Program at the assigned school, including supervision of assigned students, completion by assigned students of work assignments, and coordination of associated administrative details. The major duties and responsibilities of the positions are set forth as follows:

1. Serve as teacher in charge of the in-house suspension room at assigned location, including primary responsibility for the total daily program of students assigned.
2. Maintain a classroom environment appropriate to the disciplinary nature of in-house suspension.
3. Serve as homeroom teacher for students on in-house suspension on the days they are so assigned.
4. Maintain accurate records of the attendance of assigned students, including necessary follow-up on absences, cutting, etc.
5. Distribute and collect assignments and return them to regular classroom teachers.
6. Assist students in the completion of assignments from regular teachers, as appropriate and necessary.
7. Provide corrective guidance for students in an effort to prevent repetition of the offense(s) that led to in-house suspension.
8. Evaluate the progress of students assigned to in-house suspension and advise administration if further detention is necessary.

9. Notify principal of problems which may arise in the operation of the in-house suspension room, and make proposals for solutions.

10. Perform other duties related to primary function as required or as instructed by reporting superior.

The notice also indicates that there are four In-house Suspension Teacher positions available. One full-time and one four-tenths time position at the high school and one full-time and one four-tenths time position at the junior high school were noticed.

N.J.S.A. 18A:28-9 authorizes boards of education to reduce the number of teaching staff members whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or declining enrollment or change in the administrative or supervisory organization of the district. N.J.S.A. 18A:28-11 provides, in pertinent part:

> In the case of any such reduction the board of education shall determine the seniority of the person affected according to such standards [established by the Commissioner] and shall notify each such person as to his seniority status, and the board may request the commissioner for an advisory opinion with respect to the applicability of the standards to particular situations, which request shall be referred to a panel . . . No determination of such panel shall be binding upon the board of education or any other party in interest or upon the commissioner or the state board if any controversy or dispute arises as a result of such determination and an appeal is taken therefrom pursuant to the provisions of this title.

N.J.A.C. 6:3-1.10 sets forth the standards for determining seniority. The standards now in effect became operative September 1, 1983. However, although the new regulations contain significant changes, none of the changes has bearing on the present case.

Nowhere in the pleadings, particularly the separate defenses, is there any allegation that the petitioner does not hold an appropriate endorsement for the position. The Board's own announcement says that an In-house Suspension Teacher must hold a valid New Jersey Instructional Certificate, with any appropriate endorsement [emphasis added].

N.J.A.C. 18A:28-12 provides in pertinent part:

> 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 . . . [emphasis added]

The petitioner, by virtue of holding employment and appropriate certificates, acquired a tenure status of employment with the Board. It follows then that the petitioner also acquired certain seniority rights, which according to the cited statute, may be exercised when her position of employment is abolished. But a question remains as to whether the petitioner holds an instructional certificate with an endorsement appropriate to the In-house Suspension Teacher position. The Board's notice is conspicuously vague in this regard. It states that the person must hold an instructional certificate with any appropriate endorsement. There is no definition or suggested list of appropriate endorsements. At the same time, there is no evidence in this record to show that the petitioner's present teaching certificate, with endorsements, is not acceptable for the position of In-house Suspension Teacher.

In consideration of the foregoing, I **CONCLUDE** that Sharon Rogan is entitled to a full-time In-house Suspension Teacher position. Immediate appointment to that position with appropriate adjustment of salary and benefits is hereby **ORDERED** unless the Board can show to the satisfaction of Commissioner of Education that the petitioner's certification is in some way inappropriate to the position, jurisdiction of that question remaining with the Commissioner.

Under the holding in Levitt, above, I **FIND** and **CONCLUDE** that an award of post-judgment interest would be premature at this time. 197 N.J. Super. at 248 and 248 n.3. The Board must be allowed reasonable time in which to effect the ordered adjustments.

Pre-judgment interest, however, is not a penalty but rather a payment for the use of money. Pressler, Current N.J. Court Rules, Comment R. 4:42-11(b) (1985). Even though the Levitt court found the Commissioner to have the power to award pre-judment and post-judgment interest as "an ancillary power which he must be deemed to have in order to fully execute his statutory responsibility to hear and determine all controversies and disputes arising out of the school laws," 197 N.J. Super. at 245, the court also said, "When the debtor is a governmental agency and interest in the cause is not provided for by statute, particular circumspection in the granting of pre-judgment interest is required and a showing of compelling equitable reasons must be made in order to justify the award" [citations omitted] [emphasis added]. Ibid. at 244.

I am not satisfied, upon this record, that a showing of compelling equitable reasons has been made. The question is barely addressed in the petitioner's brief. Accordingly, I **FIND** and **CONCLUDE** that the petitioner's request for pre-judgment interest must be and is hereby **DENIED**. It is so **ORDERED**.

By this order, summary decision, as limited above, is **GRANTED** to the petitioner.

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

3 APRIL 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

APR 04 1985
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 08 1985
DATE

Ronald L. Parker/jdb
OFFICE OF ADMINISTRATIVE LAW

ij

SHARON ROGAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

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

The Commissioner finds nothing in this record to show that petitioner is not properly certified for the position of full-time In-house Suspension Teacher. Accordingly, Petitioner Rogan is entitled to that position to which the Board must appoint her with appropriate salary placement and remuneration without pre-judgment interest. The Commissioner further directs the Board to comport with the provisions of N.J.A.C. 6:11-3.6 relative to the position which is the subject of the controversy herein.

COMMISSIONER OF EDUCATION

MAY 17, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7113-84
AGENCY DKT. NO. 362-8/84

ELAINE G. LANGE,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF LAUREL SPRINGS, CAMDEN COUNTY,
Respondent.

Elaine G. Lange, petitioner, pro se

JoAnn A. Laughlin, Esq., for the respondent (Charles J. Clarke, Jr., P.C.)

Record Closed: March 5, 1985 Decided: April 2, 1985

BEFORE **AUGUST E. THOMAS,** ALJ:

Petitioner alleges that the Board of Education of the Borough of Laurel Springs (Board) has violated and continues to violate the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6, by failing to make minutes of public meetings available to the public in a prompt fashion.

This matter was filed with the Commissioner of Education on August 14, 1984, and thereafter was transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted by Administrative Law Judge (ALJ) Judith H. Wizmur on November 7, 1984, where the nature of the proceeding and the issue was established. Letter briefs were filed by the litigants and the record was closed on receipt of the Board's notice on March 5, 1985, confirming that the hearing was adjourned and that the matter would be decided on the papers already filed.

After the prehearing conference, petitioner served interrogatories upon the Board and each individual member thereof. The information requested included inquiries relating to the past history of petitioner's attempts to change the Board's policy with regard to the availability of minutes. Petitioner asserts that members of the Board were advised that they were violating the OPMA but they continued to do so. Respondent sought to strike all interrogatories pertaining to past encounters between the petitioner and the Board on the ground that this line of inquiry is not relevant.

BACKGROUND FACTS

The Board of Education is required under N.J.S.A. 10:4-14 to keep reasonably comprehensive minutes of all meetings and to make such minutes "promptly available to the public." It is stipulated in this case that the procedure of the Board of Education with regard to the minutes of the regular monthly meetings is to distribute completed copies of the minutes to Board members for review several days before the next meeting. The minutes are then adopted at the next meeting, with amendments, if any. The minutes are not available to the public before final adoption. The issue here is limited to the legal question of whether the Board's procedure complies with the statutory requirement to make minutes "promptly available."

In her petition, petitioner seeks not only a directive from the Commissioner that the procedure of the Board be altered to provide for more "prompt" availability of meeting minutes, but also requests the following:

> Wherefore, petitioner requests that this violation be charged as a criminal offense due to the prior knowledge of the Laurel Springs Board of Education and their apparent blatant disregard of the Open Public Meetings Act; all fees, penalties, court costs and Attorney's fees to be borne by those individual board members, since criminal charges are apparently not covered by Board insurance, thus relieving the taxpayers of the burden of additional legal fees.

In her Order signed on February 1, 1985, ALJ Wizmur decided that the Commissioner has jurisdiction over controversies and disputes arising under the school laws (N.J.S.A. 18A:6-9) and that he may determine issues arising under the OPMA as they

relate to controversies under the school laws. Sukin v. Northfield Bd. of Ed, 171 N.J. Super. 184 (App. Div. 1979). However, ALJ Wizmur also concluded that the Commissioner does not have statutory authority to impose fines and/or penalties upon individual members of the Board. ALJ Wizmur stated that N.J.S.A. 10:4-17 governing the imposition of penalties provides that knowing violations of the OPMA shall result in the imposition of fines that are recoverable by a summary proceeding under the Penalty Enforcement Law, N.J.S.A. 2A:58-1 et seq. N.J.S.A. 10:4-17 provides further as follows:

> The county district court of the county in which the violation occurred shall have jurisdiction to enforce said penalty upon complaint of the Attorney General or the county prosecutor, but the Attorney General or the county prosecutor may refer the matter to the Public Advocate.

The ALJ concluded also that jurisdiction for the enforcement of the specified penalties is specifically assigned to the county district court. The attorney general and the county prosecutor are authorized to seek to enforce the penalties specified. The Commissioner, and therefore, derivatively, the Office of Administrative Law, does not have statutory authority to entertain a citizen complaint for the imposition of fines upon individual members of the Board.

ALJ Wizmur then granted respondent's motion to strike interrogatories which concern the past history of petitioner's attempts to enforce the OPMA with the intention of establishing that members of the Board knowingly violated and continued to violate the provisions of the OPMA. Other interrogatories not relating to this line of inquiry were ordered to be answered. ALJ Wizmur also granted respondent's attorney's motion to dismiss the petition as against her.

There was no appeal from this interlocutory decision.

Based on the foregoing, I **CONCLUDE** that there are no facts in dispute. At issue is whether or not the Board's policy, which is set forth in full, infra, meets the statutory requirement of making its minutes available "promptly." Petitioner asserts also that the public is not permitted to participate in the Board's public meetings.

BOARD POLICY 200-7.4.9

Minutes of meetings; availability to public

> The Board of Education shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with N.J.S.A. 10:4-12 (200-7.4.10 & 200-7.4.11).
>
> Members of the public shall have the right to purchase copies of said minutes in accordance with the fee schedule set forth in N.J.S.A. 45:1A-2 (Right to Know Law).
>
> The Secretary shall record all proceedings of the Board, including annual and special school meetings and shall mail to each member of the Board a copy of the minutes three days prior to the next regularly scheduled meeting.
>
> [Exhibit I]

CONCLUSIONS OF LAW

Based on the foregoing, the basis of the dispute between the petitioner and the Board is the meaning of "promptly" within the OPMA section regarding the public body's providing minutes of its meeting to the public. The OPMA states in part as follows:

> Each public body shall keep reasonably comprehensible minutes of all its meetings. . . which shall be promptly available to the public. . .

The most reasonable interpretation of "promptly" is to have the minutes available to the public as soon as the minutes are compiled and put in typewritten form in the regular course of the Board staff's day-to-day ministerial duties.

The Board argues that its internal policy of approving minutes at its next regularly scheduled monthly meeting before releasing the minutes to the public is consistent with the OPMA "promptly" requirement. However, the OPMA does not require

that the public receive approved board minutes, but only "reasonably comprehensible minutes" N.J.S.A. 10:4-14. Allowing the Board to type or stamp on its unapproved copies that the minutes are "subject to approval by the Board at its next monthly meeting" would prevent the Board from being held to an error which may exist in the unapproved minutes, while allowing the public to ascertain what occurred at the last meeting before they attend the Board's next meeting. Such an interpretation is consistent with the well-reasoned approach of the New Jersey Department of State in interpreting the OPMA:

> The minutes become public as soon as they are prepared by the staff of the public body. To hold them until they are formally approved at the next meeting would not meet the Law's requirement that the minutes be made "promptly available to the public." In releasing the minutes prior to formal approval, a statement should be placed at the top of them stating that the minutes have not been formally approved and are subject to change or modification by the public body at its next meeting. [emphasis supplied] ["Guidelines on the Open Public Meetings Law" at 16]

The New Jersey Department of State also makes a reasonable recommendation regarding the fundamental meaning of the term "promptly:"

> The Law requires that the minutes be made "promptly available to the public." Although prompt availability will depend on the circumstances of each case, it generally requires that the minutes be made available as soon after the meeting as it takes to prepare them. [Ibid]

This interpretation is consistent with New Jersey case law, which in Miller v. Zurich Gen. Accident and Liability Ins. Co., 36 N.J. Super. 288 (App. Div. 1955) states that phrases such as "immediate" and "prompt" should be defined as "within a reasonable time" in "light of the particular fact situation. . . ."

> This phrase [as soon as practicable] has been uniformly construed to mean, "within a reasonable time." Annotations 18 A.L.R. 2d, 443, 448 449; 123 A.L.R. 950, 958; 76 A.L.R. 23, 46. So, too, have Macchia v. Scottish Union and National Insurance Co., 101 N.J.L. 258, 261 (Sup. Ct. 1925). Aside from special policy limitations and statutory qualifications it is fair to synthesize the cases by saying that the determination of what is compliance with a provision of this kind must be adjudged in the light of the particular fact situation presented. . . .

Similarly, the court in Macchia v. Scottish and Nat. Co., 101 N.J.L. 258, 261 (Sup. Ct. 1925) stated as follows:

> The words "immediate," "forthwith" and the like, are ordinarily held to mean within a reasonable time, and it is elementary law that what is reasonable time depends on the circumstances of the case, and is ordinarily a question for the jury.

Applying this standard to the instant dispute, the present facts center around the term "promptly" as applied to the compiling and putting the minutes of the Board meeting in typewritten form. A reasonable time under these facts would encompass a time period for the Board's secretary or the responsible Board official to compile the minutes and for a suitable, short time to type the minutes. As soon as the minutes are compiled in this typewritten form, they should be available to the public with an attached notice that these are the unapproved minutes of the Board, which will be subject to approval at the next Board meeting.

Since "one purpose of the Sunshine law is to promote the public's confidence in the public bodies which govern them," Accardi v. Mayor and Council of City of North Wildwood, 145 N.J. Super. 532, 541 (Law Div. 1976), and the law also seeks to promote "the public's effectiveness in fulfilling its role in a democratic society," N.J.S.A. 10:4-7, the term "promptly" should be interpreted as making minutes available to the public as soon as they are compiled and put in typewritten form. In this manner, the public will be able to read the unapproved minutes before the next regularly scheduled Board meeting, have a reasonable time to reason over and possibly take issue with any of the Board's actions reflected in the minutes, and be able to function as informed observers and participants at each Board meeting.

Accordingly, allowing the public to view the Board's minutes as soon as the minutes have been compiled and put in typewritten form during the regular day-to-day performance of the Board staff's ministerial functions would be consistent with the OPMA requirement of making the minutes "promptly" available to the public. Since the Board has to prepare the minutes anyway, this requirement would place no additional burden on the Board. The time of the minutes' release once prepared is no burden on the Board. Placing the caveat on the copies of the minutes that they are subject to approval at the next regularly scheduled Board meeting would prevent the Board from being held to any possible error in the unapproved minutes.

Based on the above rationale, the relief petitioner seeks concerning the release of the Board minutes is granted and the Board is **ORDERED** to make available to the public in its office, on request, copies of its unapproved minutes as soon as they are typewritten, in accordance with the fee schedule set forth in N.J.S.A. 47:1a-2, unless in its discretion, no charge will be assessed. N.J.S.A. 18A:11-1.

Petitioner also argues that Board policy (Exhibit II) limits or restricts public participation at its public meetings. The record does not support this allegation. The Board permits public participation at several category levels established in its policy (200-7.4.13 Citizen Participation). Specifically, limited citizen participation is permitted in three categories. Thereafter, open citizen participation is entertained.

The OPMA provides in N.J.S.A. 10:4-12(a) as follows:

> Except as provided by subsection b. of this section, all meetings of public bodies shall be open to the public at all times. Nothing in this act shall be construed to limit the discretion of a public body to permit, prohibit, or regulate the active participation of the public at any meeting.

There is no evidence offered by petitioner that the public is denied the right to participate in the public meetings of the Board. Conversely, the Board policy supports its intention that the public is permitted to participate in its meetings. That policy (Exhibit II) is not inconsistent with N.J.S.A. 10:4-12(e). Consequently, petitioner's complaint in regard to public participation must be **DISMISSED WITH PREJUDICE.**

Except as ordered above, there is no further relief to which petitioner is entitled.

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

2 April 85
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

APR 03 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 04 1985
DATE

Ronald J. Parker/sh
OFFICE OF ADMINISTRATIVE LAW

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ELAINE G. LANGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAUREL SPRINGS, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner observes that no timely exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1-16.4a, b and c.

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

The Board shall make available to the public in its office copies of its unapproved minutes on request. Otherwise, the Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

MAY 20, 1985

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6223-84
AGENCY DKT. NO. 330-7/84

PATRICIA NAFASH,
Petitioner
v.
BOARD OF EDUCATION OF THE
BOROUGH OF RIDGEFIELD,
Respondent

Sheldon H. Pincus, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Dennis G. Harraka, Esq., for respondent
(Gallo and Geffner, attorneys)

Record Closed: March 25, 1985 Decided: April 2, 1985

BEFORE WARD R. YOUNG, ALJ:

Patricia Nafash, a tenured teaching staff member, alleged the action of the Ridgefield Board of Education (Board) in withholding her salary increment for the 1984-85 school year was arbitrary, capricious, unreasonable and/or retaliatory. The Board avers said action was a proper exercise of its discretionary authority pursuant to N.J.S.A. 18A:29-14.

The matter was transmitted to the Office of Administrative Law on August 21, 1984 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq., and was preheard on October 15, 1984. A plenary hearing was held on March 6, 1985, and the record closed on March 25, 1985, the date established for the filing of the Board's responsive post-hearing submission.

The thrust of petitioner's contention is that the withholding of her salary increment for 1984-85 resulted from her modification of her plans, methods and techniques to meet the demands of her previous supervisor as her increment had been withheld in each of the three previous years. Her disagreement with the observation reports are clearly memorialized in rebuttals, P-10, P-11, and P-12.

The credibility of the testimony of petitioner and her evaluators, the principal and superintendent, is not doubted here. What was apparent were varying perspectives of petitioner's expectancies and performance.

Petitioner teaches music. One of her class assignments is a required course for eighth graders which is taught at 8:00 a.m. The difficulty of motivating such pupils at that time of day, in a course that many would probably not take if it was an elective, is recognized. The curricular policy schedules this course in a cycle with home economics, art, and industrial arts, all of which are taught at the same hour at different times of the year.

A review of the observation reports, P-2, and P-4 and the testimony of her evaluators indicates that pupil inattentiveness, discipline, or class control was an identified concern. The summary report indicates no significant improvement was observed between December and April of the 1983-84 school year. It is noteworthy that the principal testified that he observed this same group of pupils in home economics, art, and industrial arts also at 8:00 a.m., but with no significant problems of pupil attentiveness, discipline, or class control. It is also noteworthy that the superintendent observed these same problems in petitioner's fourth grade class after 11:00 a.m. See P-3.

Petitioner raised suspicion of the validity of the superintendent's observation due to prior litigation. The principal, however, recommended the withholding action. He, the principal, had no prior professional relationship with petitioner as she did not come under his supervision until the 1983-84 school reorganization brought the eighth grade within his administrration.

I FIND that a reasonable basis existed for the evaluation of petitioner, and therefore also FIND it reasonable for the Board to have concluded and acted as they did. Kopera v. Board of Education of West Orange, 1958-59 S.L.D. 96, aff'd State Board of Education 98, rem'd 60 N.J. Super. 288 (App. Div. 1960), dec. on rem. 1960-61 S.L.D. 57, aff'd N.J. Super. (App. Div. 1963), Docket No. A-632-58 (1961-62 S.L.D. 223).

I CONCLUDE, therefore, the Petition of Appeal shall be and is hereby DISMISSED.

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

I hereby FILE this Initial Decision with Saul Cooperman for consideration.

2 April 1985
DATE

WARD R. YOUNG, ALJ

APR 03 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

APR 08 1985
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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PATRICIA NAFASH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b and c. The Board's reply to petitioner's exceptions was not filed within the timelines prescribed by this regulation.

Petitioner contends that the initial decision should be reversed and remanded for more detailed findings of fact and conclusions of law or, in the alternative, the Commissioner should order restoration of her 1984-85 salary increment. She argues that the initial decision fails to comport with administrative regulation N.J.A.C. 1:1-16.3(c) which reads:

"(c) The initial decision shall contain:

***

(6) An analysis of the facts adduced at the hearing in relation to the applicable law and covering all issues of fact and law raised in the proceedings;

(7) Specific findings of contested fact which shall be designated as such and which shall not be set forth in statutory or conclusionary language;

(8) Specific conclusions of law based upon the findings of fact and applicable constitutional principles, statutes, and rules or regulations***."

Petitioner avows that she successfully carried her burden of proof. Further, she argues that the observations and evaluations (P-1 through P-5) used as the bases for the increment withholding cannot be viewed in a vacuum because the teaching techniques and methods used were imposed on her by a previous supervisor the preceding three years. However, two prior Commissioner decisions involving the parties herein demonstrated that that individual's "observations were baseless and that the process was tainted by an improper motivation to force petitioner from the district." (Exceptions, at p.4) She believes that a review of the rebuttals she prepared (P-10 through P-12), her credible testimony and other documentation prepared at the hearing demonstrates that the underlying facts were not as those who made the observations claimed and that it was unreasonable for the Board to withhold her 1984-85 increment based on these facts.

Upon review of the record and the exceptions filed in this matter, the Commissioner is unpersuaded by petitioner's allegations that the initial decision does not comport with N.J.A.C. 1:1-16.3.

Further, the Commissioner is constrained to comment that he disagrees with petitioner's characterization of the determinations in the two prior cases involving the parties (In the Matter of Nafash, decided by the Commissioner March 12, 1984 and Nafash v. Ridgewood, April 8, 1985). In the first matter, it was determined that the credibility of the evaluator was lacking and, therefore, the evaluations could not serve as documentation to justify the tenure charges. In the second matter involving an increment withholding, the Board's action was overturned because it was based on the same evaluations. Nowhere in either decision was it determined that "the process was tainted with an improper motivation to force petitioner from the district."

In the instant matter, there is no involvement of the individual whose credibility was lacking in the two prior cases. The principal conducting evaluations herein had no prior professional relationship with petitioner, not having assumed supervisory responsibilities for her until 1983-84. (Initial Decision, at p. 2) Further, it is noted by the Commissioner that the superintendent had not conducted any of the disputed evaluations in the other two matters. In the Matter of Nafash, supra, reads in part:

> "The superintendent of schools testified that he based his decision to file charges against the respondent on evaluations, observations and reports of his administrative and supervisory staff. He did not conduct an observation of the respondent." (Slip Opinion, at p. 10)

The judge, upon his review of the evidence submitted to the record by petitioner and the Board and the testimony in this matter both with respect to the evaluations/observations and allegations of taint/improper motivation, determined that a reasonable basis

Accordingly, the Commissioner accepts the Office of Administrative Law's recommendation dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

MAY 20, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1026-85
AGENCY DKT. NO. 34-2/85

A.K. AND S.K., AS PARENTS AND GUARDIAN OF M.K.,
Petitioner,
v.
HILLSBOROUGH TOWNSHIP BOARD OF EDUCATION, SOMERSET COUNTY,
Respondent.

Daniel A. Lime, II, Esq., for petitioner (Westling, Lime & Welchman, attorneys)

Richard A. Koerner, Esq., for respondent

Record Closed: March 29, 1985 Decided: April 24, 1985

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Action for an order of the Commissioner to reverse the decision and judgment of the Hillsborough Township Board of Education (Board) of February 11, 1985, to the extent that decision and judgment impose a classroom suspension on M.K. lasting to the end of the 1984-85 school year.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On March 8, 1985, oral argument was heard on the petitioner's motion for interim relief. The undersigned ordered M.K.

reinstated to classes effective March 11, 1985, ordered a Child Study Team (CST) evaluation of M.K. to be completed by March 14, and set the matter down for expedited hearing on March 15, 1985. The transcript of the suspension hearing before the Hillsborough Board of Education on February 11, 1985, was admitted into evidence as Joint Exhibit 1.

Hearing was conducted on March 15, 1985, at the Office of Administrative Law, Trenton. Four witnesses were heard. The petitioner and the Board were allowed 10 days and 15 days, respectively, in which to file written summations. All submissions were timely made. The order reinstating M.K. to attendance was continued in effect pending final decision by the Commissioner of Education in this matter.

I have reviewed the transcript of the hearing held on Monday, February 11, 1985, before the Hillsborough Board of Education, the testimony of all witnesses on March 15, and the submissions of the parties. There is no dispute as to the facts underlying the suspension of M.K. from Hillsborough High School (J-1). M.K. was afforded a hearing, which comports with the due process requirements of Title 18A of the New Jersey Statutes. There are no allegations of procedural deficiency.

I

The petitioner argues that the Board's vote to continue the suspension of M.K. until the end of the school year is wholly unwarranted and excessive. The petitioner points to what she sees as mitigating factors:

1. M.K. has a good prior disciplinary record.
2. She is in her senior year of high school.
3. She intends to go on to higher education after high school.
4. She has acknowledged that the incident should have been handled in a different manner.
5. The victim was not seriously injured. Basically, she sustained a black eye.
6. There was evidence of harassment directed toward M.K. by the victim.
7. No weapons were used by M.K. in the attack.

8. The incident lasted only 30 seconds or so.

9. M.K. has presented no disciplinary problem since she was readmitted to school during the week of March 11, 1985.

10. The high school vice-principal indicated before the Board and this tribunal that he did not believe that an incident like this would recur.

In addition to these factors, this tribunal has had the benefit of the evaluation by the CST. This evaluation indicated that M.K. is of normal intelligence and not classifiable. In the petitioner's view, the logical conclusion must be that she should continue her classroom studies.

Given all these factors, the administration nonetheless felt that suspension to the end of the school year was appropriate because, in the vice-principal's words, "there are just some things you don't do." The problem with this logic is that it does not provide any flexibility and places too much emphasis on punishment rather than rehabilitation. As the Supreme Court stated in Goss v. Lopez, 419 U.S. 565 (1965), there is a distinction between a short suspension of a pupil from regular school attendance and a pupil's permanent expulsion from regular school attendance. The former is of brief duration while the latter is permanent and unforgiving. For M.K., the Board's suspension to the end of the year amounts to expulsion. As the vice-principal observed, there is no middle ground in this case. This reasoning could lead one to believe that M.K.'s situation is an all-or-nothing proposition. However, the real purpose for which the public schools exist is to educate students. Clearly, a vital part of this process involves interaction with other students in a classroom environment. This cannot be accomplished by tutoring M.K. at home. Moreover, one hour of tutoring per week in each of M.K.'s five major subjects cannot be considered an adequate substitute for in-class instruction.

The right to an education is so important that it is embodied in the New Jersey Constitution. N.J. Const., (1947), Art. VII, §XV, par. 1. Pupils must, however, submit to discipline and, in violation of rules of order, may be suspended or expelled. N.J.S.A. 18A:37-1, 37-2. M.K. argues, however, that it is common sense that the punishment must fit the crime. In this regard, the general test for a long-term suspension is that classroom attendance by the student constitutes the danger to herself or others. It is to be emphasized that she has safely studied in a classroom environment for 12 years and needs the next few months to have any realistic chance to enter college in the fall.

M.K. cites several suspension cases in support of her argument. In Cobb v. Ocean Tp. Bd. of Ed., OAL DKT. EDU 2262-79 (Jan. 29, 1980), adopted, Comm'r of Ed. (Mar. 17, 1980), rev'd, St. Bd. (Nov. 5, 1980), the Commissioner reversed an expulsion and permitted a one-year suspension for the sale of marijuana to others. But, as noted in the citation, the State Board reversed the Commissioner's decision.

In W.N.Y. v. Neptune Tp. Bd. of Ed., OAL DKT. EDU 7277-82 (Dec. 16, 1982), adopted, Comm'r of Ed. (Jan. 31, 1983), a student who referred to a substitute teacher in strong language was suspended for two days. The administrative law judge characterized the suspension as not overly severe and not violative of the pupil's due process rights.

In Capri v. Burlington City Bd. of Ed., 1972 S.L.D. 67, a four-month suspension was upheld where a pupil struck a disciplinarian in the eye causing a wound which required eight stiches. The altercation was described as a "brawling" fight. In S.T. v. Neptune Tp. Bd. of Ed., 1972 S.L.D. 555, a six-month suspension was imposed for attacking and severely beating a fellow pupil. This suspension was remanded by the Commissioner for review by the CST. In his decision, the Commissioner quoted from Blackstone to the effect that offenses against one's fellow man are best presented ". . . by the certainty rather than the severity of punishment" (Id. at 559).

In O.P. v. Paterson Bd. of Ed., 1976 S.L.D. 658, the Commissioner reiterated that a pupil's prior record and nearness to graduation are factors to be considered in assessing punishment. At 660 the Commissioner stated:

> While a board of education need not have standards of punishment as hereinbefore stated, permanent expulsion of petitioner from school attendance for this one infraction [possession of marijuana], albeit serious, is in the Commissioner's judgment too harsh a penalty. Petitioner is in his twelfth year, approaching graduation, and the Board has produced nothing of merit in his prior school attendance which justified such permanent expulsion. Therefore, the Commissioner will uphold petitioner's suspension for the remainder of the 1975-76 academic year but the Board is directed to enroll petitioner in its schools as a twelfth grade pupil as of September 1976.

In B.C. v. Burlington Tp. Bd. of Ed., OAL DKT. EDU 456-82 (Apr. 12, 1982), adopted, Comm'r of Ed. (May 12, 1982), a pupil was given a ten-day suspension for possession of marijuana. The Board later voted to expel the pupil for the offense. The

administrative law judge characterized the ten-day suspension as severe in itself. He thereupon set aside the Board's vote to expel. The Commissioner upheld, noting the requirement of a CST evaluation prior to expulsion.

In A.K. v. Englewood Bd. of Ed., OAL DKTS. EDU 2562-82 and 1941-82 (Apr. 29, 1983), mod., Comm'r of Ed. (Jun. 16, 1983), the pupil was expelled after he became involved in a fight on school property with another student while he was already under suspension. The disciplinary record of G.K. (the pupil) revealed that he had been previously suspended on five occasions, that he had failed two courses in each of the freshman, sophomore and junior years and that his absentee record shows 24 absences while in tenth grade and from 9 to 25 absences in the eleventh grade. He also had had a previous altercation with one of the school administrators and he was classified by the CST as emotionally disturbed. The officials who heard this case felt that they ultimately had no alternative but expulsion because of G.K.'s pattern of refusing to comply and his perceived danger to the physical safety of other students. The administrative law judge concluded that the suspension and expulsion were invalid as a result of delays in the hearing process. The Commissioner set aside that portion of the decision that found the Board's suspension of G.K. to be invalid. The Board acted properly because the delays were caused by G.K. The Commissioner, however, affirmed the finding that the expulsion was invalid because the Board had failed to refer G.K. to the CST.

The petitioner here argues that the disciplinary record in the previously cited case stands in marked contrast to the case of G.K. The Commissioner has stated in more than one case that, "termination of the pupil's right to attend public school is a drastic and desperate remedy which should be employed only when no other course is possible." Scher v. West Orange Bd. of Ed., 1968 S.L.D. 92, 96. In the same decision, the Commissioner urged boards of education to recognize expulsion as a negative and defeatist kind of last ditch expedient to be employed only after and based upon competent professional evaluation and recommendation.

II

The Board argues that the petitioner concedes the requirements of due process were satisfied and that the sole issue in this case is the severity of the punishment. In order to grant the relief sought by the petitioner, this tribunal must be satisfied that the petitioner has met its burden of proof by a preponderance of the evidence that the action

of the Board was arbitrary and capricious. The standard related to this has been described in Bayshore Sewerage Co. v. Dept. of Environmental Protection, 122 N.J. Super. 1984 (Ch. Div. 1973), at 199:

> Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.

This holding was quoted verbatim by the New Jersey Supreme Court in Worthington v. Fauver, 88 N.J. 183 (1982) at 204.

In Thomas v. Morris Tp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965) at 332, it was stated:

> When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial credible evidence.

Similarly, in the case of I.F.A. Ins. Co. v. Dept. of Insurance, 195 N.J. Super. 200 (App. Div. 1984), at 208, it was stated:

> If there is any fair argument in support of the agency's action or any reasonable grounds for difference of opinion among intelligent and conscientious officials, the decision is conclusively legislative, and will not be disturbed unless patently corrupt, arbitrary or illegal.

The point of these cases is that it is not the province of the court of review to determine whether it disagrees or agrees with the decision or whether it would have decided the matter differently had it been a member of the Board, or whether the decision is right or wrong. It is the obligation of the reviewing body to determine whether the six board members acted arbitrarily and capriciously in their action, which would imply further that the recommendation of the pricipal or vice-principal was arbitrary and capricious. Arbitrariness connotes conduct or acts based on will alone and not upon any course of reasoning or exercise of judgment. Capriciousness connotes whim.

Therefore, a judgment in favor of the petitioner would be equal to a finding that the decision of the Board, and the recommendation of the principal and vice-principal, were based on whim and without the use of reasoning and judgment. It is submitted, therefore, that the question is not whether the punishment was severe but whether the action of the Board was arbitrary and capricious.

In order to meet its burden of proof, the petitioner introduced the testimony of the principal and vice-principal as to the basis of the recommendation. Their testimony clearly signifies that their actions were based upon a careful determination of the facts and the application of reasoning and judgment to the factual situation. The items of mitigation set forth in the petitioner's arguments were all duly presented to the principal and vice-principal as well as to the Board, so that there is no doubt that these things were considered at the time the Board made its determination. In addition to the items of mitigation, however, there are values and principles that the Board also must take into consideration.

In the case of R.R. v. Shore Reg. H.S. Bd. of Ed., 109 N.J. Super. 337 (Ch. Div. 1970), at 343, the court stated:

> There can be no doubt that the establishment of an educational program requires rules and regulations necessary for the maintenance of an orderly instructional program and the creation of an educational environment conducive to learning. Such rules and regulations are equally necessary for the protection of public school students, faculty and property. The power of public school officials to expel or suspend a student is a necessary corollary for the enforcement of such rules and the maintenance of a safe and orderly educational environment conducive to learing.

Similarly, in State v. Conk, 180 N.J. Super. 149 (App. Div. 1981), at 145 the court stated:

> Conduct which constitutes good cause for punishment, suspension or expulsion of a pupil includes, among other things, continued and willful disobedience, open defiance of the authority of any teacher or person in authority and physical assault upon another pupil.

At the plenary hearing in this matter held on March 15, 1985, the principal of 18 years and the vice-principal of 15 years testified that they had had only one other incident as serious as this one in which they had assessed a similar penalty of suspension for the balance of the year. They testified that they had considered the fact that M.K. had been warned previously regarding other incidents and regarding the possibility of severe punishment, that the incident was premeditated, that there was injury to the victim and that M.K. has shown no remorse. The Board notes that M.K. has never stated that she was sorry nor remorseful about the incident and even at the plenary hearing only stated that the matter should have been handled differently.

The testimony revealed that the investigation by building administrators was swift, thorough and fair. All procedural safeguards were followed, and inasmuch as M.K. immediately retained counsel, all of her rights were protected. There is no evidence to indicate that the administrators or the Board acted arbitrarily or capriciously.

N.J.A.C. 6:28-1.5(e) reads as follows:

> A pupil shall be referred to the basic child study team to determine if the pupil is eligible for the services described in these regulations as a prerequisite to any board of education action on expulsion from the public schools.

The record of the plenary hearing reveals that the school administrators attempted to comply with this law. However, the parents of M.K. refused to permit the CST examination. In fact, M.K.'s father stated that he did not feel that the CST examination would be "worthwhile" and that his daughter "should not be subjected to it."

It is submitted that M.K.'s parents retained counsel at this point and voluntarily refused to have their daughter meet with the CST. They should not now be heard to use this deliberate refusal as a defense to the action of suspension.

In Scher, above, it was also stated as follows:

> Moreover, respondent offered to reserve final decision pending an appropriate mental health evaluation of petitioner, which petitioner rejected. Under these circumstances, the Commissioner holds that respondent has fulfilled the procedural requirements prior to an expulsion action demanded by due process. (at 96).

III

In the present case, the defense regarding a failure to have a CST evaluation must be rejected. Even without the rejection, in the case of S.T., above, the Commissioner remanded the matter to the Board for the purpose of considering the CST report which had been prepared subsequent to the Board's action in that case. And in the case of A.K., above, the question was set forth as, "May respondent Board expel a student prior to a CST evaluation if there is probable cause to believe that the child is handicapped and this has been brought to the Board's attention?"

The implication is that such a rigid procedural requirement is only necessary if there is a probable cause to believe that the child is handicapped. Such is not the situation in the present case. I have heard the testimony in this matter and have observed the witnesses as they testified. I have read the transcript of the hearing before the Board on February 11, 1985, and have read and carefully considered the submissions of counsel. For the reasons set forth below, I **DETERMINE** that the Hillsborough Township Board of Education has not acted arbitrarily, capriciously or without basis in the case of M.K.

The right to a free public school education for all New Jersey children between the ages of five and eighteen is, indeed, guaranteed by the New Jersey Constitution. The statutes provide that the public schools are to be free to any person over five and under twenty years of age who is domiciled within the school district. N.J.S.A. 18A:38-1. State law also fixes the ages between which education shall be compulsory. N.J.S.A. 18A:38-25.

The right to education is not without bounds. Pupils must submit to the authority of their teachers, they must pursue their prescribed courses of study, and they must obey those rules that have been established by law for the governments of their schools. N.J.S.A. 18A:37-1. Pupils who do not obey the reasonable rules of the school system or who otherwise act so as to disrupt the school system are subject to punishment. The punishment may constitute suspension or expulsion. N.J.S.A. 18A:37-2.

Physical assault on another pupil may constitute good cause for suspension or expulsion of a pupil from school. N.J.S.A. 18A:37-2.

Suspension and expulsion are often used interchangeably, but there is a difference in their meanings. Suspension refers to the temporary denial of a pupil's right to attend school. A suspension is normally imposed by the school principal and is usually of short duration. Expulsion, on the other hand, refers to the permanent denial of the pupil's right to attend school and may be imposed only by the board of education. The principal may suspend any pupil from school for good cause but the suspension must be reported immediately to the superintendent, who in turn must report the suspension to the board of education at its next regular meeting. N.J.S.A. 18A:37-4. The suspended pupil may be reinstated by the principal or superintendent prior to the second regular meeting of the board after suspension unless the board has reinstated the pupil at its first regular meeting after the suspension. Ibid. No suspension may be continued beyond the second regular meeting of the board after such suspension unless the board continues it. N.J.S.A. 18A:37-5. A student may appeal a suspension or expulsion decision of the board of education to the Commissioner of Education. N.J.S.A. 18A:6-9.

A board's statutory authority to suspend or expel a student is also affected by Federal law. The well established set of constitutional principles governing the due process rights of students was articulated in several court decisions in the 1960's and 1970's. In Dixon v. Alabama State Bd. of Ed., 294 F. 2d 150 (5th Cir. 1961), cert. den. 368 U.S. 930 (1961), the court recognized that the requirements of procedural due process under the Fourteenth Amendment of the United States Constitution are applicable to the long-term suspension or expulsion of pupils from public education institutions.

Dixon involved the expulsion of students from a State college without providing the students any of the procedural safeguards required by due process. The guidelines stated by the court in Dixon are relevant to this day. Dixon stands for the proposition that pupils or students must be provided notice containing a statement of the specific charges and grounds which, if proper, would justify expulsion under the regulations of the board of education. The nature of the hearing should vary depending on the circumstances of the particular case. A charge of misconduct, as opposed to a failure to meet the scholastic standards of the institution, depends upon a collection of facts concerning the charge of misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing that gives the board or the administrative authorities of the institution an opportunity to hear both sides in considerable detail is best suited to provide the rights of all involved. Thus, a trial-type proceeding is envisioned.

The Dixon court, however, specifically stated that this was not to imply that a "full-dressed judicial hearing" with a right to cross-examine witnesses is required. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the institution.

These guidelines were quoted as setting forth the minimum requirements for a suspension hearing in R.R., above. That case involved a high school pupil who was given neither a preliminary hearing nor a full hearing before he was suspended from school. The court held that the New Jersey statutes relating to suspension and expulsion must be construed so as "to afford students facing disciplinary action involving the possible imposition of serious sanctions, such as suspension or expulsion, the procedural due process guaranteed by the fourteenth amendment." R.R., above, at 347.

The court went on to say that when school authorities have reasonable cause to believe that a pupil presents a danger to himself, to others or to school property, they may temporarily suspend the pupil for a short period of time pending a full hearing which will afford the pupil procedural due process.

A 1971 case which was decided by the State's highest court held that in a suspension or expulsion hearing before the board of education, the accused pupil always has the right to demand that his accusers appear in person to answer questions. This right of confrontation exists even if the penalty to be imposed is less than expulsion or a severe term of suspension. Tibbs v. Franklin Tp. Bd. of Ed., 114 N.J. Super. 287 (App. Div. 1971), aff'd, 59 N.J. 506 (1971).

In addition to the safeguards mandated by constitutional considerations and case law, one additional prerequisite must be met before a pupil who is not already classified as educationally handicapped may be expelled or subject to a long-term suspension: the pupil must be evaluated by the district's CST in order to determine if he is eligible for the services described in the State Boards' special education regulations. N.J.A.C. 6:28-1.5e. Furthermore, the Commissioner frequently finds that the board must provide a pupil with home instruction during the time he or she is prohibited from attending classes. J.W. v. Hammonton Bd. of Ed., 1975 S.L.D. 776.

The testimony of the principal and vice-principal in this matter was convincing. Their testimony, coupled with a review of the hearing before the Hillsborough Township Board of Education on February 11, 1985, leads me to **FIND:**

1. The requirements of due process in this matter were satisfied.

2. The Board did attempt to comply with N.J.A.C. 6:28-1.5(e) as to CST evaluation prior to expulsion or long-term suspension.

3. M.K.'s parents refused CST evaluation.

4. The conduct that was the basis for suspension constitutes good cause for suspension.

5. The incident that was the basis for this action was premeditated.

6. School administrators and the Board considered all factors before deciding to impose a long-term suspension.

7. A CST evaluation conducted in March 1985 showed M.K. to possess good intelligence and to be not classifiable as educationally handicapped.

The marijuana and drug cases cited by M.K. are inapposite to the present matter. Those cases dealing with altercations involving pupils tend to support the Board's position. As the court stated in R.R., above, the power of public school officials to expel or suspend a student is a necessary corollary for the enforcement of rules and regulations necessary to the maintenance of an orderly instructional program. Obviously, Federal and New Jersey case law have established clear direction for boards of education in such matters with concomitant safeguards for pupils affected or potentially affected.

It is axiomatic that an effective school is an orderly one. Viewing the foregoing in the light most favorable to M.K., I **CONCLUDE** that the Hillsborough High School administration and the Hillsborough Board of Education have acted reasonably, properly and in accordance with law in this matter. It cannot be denied that M.K. had been warned previously regarding other related incidents and the possibility of a severe punishment should any further incident ensue.

Accordingly, the action of the Hillsborough Township Board of Education imposing a suspension until the end of the school year upon M.K. is **AFFIRMED.** The Board may, in its discretion, return M.K. to home instruction. However, having observed M.K.'s comportment in the high school since her reinstatement under the temporary order of March 8, 1985, the Board, in its discretion, may exercise its broad powers and allow M.K. to continue in attendance until the end of the academic year conditioned upon her continued good behavior. In all other respects, the petition of appeal is **DISMISSED.** It is so **ORDERED.**

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

24 APRIL 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

APR 25 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 29 1985
DATE

Ronald J. Parker/pa
OFFICE OF ADMINISTRATIVE LAW

ks

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A.K. AND S.K., as parents and guardians of M.K.	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners' exceptions were received within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioners argue that the focal issue in this case centers strictly on the severity of the punishment meted out to M.K. They contend that the suspension is tantamount to an expulsion since M.K. is a senior and avow that such punishment is so totally unwarranted and is so excessive that it constitutes an arbitrary, capricious or unreasonable exercise of the Board's power to discipline under N.J.S.A. 18A:37-1 and 2.

Petitioners believe that the judge missed the point when interpreting Thomas, supra, and I.F.A. Ins. Co., supra, contending that his reasoning would preclude any case such as M.K.'s from succeeding before the court. In addition, they avow that one must question the purpose to be served by the suspension in this case. They assert that the only purpose of the judge's affirmance of the Board's action is retribution which clearly has no place in our educational system. They cite S.T. v. Bd. of Ed. of Neptune, 1972 S.L.D. 555, 559 as support, a case wherein the Commissioner alluded to the Blackstone premise that the certainty of punishment rather than the severity serves as a deterrent.

Petitioners contend that M.K. has not posed a "danger to herself or others" in the past nor during the two months which have passed since her re-admission to school on March 11, 1985. They believe she has been punished enough and that her removal now would be cruel and distressing.

The Commissioner, upon careful consideration of the record and all the arguments expressed in the exceptions, concurs with the determination reached by the Office of Administrative Law affirming the Board's action in suspending M.K. for the remainder of the 1984-85 school year. The Commissioner can find nothing in the

record to conclude that the judge erred in applying the appropriate standard of review in this matter. Petitioners have failed to bear their burden of proof that the Board's action was arbitrary, capricious, unreasonable or unduly harsh. As is found in Thomas, supra, Kopera v. Bd. of Ed. of West Orange, 60 N.J. Super. 288 (App. Div. 1960) dictates that the Commissioner is not to substitute his judgment for that of the Board unless the action is determined to be arbitrary, capricious, or unreasonable.

The Commissioner is unpersuaded that the Board's action constituted an expulsion. M.K. had been provided home instruction as an alternative educational program during her suspension prior to the order for her reinstatement conditioned upon her good behavior. Long-term suspension with home instruction does not constitute expulsion in this matter. There has been no showing that M.K.'s procedural due process rights were violated with respect to that long-term suspension. The Commissioner finds no basis in the record to reverse the judge's determination that the suspension was an improper exercise of the Board's authority or that the suspension is harsh or cruel given the factual circumstances of this matter.

Accordingly, the recommendation of the Office of Administrative Law affirming the Board's action is adopted as the final decision in this matter for the reasons stated in the initial decision. The Commissioner is constrained to emphasize that the Board is in no way obligated to reinstitute its suspension until the end of the academic year. However, if it chooses not to allow her continued attendance, home instruction is to be provided for the duration of the suspension.

The Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

MAY 24, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4214-84
AGENCY DKT. NO. 177-5/84

IRENE BARTZ,
Petitioner,
v.
GREEN BROOK TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Richard Friedman, Esq., for petitioner (Ruhlman, Butrym & Friedman, attorneys)

Kenneth S. Meyers, Esq., for respondent (Nichols, Thomson, Peek & Meyers, attorneys)

Ezra D. Rosenberg, Esq., for intervenors Vivian E. Werner, Marilyn M. Burke, Brian Reardon and Gary Taylor (Katzenbach, Gildea & Rudner, attorneys)

Record Closed: March 7, 1985 Decided: April 8, 1985

BEFORE DANIEL B. MC KEOWN, ALJ:

Irene Bartz (petitioner), a teaching staff member employed by the Green Brook Township Board of Education (Board) since the 1971-72 academic year, alleges the Board violated her tenure protection at N.J.S.A. 18A:28-5 et seq., and her seniority entitlement when, following a reduction in force effective for the 1984-85 academic year, the Board assigned her less than full-time employment while retaining other teachers on a

full-time basis but who have a lesser seniority claim than she.[1] The Board denies the allegations and asserts that its controverted action with respect to petitioner's less than full-time employment for 1984-85 is in all respects proper and lawful. After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted at which petitioner and the Board agreed to stipulate the relevant material facts and cross-move for summary decision on the merits. When intervenors joined as active participants in the matter, they agreed that the matter may be adjudicated by way of cross-motions for summary decision. The record closed March 7, 1985 upon the filing of relevant curriculum guides by the Board.

I

Petitioner had been employed as a full-time teaching staff member by the Board since academic year 1971-72 through the conclusion of academic year 1983-84. Effective for the 1984-85 year, the Board abolished its high school Cooperative Industrial Education program within which petitioner was primarily assigned throughout her employment with it. As a result, petitioner's full-time employment was reduced to part-time employment and her 1984-85 assignment is to teach three classes of home economics. Petitioner's salary and benefits are now 3/7ths of what she would have received had her employment been continued full-time.[2] Petitioner contends that the Board violated her tenure protection at N.J.S.A. 18A:28-5 and her seniority entitlements at N.J.S.A. 18A:28-10 et seq., under seniority standards promulgated by the Commissioner with the approval of the State Board of Education at N.J.A.C. 6:3-1.10, as amended, by reducing her employment to part-time while continuing the full-time employment of other persons with lesser seniority than she.

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[1]Though petitioner initially claimed that the seniority regulations at N.J.A.C. 6:3-1.10 apply as they existed prior to September 1, 1983, the effective date of their amendment, 15 N.J.R. 464, she has since withdrawn such claims as well as having withdrawn related claims of constitutional deprivations. Petitioner concedes that the seniority regulations, as amended, apply.

[2]No party disputes the Board's representation that a full-time teacher in its employ is assigned seven periods each day. Thus, for purposes of the Board's arguments, a full-time teacher is considered one who is assigned seven periods per day each day school is in, or intended to be in, session.

Specifically, petitioner claims a seniority entitlement to the full-time position of "Business Course Study" presently held by intervenor Werner; petitioner claims a seniority entitlement to the full-time position of home economics teacher presently held by intervenor Burke; and, petitioner claims a seniority and tenure right entitlement to the full-time position of family living teacher over intervenor Reardon who has not yet acquired tenure in the Board's employ. Moreover, petitioner claims a seniority entitlement to unspecified "business courses" which may be held by persons with lesser seniority than she.[3]

II

In order to resolve petitioner's claims of tenure and seniority violations, it is necessary to compare petitioner's employment with the Board and accompanying assignments through 1983-84, together with the certificates and endorsements she possessed with the employment history, assignments, and certificates and endorsements of intervenors. According to a stipulation of fact duly executed and filed by the parties, employment dates, assignments, certificates and endorsements held, for petitioner Bartz, intervenors Burke, Reardon and Werner are as follows:

PETITIONER BARTZ

Certificates (endorsements)[4] possessed and date issued:

1. Teacher of Distributive Occupations, issued May 1972
   (A specific field endorsement to an Instructional Certificate, N.J.A.C. 6:11-8.4(b)(5))

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[3]Petitioner withdrew a seniority claim to a full-time position of teacher of art. Thus, no argument is made against or on behalf of the full-time position ostensibly held by Intervenor Gary ~~Gayler~~. Taylor

[4]Three kinds of regular certificates are issued by the State Board of Examiners under rules and regulations prescribed by the State Board of Education. N.J.S.A. 18A:6-38. The regular certificates are: instructional, N.J.A.C. 6:11-6.1 et seq.; administrative and supervisory, N.J.A.C. 6:11-9.1 et seq.; and, educational services, N.J.A.C. 6:11-11.1. See, Howley v. Ewing Board of Education, 6 N.J.A.R. 509 (1982). All other asserted "certificates" are endorsements on one of the three certificates.

2. Coordinator, Cooperative Industrial Education, issued May 1972
(An endorsement to an Educational Services Certificate, N.J.A.C. 6:11-12.3)

3. Teacher of Home Economics, issued May 1972
(A comprehensive field endorsement to an Instructional Certificate, N.J.A.C. 6:11-8.4(c)(7))

EMPLOYMENT DATES AND ASSIGNMENTS

Year	Courses Assigned and Taught
1971-72	Cooperative Industrial Education,[5] and 2 business classes (sales)[5A]
1972-73	Cooperative Industrial Education only
1973-74	Cooperative Industrial Education only
1974-75	Cooperative Industrial Education only
1975-76	Cooperative Industrial Education only
1976-77	Cooperative Industrial Education, and 1 business class (Distributive Education)[6]
1977-78	Cooperative Industrial Education, and 1 home economics class
1978-79	Cooperative Industrial Education, and 1 home economics class
1979-80	Cooperative Industrial Education, and 1 home economics class
1980-81	Cooperative Industrial Education, and 1 home economics class
1981-82	Cooperative Industrial Education, and 1 home economics class
1982-83	Cooperative Industrial Education, and 2 vocations classes, 1 home economics class
1983-84	Cooperative Industrial Education, 2 1/2 home economics classes

[5]Neither the Board nor intervenors complain of petitioner's lack of physical possession of appropriate certification for either of these assignments between September 1971 through May 1972 when the actual documents were issued her by the Department of Education. It is, accordingly, inferred petitioner was eligible for such certificate/endorsement at the time of first employment. See Kane v. Hoboken Bd. of Ed., 1975 S.L.D. 12, 17.

[5A]The Board acknowledges that the courses of sales, [Business] law, and advertising were part of its distributive education program during 1971-72 and, by inference, remained there until September 1977. (Board's explanatory curricula letter, March 6, 1985.)

[6]No further explication of the nature of the business class (Distributive Education) exists in this record.

Petitioner claims 13 years seniority as a teacher of cooperative industrial education although it is agreed the Board presently offers no such courses; 13 years seniority as a teacher of business by virtue of (1) her assignment to teach two business classes of sales in 1971-72 under the distributive education endorsement and/or (2) by virtue of authorization to teach business courses under her cooperative industrial education certificate; seven years seniority as a teacher of home economics by virtue of her assignments since 1977-78 to teach home economics, albiet one such class each year, under her home economics endorsement; and, finally, petitioner claims at least seven years seniority to teach family living by virtue of the fact she is authorized by N.J.A.C. 6:29-7.1(e) to teach that course. Alternatively, petitioner says that as a tenured teacher in the Board's employ she has an enforceable preference to the full-time position of family life teacher as against the nontenured intervenor Reardon under the rationale of Lichtman v. Village of Ridgewood Bd. of Ed., 93 N.J. 362 (1983).

INTERVENOR BURKE

Certificates (endorsements) possessed and date issued:

1. Teacher of Home Economics, issued May 1977
   (A comprehensive field endorsement to the Instructional Certificate, N.J.A.C. 6:11-8.4(c)(7))

EMPLOYMENT DATES AND ASSIGNMENTS

Year	Courses Assigned and Taught
1978-79 through 1983-84, inclusive	Home Economics

Though not stipulated as fact, it is obvious intervenor Werner has taught home economics in the Board's employ for six years, acquired tenure as a teaching staff member in the Board's employ and, accordingly, has six years seniority.

INTERVENOR REARDON

Certificates (endorsements) possessed and date issued:

1. Teacher of Health and Physical Education, issued August 1975;
(A comprehensive field endorsement to the Instructional Certificate, N.J.A.C. 6:11-8.4(c)(b))

2. Teacher of Driver Education, issued August 1979;
(A specific field endorsement to the Instructional Certificate, N.J.A.C. 6:11-8.4(b)(6))

3. Teacher of Social Studies, issued March 1982.
(A comprehensive field endorsement to the Instructional Certificate, N.J.A.C. 6:11-8.4(c)(13))

EMPLOYMENT DATES AND ASSIGNMENTS

Year	Courses Assigned and Taught
1982-83	Family Life
1983-84	Family Life

Intervenor Reardon has been employed by the Board as a teaching staff member for two years which is an insufficient period of time to have acquired tenure and, consequently, intervenor Reardon has no statutory claim to seniority.[7]

INTERVENOR WERNER

Certificates (endorsements) possessed and date issued:

1. Teacher of Typewriting, issued June 1970;
(A specific field endorsement to the Instructional Certificate, N.J.A.C. 6:11-8.4(b)(23))

2. Teacher of General Business Studies, issued June 1970;
(A comprehensive field endorsement to the Instructional Certificate, N.J.A.C. 6:11-8.4(c)(3))

[7] N.J.S.A. 18A:28-9 et seq. and see Howley v. Ewing Board of Education, supra. And, see Footnote 13, infra.

3. Teacher of Bookkeeping and Accounting, issued June 1970; and
(A specific field endorsement to the Instructional Certificate, N.J.A.C. 6:11-8.4(b)(3))

4. Teacher of Secretarial Studies, issued March 1975.
(A specific field endorsement to the Instructional Certificate, N.J.A.C. 6:11-8.4(b)(18))

EMPLOYMENT DATES AND ASSIGNMENTS

Year	Courses Assigned and Taught
1974-75 through 1983-84	Sales, Marketing, Retailing, Advertising and Management, each of which, the parties agree, is a course incorporated in the Board's Business Course of study.

Though not stipulated as fact, the facts demonstrate intervenor Werner has been employed by the Board for ten years and, consequently, she has ten years seniority as a teacher of business.

The curriculum guides (Exhibit A through Exhibit G) filed by the Board on March 6, 1985 are represented by it to be "* * * the curriculum for the various courses of study either taught by the petitioner Bartz or alleged by the petitioner to be areas in which she is presently qualified to teach" (Board's explanatory curricula letter, March 6, 1985). Exhibit A represents the existing family life education program as is required by State Board rule, N.J.A.C. 6:29-7.1; Exhibit B is represented to be the curriculum for a family living mini-course which is further represented to be a 20 week predecessor to two courses (interpersonal relations and child care) which were offered in ten week intervals within the home economics department,[8] although interpersonal relations has not been offered for the past five years and while child care presently is offered no specific curriculum guide exists for that mini-course; Exhibit C is the present curriculum for the mini-course of business law, while Exhibit D is the present curriculum for the mini-course

[8]There is no suggestion in this record that petitioner was ever assigned to teach either interpersonal relations or child care within the home economics department.

of business sales; Exhibit E is represented to be the home economics curriculum; Exhibit F is the cooperative education program curriculum guide for the eleventh grade while Exhibit G is represented to be the curriculum guide for the cooperative educational program for the twelfth grade.

The existing family living program is introduced in grade seven as part of the "health" program and continues through grade twelve in the same program. This detailed curriculum guide was presumably formulated to comply with the State Board of Education's definition of family life education program at N.J.A.C. 6:29-7.1(a). The program is sequential in its approach, N.J.A.C. 6:29-7.1(c), as distinguished from an "interdisciplinary approach." N.J.A.C. 6:29-7.1(d).

The family living mini-course, Exhibit B, is not material to the dispute here and, consequently, shall not be addressed. Exhibit C, the business law mini-course, is also not relevant to the instant dispute and, consequently, shall not be further discussed. Exhibit D, the business mini-sales course is presumed here to be the same business sales course as taught by petitioner during 1971-72. A comparison of this curriculum with the curriculum for cooperative industrial education as set forth in Exhibits F and G, show a marked similarity. That is, the cooperative industrial education program, as set forth in Exhibits F and G, was designed to provide career development opportunities for high school students 16 years of age or older. The broad objectives for the course were to broaden the vocational curriculum offered to students; reduce the drop out rate; allow training in an unlimited variety of occupations by having students spend one-half day at school and one-half day in organized employment in a chosen trade or occupation. The mini business course of sales was intended to afford students assistance in considering the possiblity of a career in sales; the development of personal skills necessary to influence the decision of another; to allow students to appreciate the art of sales and the marketing of goods and services; and, to acquire knowledge of the general principles of selling to be applied in other distributive education courses, such as retailing, advertising, sales promotion, sales management, and marketing research.

Exhibit E, the home economics curriculum guide, states the objectives of home economics in the following manner:

> This is a course in homemaking offered to the high school girl who wishes to further her knowledge of sewing techniques, pattern and fabric selection, nutrition and food preparation.

The parties also stipulate that neither Distributive Occupation courses nor Cooperative Industrial Education courses were offered by the Board for 1984-85. Finally, the parties stipulate that each teacher in this case signed Board adopted general "Job Descriptions" during September 1979, for the position of teacher they then each held. The only significance of such descriptions to this case is that in each instance, the qualifications stated by the Board for each teaching position held are "As set by state certification authorities." There is no evidence that the Board subsequently modified such stated qualifications for any of the teaching positions here involved.

III

ARGUMENTS OF THE PARTIES

Petitioner contends that by virtue of her employment with the Board since 1971-72 as a teacher of cooperative industrial education, under the educational service certificate Coordinator-Cooperative Industrial Education and, she says that equally as important, by virtue of her assignments in 1971-72 and again in 1976-77[9] to teach business courses under the instructional certificate endorsement of distributive education teacher, she has accrued the greater seniority of 13 years to be a business teacher than the seniority of ten years enjoyed by intervenor Werner. This is so, petitioner argues, because seniority attaches to all subjects a person is authorized to teach by either an instructional certificate endorsement or by an educational services certificate held so long as the Board assigns, or has assigned, the person duties within the scope of the certificate or endorsement. Petitioner contends the distributive education endorsement she possesses authorizes her not only to have taught the two business courses in sales she did teach in 1971-72, but it authorizes her to teach all business courses presently assigned intervenor Werner.[10] And, petitioner says, because she is authorized to teach business courses under

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[9]The 1976-77 business course assignment is immaterial to petitioner's basic claim to seniority as a business teacher in light of her assignment to teach a business course of sales under her distributive education endorsement in 1971-72. This is so for petitioner contends that once a teacher is assigned to teach under a particular endorsement, seniority continues to accrue under that endorsement regardless of whether the teacher continues in such assignment so long as the teacher remains in the Board's employ as a teaching staff member.

[10]Petitioner collectively refers in her brief to the courses of sales, marketing, retailing, and management presently assigned intervenor Werner as "management" (Pb. 21). However, there is no evidence in the record, either by way of exhibits or by stipulation, that the Board offers the courses under the collective designation of management or that the Board incorporates such courses in any curriculum under such designation.

the distributive education teacher endorsement and because she did, in fact, teach under that endorsement in 1971-72, N.J.A.C. 6:3-1.10(f) and (l)(15), as viewed by the Commissioner in Furst v. Rockaway Tp. Bd. of Ed., 1983 S.L.D. — (May 18, 1984), aff'd St. Bd. (Oct. 29, 1984) allows her to tack on all subsequent service in the Board's employ, whatever the assignment, to that endorsement. Hence, petitioner says she has acquired 13 years seniority as a business teacher by virtue of her assignment in 1971-72 to teach the business course of sales.

Moreover, petitioner says that even if she did not acquire greater seniority than intervenor Werner by virtue of her 1971-72 assignment and simultaneous possession of the distributive education endorsement, her educational services certificate as coordinator-cooperative industrial education, under which she served the Board as cooperative industrial education teacher for 13 years and under which she says she is authorized to teach business courses, creates a superior seniority claim of 13 years to now teach business courses as against the lesser seniority claim of intervenor Werner. In support of this latter argument, petitioner cites the unreported decision of Schmidt v. Bd. of Ed. of Weehawken, (N.J. App. Div. June 4, 1984, A-4842-82T5) (unreported), wherein the Appellate Division, in a per curiam decision which reversed the decision of the State Board of Education and the ruling of the Commissioner, held that one who was certified as a reading specialist, an educational services certificate[11] is eligible to teach reading notwithstanding N.J.A.C. 6:11-6.3(a)(1)(ix) which requires an endorsement to the instructional certificate to teach reading which Schmidt had not possessed at the time his seniority claim arose. Petitioner also relies upon what appears to be a purported "manual" of teacher certification rules and regulations entitled New Jersey Regulations and Standards for Certification (Pb. 20, 21). Whatever this document may be and whatever legal effect its contents are purported to have, it is not part of this record and, accordingly, shall not be considered here.

Petitioner next contends she is entitled to seven years seniority as a teacher of home economics, as against six years for intervenor Burke, through the application of N.J.A.C. 6:3-1.10(f) in light of her assignment since 1977-78 to teach one home economics class under her endorsement as a teacher of home economics.[11A] Petitioner also relies in

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[11] See N.J.A.C. 6:11-12.20.

[11A] Petitioner's seniority claim here is that because she taught at least one course each year in home economics since 1977-78, that one course each year entitles her to one full year seniority as a home economics teacher in light of the fact she was otherwise employed on a full-time basis. This approach, of course, differs from her approach in her claim to full-time business teacher.

this regard upon the decision of the Commissioner in In the Matter of Seniority Rights of Certain Teaching Staff Members employed by the Old Bridge and Edison Township Board of Education, Middlesex County, 1984 S.L.D. ____ (Aug. 6, 1984).

Finally, petitioner contends that because she acquired tenure in the Board's employ, and in light of her home economics endorsement which authorizes her to teach family life, she has a superior seniority claim to the full-time position of teacher of family life presently held by intervenor Reardon. Petitioner contends that because intervenor Reardon has not acquired a tenure status in the Board's employ he has no cognizable claim by way of seniority to continue as a full-time teacher in the circumstance by which she, as a tenured teacher, was subject to a reduction in force. Petitioner contends her tenure status was acquired in the position of teacher and that that protection is as broad as the courses she is authorized to teach by virtue of the certificates/endorsements she possesses.

Intervenor Werner contends that petitioner does not possess an appropriate certificate to teach the business courses she, Werner, is presently assigned and, consequently, petitioner does not have a greater seniority claim to the full-time position as business teacher. Intervenor Werner sees petitioner's educational services certificate as Coordinator-Cooperative Industrial Education and the endorsement of distributive education as authorizations to teach a skill, trade, or an industrial or service occupation in the limited area of vocational education. Werner says that because the business courses she presently teaches have been integrated by the Board into its general business curricula, petitioner's lack of an appropriate business education endorsement renders her ineligible to teach the presently controverted courses and, hence, intervenor Werner says petitioner's seniority claim is thereby defeated.

But even if petitioner is authorized to teach the controverted business courses under a distributive education endorsement or under the educational services certificate of coordinator-cooperative industrial education, Werner says she still has not acquired a superior seniority claim to the controverted courses for the following reasons. One, because petitioner did not serve a sufficient period of time under the distributive education endorsement she did not acquire tenure under that endorsement (IRb, at p. 6). Hence, Werner says petitioner cannot acquire seniority under that endorsement upon the principle that seniority follows tenure and cites King v. Keansburg Bd. of Ed., 1984 S.L.D. — (May 21, 1984). Intervenor Werner says that that case stands for the principle that

petitioner's "tacking on" of seniority calculations is prohibited. Next, intervenor Werner says seniority attaches only to categories of employment as are set forth at N.J.A.C. 6:3-1.10(l) and because petitioner did not "move from" or "revert" to a category in the sense of a complete move to a different category of employment or a complete reversion to one category from another category, N.J.A.C. 6:3-1.10(h) which permits tacking on of seniority under those circumstances is not applicable. While Werner concedes N.J.A.C. 6:3-1.10(f) applies in this case because petitioner did serve simultaneously under the education service certificate and distributive education endorsement in 1971-72, Werner says this regulation allows petitioner, for seniority purposes, only to claim time actually served in the Board's employ under the distributive education endorsement. The regulation, Werner explains, does not allow tacking on as urged by petitioner.

Intervenor Burke contends petitioner has no entitlement to seven full years seniority as a teacher of home economics because she, petitioner, was never assigned full time as a home economics teacher. Consequently, intervenor Burke says N.J.A.C. 6:3-1.10(f) and (1) must be read in pari materia so that seniority is awarded only for actual teaching experience or, in petitioner's case, 1.2 years seniority. Intervenor Burke contends that under Lichtman, supra, actual service is the critical determinant in calculating seniority and that to the extent the Commissioner's decision in In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Township Board of Education and the Edison Township Board of Education, supra, is inconsistent with Lichtman, the Commissioner's decision may not be followed.

Intervenor Reardon contends petitioner has no seniority claim to his full time position as teacher of family life because petitioner has had no actual experience teaching family life. Furthermore, intervenor Reardon says because the Board "* * * adopted a detailed and comprehensive interdisciplinary family life program * * *" (Id. at p. 4), the Board cannot be compelled to implement its family life curriculum in order to accommodate petitioner's seniority claims and cites Jeanette Johnson v. Glen Rock Bd. of Ed., 1984 S.L.D. ____ (May 21, 1984).

The Board, of course, opposes petitioner's claim that it violated any seniority entitlements she accrued by virtue of her employment with it since 1971-72. The Board says its concluded, based upon petitioner's limited experience in its employ of teaching 2 business courses in sales during 1971-72, compared to intervenor Werner's full-time employment with it as a business teacher since 1974-75, that petitioner is "* * * entitled

to no seniority under [its] presently constituted business program" (Bd., 4). The Board explains that prior to September 1977 the more theoretically oriented business related courses such as sales and marketing were not incorporated into any specific curricula. Rather, such courses were considered "free-floating electives" which would be conducted, on a ten week mini-course basis, if sufficient pupils expressed an interest in the course and if the high school principal found a teacher with a "suitable background" to teach the course.

Without contradiction from petitioner, the Board explains that as of September 1977 its business department was redesigned so that that department now includes business related courses heretofore designated as free-floating mini-courses as taught by petitioner. Furthermore, the Board says, again without contradiction from petitioner, that since September 1977 forward it requires all who teach business courses to be in possession of a "business certificate."[12] Consequently, the Board concludes that because it presently requires specific endorsements to teach specific business courses, all of which are now within its business course of study, and because petitioner has no such endorsement, any seniority petitioner may have accrued by virtue of her 1971-72 assignment to teach the business courses of sales has been eradicated or, as the Board says

> Since the Petitioner [Bartz] does not possess a business certificate, any view of her [claimed] seniority based upon earlier [business-sales] courses [she taught in 1971-72] is * * * moot.
> Bd. b, at p. 5

In regard to petitioner's claim of seniority to the full-time position of home economics teacher, the Board says that under N.J.A.C. 6:3-1.10(f) and Lichtman, supra, petitioner received seniority credit for time she actually spent teaching home economics courses. Consequently, the Board recognizes the time petitioner spent teaching one home economics class between 1977-78 through 1982-83 as one-seventh of a full year's seniority as a teacher of home economics. During 1983-84 when petitioner taught two and one-half home economics classes, the Board recognizes petitioner earned an additional two and one-half sevenths (.3571) seniority credit for that year. In sum, the Board says petitioner

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[12]More properly, it appears that the Board requires either an instructional certificate endorsement in general business studies, N.J.A.C. 6:11-6.3(a)(1)(vi), or in comprehensive business education, N.J.A.C. 6:11-6.3(b)(1)(ii). See also N.J.A.C. 6:11-8.4(c)(3).

has an accumulated seniority as a teacher of home economics of one and one-half sevenths years (1.2143). The Board says intervenor Burke, by comparison, has six full years seniority.

In regard to petitioner's seniority claim to teach family life, the Board says because petitioner was never assigned to teach any subject within the family life program she has no cognizable seniority claim to the full time family life teaching position now. Finally, the Board says it did not violate petitioner's tenure rights by its reduction of her full time employment to part time. The Board explains that petitioner does not allege bad faith in the abolition of her full time position and, that as such, whatever tenure rights she may have may not now defeat its legitimate reduction in force absent proof her seniority rights were violated.

Finally, the Board contends that even if it is determined that petitioner's seniority rights were violated, she is not entitled to any full time position because it, the Board, could elect to divide teaching duties equally with other staff members and cites Klinger v. Cranbury Bd. of Ed., 190 N.J. Super. 354 (App. Div. 1982) cert. den. 93 N.J. 277 (1983) and Wendelken v. Bd. of Ed. of Borough of Demerest, 1984 S.L.D. ____ (May 3, 1984).

DISCUSSION OF APPLICABLE LAW

It is clear petitioner has served the requisite period of time in the Board's employ to have acquired the legislative status of tenure as a teacher. N.J.S.A. 18A:28-5. Having acquired tenure, petitioner then is entitled to claim seniority when, as occurred here, her full time employment is affected by a reduction in force.[13] The ultimate issue is, of course, what enforceable seniority does petitioner enjoy given the facts of this case.

N.J.S.A. 18A:28-10 requires seniority to be determined according to standards established by the Commissioner with the approval of the State Board of Education. Such standards have been promulgated and are as set forth at N.J.A.C. 6:3-1.10, as amended effective September 1, 1983. Relevant portions of the amended seniority standards follow:

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[13]The legislative status of tenure is a prerequisite to an enforceable seniority claim following a reduction in force. N.J.S.A. 18A:28-9, et seq.; Howley, supra.

> N.J.A.C. 6:3-1.10(b)
>
> Seniority * * * shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided * * *
>
> N.J.A.C. 6:3-1.10(c)
>
> In computing length of service for seniority purposes full recognition shall be given to previous years of service within the district * * *
>
> N.J.A.C. 6:3-1.10(f)
>
> Not more than one year of employment may be counted towards seniority in any one academic or calendar year. Whenever a person shall hold employment simultaneously under two or more subject area endorsements or in two or more categories, seniority shall be counted in all subject area endorsements and categories in which he or she is or has been employed. (emphasis added)

Petitioner's entire service with the Board of Education has been as a teacher assigned to grades 9 through 12 under endorsements to an Instructional Certificate and under an Educational Services Certificate. Petitioner's seniority may exist in two categories as established by the Commissioner.[14] One is at N.J.A.C. 6:3-1.10(1)(15) which provides in full as follows:

> Secondary. The word " 'secondary' " shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction. Any person holding an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject area endorsement(s) under which he or she has actually served. Whenever a person shall be reassigned from one subject area endorsement to another, all periods of employment in his or her new assignment shall be credited towards his or her seniority in all subject area endorsements in which he or she previously held employment. Any person employed at the secondary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such educational services certificate or special field endorsement. Persons employed in providing services on a district-wide basis

[14]Seniority accrues in "categories" as established by the Commissioner at N.J.A.C. 6:3-1.10(1) which rule presently acknowledges 17 such categories.

> under a special subject field endorsement or an educational services certificate shall acquire seniority on a district-wide basis. (emphasis added)

The other is at N.J.A.C. 6:3-1.10(l)(17) which states:

> Additional categories of specific educational service endorsements issued by the State Board of Examiners and listed in the State Board rules dealing with teacher certification (N.J.A.C. 6:11).

These two seniority categories apply because petitioner was assigned to teach sales and home economics during the course of her employment, with the former assignment carried out under the asserted authority of her distributive education while the latter assignment was under the home economics endorsement, N.J.A.C. 6:3-1.10(1)(15), and she was also assigned to teach cooperative industrial education under her endorsement of coordinator, cooperative industrial education to an educational services certificate. N.J.A.C. 6:3-1.10(1)(17). To resolve the ultimate issue here, consideration must be given to the amended seniority regulations as viewed by both the Commissioner and State Board.

Since September 1, 1983, the effective date of the amendments to N.J.A.C. 6:3-1.10 et seq., the standards for determining seniority, several rulings of the Commissioner and the State Board of Education issued which address the regulations as amended. In In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Township Board of Education and the Edison Township Board of Education, Middlesex County, 1984 S.L.D. ____ (Aug. 6, 1984), the Commissioner, in an application for declaratory judgment filed by certain teachers employed by both named boards of education, which action was joined by the New Jersey Education Association and the New Jersey School Boards Association as amicus curiae, addressed the impact of N.J.A.C. 6:3-1.10(f) upon a teacher, employed on a full time basis but who serves in two categories. In rendering his opinion, the Commissioner said the following:

> Based upon a careful review of petitioners' arguments, as well as the clear intent of the regulations [as amended], petitioners' conclusions as to the seniority entitlement of persons serving simultaneously in two categories are entirely supported by the language of the regulations themselves and by the fundamental principle by which both the commissioner and the state board were guided in their adoption of revised seniority regulations. That significant principle which was involved in the aforesaid revision was that seniority would be based solely upon actual experience in

a subject area or category and would no longer be awarded upon the mere possession of a certificate endorsement.

Petitioners' contention is further buttressed by the conscious deletion of the language in the prior N.J.A.C. 6:3-1.10(l) [the predecessor to the now present N.J.A.C. 6:3-1.10(f)] which limited seniority entitlements to the category in which the individual spent the greatest portion of his or her time.

Further, it may be noted that the State Board provided additional proof of its intent to provide full seniority in all categories or subject area endorsements served when it further amended the regulations at its November 1983 meeting to strike a sentence concerning the seniority rights of teaching principals because that sentence was inconsistent with the intent of the full paragraph. The sentence removed was as follows:

> " 'The seniority rights of principals who teach shall be counted in the appropriate principal's category.' "

Such further deletion makes absolutely clear the State Board's intent that principals who teach should receive seniority both as principals and teachers.

The Commissioner further adopts petitioners' reasoning as it relates to the acquisition of a full year's seniority in each category or subject area endorsement taught, provided such teacher was a full-time teacher. The Commissioner agrees with petitioners' reasoning that the limitation of " '[n]ot more than one year of employment may be counted towards seniority in any one academic or calendar year' " was meant to assure that no more than one year's seniority in any category was acquired in any one year. * * * Any other conclusion would result in the actual punishment of versatility and of flexibility. The teacher, as illustrated by petitioners, who actually taught in more than one subject field or category would be disadvantaged by virtue of such versatility. Further, pro-ration of seniority under such circumstances would provide opportunities for abuse wherein seniority could be manipulated to advantage or disadvantage of one individual as opposed to another.

This ruling, it is noted, was predicated upon the following illustration:

A teaching staff member who had been employed six years, assigned half time as a guidance counselor and half time as a social studies teacher would have three years seniority in each category. Assume a reduction in force occurred in each category, with no nontenured teachers employed in either category, but one tenured teacher employed in each category, with three years and one day service. Both persons, although employed only three years and one day, could bump the six year employee, who would have been employed nearly twice as long in a full-time capacity. Similarly,

> another individual could be employed nine years, serving one-third as a guidance counselor, one-third as a social studies teacher and one-third as an LDTC. In the same situation, that person could be bumped in each category by a person who had been employed three years and one day, just barely one-third of the time the person had been employed.

This case clearly stands for the proposition that the Commissioner encourages versatility of individuals who are employed as teaching staff members in New Jersey and that the reward for such versatility is the accumulation "* * * of a full year's seniority in each category or subject area endorsement taught, provided such teacher was a full-time teacher." This ruling also stands for the principle that one who serves the board for any given year under authority of more than one endorsement and/or certificate shall receive a full year's seniority under such endorsements or certificates used to carry out such teaching assignments notwithstanding that a person may, under such endorsement or certificate, only teach one course per year. The event which triggers accumulation of dual seniority appears not to be quantitative in nature, so much as the qualitative nature of the assignment. Under this ruling the Commissioner has said, in essence, that once a board assigns a full time teacher to duty that requires the possession of a separate endorsement or certificate other than the person's endorsement or certificate exercised for the major portion of their employment, dual full-year seniority accrues under both subject area endorsements or both certificates regardless of time actually spent in each duty so long as the teacher was obligated to teach the second course or courses throughout the academic year.

These principles are not contrary to the holding of Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983) as is suggested by the Board and Intervenors. Nor does Lichtman support the view that a teacher, who was assigned at the inception of and continuing through the conclusion of an academic year to teach more than one subject area each of which requires a separate endorsement or certificate, is entitled to a seniority claim for each subject area based only on a ratio of a full time assignment.[15] Shirley Lichtman had been employed by the Ridgewood Board of Education as a part time librarian since 1965. She possessed appropriate certification as a "teacher librarian" which also qualified her for a full time position and her duties as part time librarian were

[15]Assignments not within the parameters of a full time teacher, or assigments extra-curricular in nature such as athletic coaching, yearbook advisor, drama coach, debate coach, and so on, are excluded from consideration herein.

identical to those of a full time librarian. In 1976 the superintendent advised Ms. Lichtman that her part time position was being eliminated and while recognizing that she had tenure, he also advised that her tenure was limited to any 3/5 time position. Despite that advice, Ms. Lichtman applied for the then open position of a full-time librarian. After determining that Ms. Lichtman had no seniority rights for a full-time position, the Ridgewood board hired a non-tenured applicant for the full-time librarian position. On appeal, the Commissioner ruled that full-time versus part-time status should not be the basis for determining an employee's seniority and that such seniority should be determined solely on the basis of which category at N.J.A.C. 6:3-1.10(1) the person was employed. The Commissioner did not distinguish seniority on the basis of full-time, part-time employment except as to the amount of seniority to be honored. The State Board reversed the Commissioner and its decision was affirmed by the Appellate Division. The New Jersey Supreme Court, in reversing the Appellate Division, noted that seniority regulations set forth at N.J.A.C. 6:3-1.10 allow a prorata calculation of seniority for persons who are employed by a board on a part time basis. In that way, the Court said, "* * * actual service can be duly recognized and relevant experience and seniority of all tenured employees within a single category can be readily ascertained and compared." In addressing the amendments to the seniority regulations, Justice Handler, writing for the Court, noted

> Indeed, regulations recently adopted by the Commissioner of Education to replace N.J.A.C. 6:3-1.10, see 15 N.J.R. 464 (adopted June 1, 1983), clarify this basic policy by emphasizing that actual experience in particular positions should be the critical determinant in awarding seniority.[5] 93 N.J. at 368.

Justice Handler's reference in footnote 5 was a recitation of N.J.A.C. 6:3-1.10(l)(15) as set forth above, in addition to the recitation of N.J.A.C. 6:3-1.10(l)(16) which regulation is not relevant to this dispute. The facts in Lichtman do not address, and consquently cannot support, either the proposition that a full-time teacher assigned to teach two or more subject areas for any given academic year is not entitled to claim one full year seniority in each subject area taught or that such teacher is entitled to claim seniority in each subject area only to the extent of time actually spent teaching each subject area.

Following Lichtman, however, the State Board of Education reversed two of its own decisions remanded to it by the New Jersey Superior Court, Appellate Division

both of which cases involved seniority claims to specific supervisory positions which were never held by the claimants. In Flannagan v. Bd. of Ed. of City of Camden, State Board Dkt. No. 99-83, (Sept. 5, 1984), the State Board in applying Lichtman to the facts before it in Flannagan held as follows:

> [C]ertification is not the sole measure of preferred eligibility for seniority purposes under Lichtman. While the [Lichtman Court] specifically considered whether tenured part-time teachers may assert seniority rights to full time positions, the analysis of relevant criteria for making such seniority determinations pertains with equal force to all seniority decisions and hence to the claims advanced by petitioner herein.
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> The court in Lichtman stressed the importance of "actual experience" holding that:
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> > " 'appellant's seniority accrues from her actual service in the particular position for which she was certified the nature and duties of the five day-a-week position that she sought were identical to those of her three-day-a-week position which had been eliminated. Id. at 369) (Emphasis supplied.)
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> That actual experience weighs heavily in the seniority equation is poignantly demonstrated by the court's disapproval of the State Board's analysis in Aslanian v. Fort Lee Bd. of Ed., 1980 S.L.D. 1475, aff'd App. Div. Dkt. No. A-4745-7971 (3/27/81), (unreported), upon which the State Board relied in reciting Lichtman
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> * * *
>
> Here, as in Aslanian, the certification needed for the abolished position is appropriate for the positions sought, but the duties emcompassed by each are different, thereby defeating petitioner's seniority claims. * * *

It is noted that Flannagan was tenured in a full time, twelve-month position of supervisor of audio-visual in the Camden City school district when his position was abolished for economy reasons. Prior to his appointment as supervisor, he had achieved tenure as an elementary school teacher. After his position was eliminated, Flannagan was reassigned to a ten-month full time teaching position in the district's Title I program. He challenged the transfer and contended he was entitled to assume another supervisor's position by virtue of his own seniority as a supervisor. The State Board initially agreed with the administrative law judge and the Commissioner of Education each of whom held that because Flannagan was tenured in the position of general supervisor, notwithstanding his specific assignment as supervisor of audio-visual, that as a general supervisor he was

entitled to enforce a superior seniority claim to other available supervisory positions with the board following the elimination of his position. Following Lichtman, and a remand of Flannagan by the Appellate Division, the State Board of Education concluded that Flannagan did not enjoy seniority rights to other supervisory positions because his actual experience was only as a supervisor of audio-visual instruction.

Thereafter, in Nachtman and Herbert v. Middletown Board of Education, State Board Dkt. No. 131-83 (Dec. 5, 1984), the State Board noted that

> It is therefore now settled that certification is not the sole criteria for determining seniority rights to a particular position. Lichtman, supra, Flannagan, supra. Rather, such rights accrue only when: (1) a claimant serves in a particular position for which he is certified, (2) is certified for the position he seeks and, (3) a substantial identity exists between the nature and the duties of the position he has held and the position he seeks.

Nachtman and Herbert were unit supervisors whose positions were abolished. Both were reassigned to elementary teaching positions and both appealed on the grounds their certification, general supervisors, under which they performed as unit supervisors entitled them to, and that as such, they had a superior seniority claims to remaining supervisory positions not abolished by the board. While the administrative law judge found that their reassignments were proper under the amended seniority regulations in effect on September 1, 1983, the Commissioner reversed and held that Nachtman and Herbert had an enforceable claim, by virtue of their general supervisors certificate, to remaining supervisory positions with the board. The Commissioner relied in large measure upon the holding of Flannagan prior to the State Board's reversal. Because the State Board reversed its own decision in Flannagan, it also reversed the Commissioner's decision in Nachtman and Herbert.

Recall that the amended seniority regulations provide full recognition be given previous years of service within the district for seniority purposes, N.J.A.C. 6:3-1.10(c), and that seniority shall be counted in all subject area endorsements and categories in which a person has been employed whenever such person holds employment simultaneously under two or more subject area endorsements or in two or more categories, N.J.A.C. 6:3-1.10(f), and that whenever a person shall be reassigned from one subject area endorsement to another all periods of employment in his or her new assignment shall be credited towards his or her seniority in all subject area endorsements in which he or she previously held employment, N.J.A.C. 6:3-1.10(l)(15). Recall also the Commissioner's

earlier holding in In re Seniority Rights of Certain Teaching Staff Members, supra, where he ruled "the Commissioner further adopts petitioners' reasoning as it relates to the acquisition of a full year's seniority in each category or subject area endorsement taught, provided such teacher was a full-time teacher * * *". The Commissioner, who is obligated to establish standards of seniority, N.J.S.A. 18A:28-13, is obviously of the view that the amended seniority regulations provide a full year's seniority in each category or subject area of an endorsement taught during a particular year and that once a teacher is assigned to teach a separate subject under an endorsement or certificate, even if such assignment is but one class throughout the year, then a full year's seniority accrues for that subject area so long as the teacher is an otherwise full-time teacher. Moreover, the Commissioner is also of the view that once such teacher teaches a separate subject under an endorsement or certificate, seniority continues to accrue in that subject area each year thereafter that the teacher remains employed without regard to whether the teacher ever teaches the subject in a subsequent year.

Moreover, the Commissioner has expanded his view of an enforceable seniority claim under the amended regulations to include all subject areas authorized to be taught by the endorsement held.

In Camilli v. Northern Highlands Regional High School Board of Education, 1985 S.L.D. ___ (Jan. 3, 1985), Camilli, who possessed a physical science endorsement on an instructional certificate and whose assignment was at all times to teach chemistry, alleged the board improperly reduced his full time chemistry assignment to half time while assigning a nontenured teacher to a full time physics position. Camilli alleged that the board violated his seniority rights by not granting him the full time physics position. The Commissioner, in applying the amended seniority regulations, held as follows:

> Petitioner [Camilli] is correct, however, in his argument that the current regulations entitle him to the physics position. The language of N.J.A.C. 6:3-1.10(l)(15) is clear and unambiguous that seniority accrues in the subject area endorsement(s) in which one actually served. Petitioner has been a chemistry teacher for his entire service with the board. Thus, his seniority attaches to the physical science endorsement, not merely chemistry. The physical science endorsement includes not only chemistry but physics and earth and space science other than geography[16]; therefore,

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[16]Though N.J.A.C. 6:11-6.3(a)(viii) authorizes the issuance of a physical science endorsement, I can find no authority in the whole of N.J.A.C. 6:11-6.1 et seq., Endorsements, which allows the holder of such endorsement to teach these specific subjects.

petitioner is unquestionably entitled to the physics position for which the nontenured teacher was assigned.

Note that Camilli did not at any time teach physics. The administrative law judge concluded Camilli had an enforceable seniority claim to teach physics because prior to the amendment to the seniority regulations, Camilli had an enforceable claim to teach any subject area authorized by his endorsement. The judge stated that Camilli's "... accrual of seniority under the pre-amended regulation is vested, and teaching seniority accrual from September 1, 1983 is restricted to actual service under an endorsement." Initial Decision, OAL DKT. No. 5752-84, at p. 3. The Commissioner specifically rejected the conclusion that the "... prior [seniority] regulations * * * provide a vested right * * *" but nonetheless recognized an enforceable seniority claim for Camilli to teach physics, a separate subject area from chemistry. Seniority to teach physics under this ruling is not predicated upon actual experience in the teaching of physics. To the contrary, seniority is recognized solely on the basis that Camilli is authorized to teach physics by virtue of the endorsement held and without regard to actual experience in the teaching of physics. Thus, the Commissioner expands his earlier decision in In re Seniority Rights of Certain Teaching Staff Members and creates the principle that a person who serves under an endorsement to an instructional certificate acquires seniority in all areas the endorsement authorizes one to teach. While such a principle seems to conflict with the basic policy of the amended seniority regulations embraced by the Court and which emphasizes "* * * actual experience in particular positions [being] the critical determinant in awarding seniority * * *" Lichtman, 93 N.J. at 368, the Commissioner's adjudicated rulings must be followed.

It is to be quickly noted, however, that the Commissioner's ruling appears to be at least facially compatible with the State Board's adopted criteria in Nachtman and Herbert for "determining seniority rights to a particular position." That is, Camilli served in the particular position of chemistry teacher for 12 years for which he was certified; Camilli was certified for the position of physics teacher which he sought; and, a substantial identity exists between chemistry and physics in that both disciplines are natural sciences though substantively different and the duties of a chemistry teacher and physics teacher are identical - to teach. Note that the Nachtman and Herbert criteria do not require actual experience in the position sought. Nonetheless, it is recognized that Camilli reiterates the principle that N.J.A.C. 6:3-1.10(l)(15) provides seniority to accrue in the subject area endorsement in which one actually serves.

Prior to reaching the ultimate issue in this case, it is noted that while seniority does not attach until the acquisition of tenure, once tenure is acquired all service during the probationary period is countable for purposes of seniority. Consequently, intervenor Werner's claim is rejected that petitioner failed to serve the requisite period of time to acquire tenure under a distributive education endorsement and, hence, no seniority applies. King, supra, does not articulate such a principle; rather, its holding is that a teacher, having acquired tenure and who is then assigned a new category, may not tack on prior experience as a teacher to that new category for seniority purposes to that new category.

Next, it should be noted that there is no evidence in this record that the Board requires additional certification of any teacher in this case beyond that " 'As set by state certification authorities' ". Ante, at p. 9. It should be noted that in Johnson v. Bd. of Ed. of Glen Rock, 1984 S.L.D. ___ (May 21, 1984) the Commissioner rejected Johnson's claim that because she enjoyed seniority as a home economics teacher by virtue of her experience as a home economics teacher she was entitled, following a reduction in her full time employment, to teach the Board's family life program which was part of its health curriculum. The Commissioner held that it is proper for the board to require a health endorsement to teach the family life program as part of its health curriculum.

Finally, it is noted that while N.J.A.C. 6:11-8.4(b)(5) authorizes the issuance of an instructional certificate endorsement in distributive occupations, no mention is made in the rule as to what that endorsement authorizes one to teach. The rule for the coordinator, cooperative industrial education certificate, N.J.A.C. 6:11-12.3, requires the endorsement "* * * for the position of teacher and coordinator of part-time cooperative vocational education in skilled trade, industrial and/or service occupations [and] to teach related vocational subjects in such classes and to act as coordinator between school and industry."

CONCLUSIONS

Based on the foregoing discussion of the amended seniority rules and administrative decisions already rendered in the area of seniority, I **CONCLUDE** that petitioner Irene Bartz has accumulated 13 years seniority as a teacher of cooperative industrial education and as a distributive education teacher in sales but that neither category of

seniority is enforceable to any course which is part of the Board's business department. This is so for neither the coordinator, cooperative industrial education certificate nor the distributive educational endorsement is valid outside the vocational area, N.J.A.C. 6:11-8.4(b)(5); 6:11-12.3, and, consequently, the holding of Schmidt, supra, is not applicable. I **CONCLUDE** petitioner Irene Bartz has accumulated seven years seniority to the position of home economics teacher by virtue of her assignment in 1977-78 to teach home economics under her home economics endorsement. N.J.A.C. 6:3-1.10(c), (f), and (l)(15); In re Seniority Rights of Certain Teaching Staff Members, supra; Nachtman and Herbert, supra. I **CONCLUDE** petitioner Irene Bartz, while eligible to teach ~~repments~~ Segments of family life under her home economics endorsement, may not claim seniority to teach the Board's family life program because such program is not "interdisciplinary in its approach; rather, it is part of its health curriculum which requires an endorsement to teach health. Cf. Johnson, supra. Petitioner's tenure status as a teacher is not insurance of continued employment in a reduction in force matter; the status does, however, provide the basis to enforce incohate seniority rights following a reduction in force. But, without an enforceable seniority claim to some position a tenure status alone allows no such claim.

I further **CONCLUDE** that because petitioner Irene Bartz has an enforceable claim of seven years seniority as a teacher of home economics as against intervenor Burke's six years seniority as a teacher of home economics, the Board violated Irene Bartz's seniority rights by not assigning her to the full-time position of home economics teacher for 1984-85 as presently held by intervenor Burke. That the Board could elect to divide teaching duties equally with other staff members under the authority of Klinger v. Cranbury Bd. of Ed., 190 N.J. Super. 354 (App. Div.), cert. den. 93 N.J. 277 (1983), is of no moment. The fact is the Board did not exercise such authority in this case. Because the Board has such authority does not negative the harm done petitioner by its violation of her seniority rights.

Accordingly, summary decision is hereby entered on behalf of Irene Bartz that her seniority rights under N.J.S.A. 18A:28-10 et seq. were violated and, accordingly, the Board of Education of the Township of Green Brook is hereby **DIRECTED** to reinstate Irene Bartz to the full time position of home economics teacher and to tender to her the difference in salary she would have received compared to what she did receive from the commencement of the 1984-85 academic year, together with all other emoluments and incidents of employment, had the Board not violated her seniority rights.

OAL DKT. NO. EDU 4214-84

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

April 8, 1985
DATE

Daniel B McKeown
DANIEL B. MC KEOWN, ALJ

APR 09 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

APR 11 1985
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

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IRENE BARTZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision have been reviewed. The maximum allowable number of exceptions including those by intervenors were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c. Each of the three parties filed primary and reply exceptions.

The Commissioner observes that in primary exceptions petitioner agrees with the home economics determination of Judge McKeown that she is entitled to reinstatement to a full-time position with back pay and all denied emoluments. Intervenor Burke and the Board argue otherwise in their primary exceptions and Burke contends that Old Bridge, supra, is bad law running contrary to Lichtman, supra.

Petitioner in primary exceptions continues by contending that the judge erred in holding that she had no entitlement to teach the Board's present business courses nor the Family Living courses taught by the full-time, nontenured Intervenor Reardon.

Respondent's exceptions contend that the ALJ improperly interpreted Old Bridge/Edison, supra, and Lichtman, supra. Intervenor's exceptions likewise emphasize the alleged incorrect interpretation by the ALJ of the aforesaid cases. Reply exceptions of all parties essentially reiterate positions argued in the record of these proceedings.

Petitioner in reply exceptions refutes the exceptions filed by Intervenor Burke and the Board, stating that they make identical arguments. Petitioner finds the use of, and consideration by, the judge of Old Bridge, supra, to be a proper one and further praises the judge for finding that Lichtman, supra, has no relevance to the question in this matter.

Intervenor Werner argues that the determination by the judge that petitioner does not have seniority over him is a proper one. Intervenor argues that without a vocational program there are no related vocational courses which may be taught under petitioner's

distributive occupation endorsement and coordinator of industrial education certificates. Nor can petitioner compel the Board to reorganize its business department to accommodate petitioner's seniority. Jeanette Johnson, supra. In the same vein and by similar logic it is argued that petitioner had no seniority in the category of teacher of Family Life.

In reply exceptions the Board joins with the exceptions filed by Intervenor Burke in disputing petitioner's position which is in concurrence with the determination by the judge that petitioner is entitled to seniority in the home economics area. Further, the Board disputes petitioner's contentions that she is entitled to seniority credit for business courses and in so doing the Board agrees with the reasoning and determination of the judge. Finally, on the Family Living issue the Board concurs with the judge who determined that petitioner had no entitlement to teach in the Family Life program.

The Commissioner has carefully examined the record, read and evaluated the arguments of law submitted to Judge McKeown and the initial decision resulting therefrom. The multiplicity of exceptions has likewise been carefully considered.

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

The Commissioner notes that the ALJ in this matter characterizes the decision in Camilli, supra, by determining that:

> "***the Commissioner expands his earlier decision in In re Seniority Rights of Certain Teaching Staff Members and creates the principle that a person who serves under an endorsement to an instructional certificate acquires seniority in all areas the endorsement authorizes one to teach." (Initial Decision, at p. 23)

The Commissioner regards such characterization as not properly reflecting the import of Camilli. In the Commissioner's view Camilli represents not an expansion but an exact implementation of N.J.A.C. 6:3-1.10(f) which provides that:

> "***seniority shall be counted in all subject area endorsements and categories in which he or she is or has been employed." (Emphasis supplied.)

In the case of Petitioner Camilli, the subject area endorsement of his instructional certificate under which he obtained tenure and thus seniority was that of a teacher of physical science which includes both chemistry and physics. Likewise, N.J.A.C. 6:3-1.10(1) 15 provides that seniority within the secondary category shall accure "***only in such subject area endorsement(s) under which he or she actually served." (Emphasis supplied.)

For all the reasons well-expressed in the determinations by Judge McKeown, except as herein modified, the Commissioner affirms the conclusion that the seniority claim of Petitioner Bartz rests with seven years' seniority as a teacher of home economics. Whereas her seniority rights were violated under N.J.S.A. 18A:28-10 et seq., the Board of Education of the Township of Green Brook is hereby directed to reinstate Petitioner Bartz to the full-time position of home economics teacher with appropriate salary recompense and remuneration.

MAY 24, 1985 COMMISSIONER OF EDUCATION

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 24, 1985

For the Petitioner-Appellant, Ruhlman, Butrym and Friedman, P.A. (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Respondent, Nichols, Thomson, Peek and Meyers (Kenneth S. Meyers, Esq., of Counsel)

For the Intervenors-Cross Appellants, Katzenbach, Gildea and Rudner (Ezra D. Rosenberg, Esq., of Counsel)

For the Intervenor-Cross Appellant Marilyn Burke, Sterns, Herbert and Weinroth (Michael J. Herbert, Esq., of Counsel)

The State Board of Education affirms the decision of the Commissioner for the reasons expressed therein. In affirming the Commissioner's determination that Appellant in this case has no seniority entitlement to teach the Board's family life program, we emphasize that eligibility to teach segments of family life within other disciplines pursuant to N.J.A.C. 6:29-7.1(e) does not confer on a teacher the right by virtue of seniority or tenure to assignment to a full-time position as a teacher of family life.

November 6, 1985

Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6245-84
AGENCY DKT. NO. 323-7/84

JOHN J. SMITH,
Petitioner,
v.
BOARD OF EDUCATION OF THE ATLANTIC COUNTY VOCATIONAL-TECHNICAL SCHOOL, ATLANTIC COUNTY,
Respondent.

Joel S. Selikoff, Esq., for petitioner (Selikoff & Cohen, attorneys)

Howard Kupperman, Esq., for respondent

Record Closed: March 18, 1985 Decided: April 12, 1985

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

Petitioner, John J. Smith, having been employed by the Board of Education of the Atlantic County Vocational-Technical School (Board) for a period of ten years under an Emergency Certificate, alleges he acquired a tenure status with the Board upon his completion of the requirements for a Standard Teacher Certificate and that the Board was in violation of N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10 et seq. when it acted not to renew petitioner's employment for the 1984-85 school year. The Board denies that petitioner acquired tenure, setting forth six separate defenses and requesting that the Petition of Appeal be dismissed.

On August 21, 1984, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Thereafter, a prehearing conference was conducted on October 4, 1984, at which the issues to be determined by this administrative tribunal were set down as follows:

1. Whether petitioner, having been employed by the Board for ten years under an Emergency Teachers Certificate, acquired a tenure status upon the completion of the requirements for the Standard Teacher Certificate?

2. Whether petitioner had, in fact, completed the necessary requirements for a Standard Teacher Certificate on or before April 25, 1984?

   a. If so, whether the completion of those requirements would be sufficient under N.J.S.A. 18A:28-5 to acquire a tenure status?

Supplemental prehearing conferences were held by way of telephone on November 8, 1984 and February 1, 1985. The parties agreed to cross-move for summary disposition; therefore, no hearing was required.

The matter now comes on for summary judgment by way of Stipulation of Facts, Exhibits and Briefs of Law and, therefore, is ripe for final determination. The last submission was received on March 18, 1985, which constituted the date the record closed.

STIPULATION OF FACTS

Petitioner JOHN J. SMITH, and Respondent BOARD OF EDUCATION OF THE ATLANTIC COUNTY VOCATIONAL-TECHNICAL SCHOOL, hereby stipulate to the following facts:

1. Petitioner was employed by Respondent as follows:

   September 1, 1974 to June 30, 1975 - Instructor of Photography/printing (part-time) and Operator of Quick-Copy Center (part-time). He taught no students in that first year. A summary description of his duties that year is attached as Exhibit 1.

   July 1, 1975 to June 30, 1976 - Teacher of Graphic Arts during the regular academic year and printer during the summer months;

July 1, 1976 to June 30, 1977 - Printing Instructor;
July 1, 1977 to June 30, 1978 - Printing Instructor;
September 1, 1978 to June 30, 1979 - Printing Instructor;
September 1, 1979 to June 30, 1980 - Graphic Arts Instructor;
September 1, 1980 to June 30, 1981 - Graphic Arts Instructor;
September 1, 1981 to June 30, 1982 - Graphic Arts Instructor;
September 1, 1982 to June 30, 1983 - Graphic Arts Instructor;
September 1, 1983 to June 30, 1984 - Graphic Arts Instructor.

2. All positions of Instructor occupied by Petitioner required the possession of certification appropriate and valid for the position, issued by the New Jersey State Board of Examiners.

3. The appropriate and valid certificate for the instructorships held by Petitioner is that for "Teacher of Skilled Trades: Printing." The job description for teaching positions occupied by Petitioner is attached as Exhibit 1a.

4. Petitioner was employed for teaching purposes under an emergency certificate as of November, 1975. That certificate expired July, 1976. He was subsequently re-employed under renewed emergency certificates. The dates during which Petitioner held a recorded emergency certificate are as follows:

	ISSUED	EXPIRED
	11/75	7/1/76
Renewed	8/2/76	7/1/77
Renewed	12/9/77	7/1/78
Renewed	9/15/78	7/1/79
Renewed	9/7/79	7/1/80
Renewed	9/5/80	7/1/81
Renewed	9/9/81	7/1/82
Renewed	9/7/82	7/1/83
Renewed	8/30/83	7/1/84

5. Petitioner's emergency certificates were renewed during the above time periods upon the representation by Respondent required by law that it was requesting such renewal because it could not secure the services of a certificated teacher suitable for the position. Respondent's requests for renewal of Petitioner's emergency certificate for the above time period were officially approved by it.

6. Applications for renewal of Petitioner's emergency certificate for the school years 1976-77 through 1983-84 are attached as Exhibits 2 through 9.

7. On April 9, 1984, Respondent acted to non-renew Petitioner's employment for the school year 1984-85. A copy of the appropriate portion of Respondent's minutes of that meeting are attached as Exhibit 10.

8. Respondent submitted written notice to Petitioner of its action of April 9, by letter of April 25, 1984, a copy of which is attached as Exhibit 11. Respondent by its Superintendent Ralston Dorrell, informed Petitioner in or about March, 1984, that he would recommend to the Board that it non-renew Petitioner's contract of employment.

9. On April 23, 1984 Petitioner hand-delivered a letter dated April 23, 1984 from Roberta Schmelz, Assistant Registrar, Glassboro State College to the office of Respondent's Superintendent. On April 24, 1984, Petitioner hand-delivered another copy of that letter to John Amato, Respondent's Board Secretary. Said letter is attached as Exhibit 12.

10. By letter of May 8, 1984, Petitioner submitted to the Respondent Board a copy of the letter of April 23, 1984 (Exhibit 12 attached hereto) from Glassboro State College. A copy of Petitioner's letter of May 8 is attached as Exhibit 13.

11. By letter of May 17, 1984, Respondent expressed its understanding that Petitioner had not completed the requirements for a permanent certificate and was therefore not under tenure. A copy of that letter is attached as Exhibit 14.

12. The Certificate for Teaching of Skilled Trades: Printing, was issued to Petitioner in October, 1984. A copy of that Certificate is attached as Exhibit 15. Petitioner furnished Respondent with a copy of that Certificate by attaching it to his answers to Respondent's First Set of Interrogatories, dated November 8, 1984.

LEGAL ARGUMENT

PETITIONER'S POSITION

Petitioner contends that he met the statutory requirements for acquisition of tenure because of his continuous employment by the Board for nine consecutive academic years under a valid and appropriate teaching certificate and his completion of the requirements for a standard teaching certificate while employed with the Board. Petitioner asserts that the facts reveal that he began employment with the respondent Board as an instructor of photography/printing (part-time), operator of Quick-Copy Center (part-time) and printer on September 1, 1974. During this first year, academic year 1974-75, petitioner taught no students. Thereafter, he was reemployed by the Board as a member of its teaching staff in the position of instructor each succeeding academic

year through the 1983-84 academic year. During each of these academic years from 1975-76 to 1983-84, petitioner was continuously employed under an appropriate and valid emergency certificate that had been annually renewed by the Board. Thus, petitioner was employed by the Board for nine consecutive academic years under a valid emergency certificate.

On April 25, 1984, the Board, by its secretary, M. John Amato, informed petitioner by letter that it had voted on April 9 for nonrenewal of his contract for the school year 1984-85. On Arpil 23 and 24, 1984, before receiving the above notification, petitioner submitted to the superintendent and Board secretary, respectively, a copy of Exhbit 12, a letter from the assistant registrar, Glassboro State College, stating that petitioner had completed all requirements for his standard certificate and that the certificate was being ordered through the college. On May 8, petitioner sent a copy of the "Glassboro letter" to the Board itself. In its response, Exhibit 14, the Board secretary concluded that it was the Board's "understanding" that petitioner had not completed requirements for the standard certificate. Absolutely no basis for this bald conclusion was given. Petitioner continued to perform his duties until the expiration of his employment contract on July 1, 1984.

Petitioner contends that as of the time of this notification, he had satisfactorily completed all of the academic as well as all nonacademic experience requirements for a standard certificate appropriate for his position, viz., "Teacher of Skilled Trades: Printing" and had so informed the Board. The occupational experience requirements were approved by the State of New Jersey, Department of Education, in November 1975. As to the academic requirements, petitioner notified the Board on April 23, 1984, of his completion of the same by a letter from the registrar of Glassboro State College.

The standard certificate for "Teacher of Skilled Trades: Printing" was issued to petitioner in October 1984 based on his application for same filed in April 1984.

Petitioner asserts that his case is similar to the case of Joann K'Burg v. Bd. of Ed. of Lower Alloways Creek, 1973 S.L.D. 636. In that case, the petitioner had been continuously employed by the Board for over four and one-half academic years during which time she held a valid and appropriate emergency teacher's certificate. In March of the 1972-73 academic year, the principal notified her that her employment would be

terminated at the close of that school year. At the time of this notification, petitioner was still the holder of an emergency teaching certificate, had completed the requirements for a standard certificate, and in the succeeding month she was, in fact, awarded the standard certificate. In rejecting the Board's contention that petitioner had not acquired tenure status, the commissioner stated that: (1) an "emergency certificate" to teach is a valid and appropriate certificate within the meaning of N.J.S.A. 18A:28-4 and N.J.S.A. 18A:28-5; and (2) the question of whether petitioner has or has not acquired tenure does not turn on the fact that the Board's notification not to renew petitioner's employment came before her acquisition of the standard certificate, but, rather, on whether petitioner has served the requisite period of time in the Board's employ and acquired possession of a standard teaching certificate during the course of the academic year while she was still employed.

Petitioner herein asserts that he has served more than the requisite time in the Board's employ with a valid and appropriate certificate so as to meet the statutory requirements for tenure. Petitioner has been continuously employed by the Board from September 1, 1974 to July 1, 1984—nine consecutive academic years. N.J.S.A. 18A:28-5 requires only:

> (b) three consecutive academic years together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years.

Furthermore, petitioner argues he held a valid and appropriate teaching certificate within the meaning of N.J.S.A. 18A:28-4 and N.J.S.A. 18A:28-5, viz., an emergency teaching certificate, during this time. Accord, Matthew F. Amato, Jr. v. Bd. of Ed. of the Hudson Cty. Area Vo-Tech Schools, Hudson Cty., OAL DKT. EDU 10125-83, decided (Sept. 20, 1984), rev'd, Comm'r of Ed. (Nov. 8, 1984) (relying in part on the reasoning in Joann K'Burg, and finding that emergency certificates are appropriate certificates for purposes of statutory tenure requirements; further finding that had the board fulfilled its responsibilities and determined from the county superintendent whether the position for which petitioner was initially employed required the appropriate certificate, the eligible teacher would have obtained same; therefore, petitioner should not be deprived of tenure protection which would have attached from commencement of his initial employment through the time when he obtained his permanent teacher's certificate).

Petitioner argues the factual difference that in Joann K'Burg, the petitioner was issued a standard teaching certificate while still employed by respondent, and here, the fact that petitioner had completed the requirements for a standard teaching certificate while still employed, but had not yet been issued one (petitioner's standard certificate was issued in October 1984) does not call for a different result.

Petitioner cites in John J. Kane v. Bd. of Ed. of the City of Hoboken, Hudson Cty., 1975 S.L.D. 12, where the Commissioner held that to preclude a candidate from appointment to a position (of junior high school principal) because he did not have in his possession a specific certificate, while acknowledging he was eligible for it, would place form over substance. See also, Hausser v. Bd. of Ed. of Ewing Tp., OAL DKT. 7715-82 (May 16, 1983), adopted, Comm'r of Ed. (June 30, 1983) (Eligibility for certificate sufficient); Saad v. Bd. of Ed. of Dumont, OAL DKT. 4126-81 (Mar. 25, 1982), aff'd, Comm'r of Ed. (May 10, 1982). Cf., Amato (impliedly recognizing that time from which the teacher was eligible for emergency certificate must be considered for the purpose of construing his total employment and the acquisition of tenure where his failure to obtain same was due to the board's failure to comply with certain regulations).

So, too, in the instant case to say that petitioner had not acquired tenure because he did not possess a simple piece of paper evidencing something he had already accomplished and was eligible for would be exalting form over substance. As stipulated herein, petitioner did complete all of the requirements for and did file an application for his standard teaching certificate while still in respondent's employ; further, he was eligible for a standard certificate at that time. In point of fact, the certificate issued to him in October 1984 was based on requirements fulfilled by him prior to his application for the certificate in April 1984.

Petitioner argues that by allowing eligibility for the certificate and not actual possession of it to control, the court stands on the side of practiciality and fairness. As the commissioner reasoned in Berkowicz v. Bd. of Ed. of Scotch-Plains/Fanwood, 1980 S.L.D. 866, 879:

> fairness alone dictates that such teachers ought not to be penalized by the administrative delay which necessarily exists in processing great numbers of applications for certificates by teachers. . . .

Petitioner concludes that for all of the foregoing reasons, he should be considered a tenured teaching staff member in the Board's employ and that the Board's action of nonrenewing petitioner's employment for 1984-85 should be declared, null, void and of no effect.

THE BOARD'S POSITION

POINT I

PETITIONER DID NOT ACQUIRE A TENURE STATUS UNTIL THE FORMAL REGULAR CERTIFICATE WAS ISSUED TO HIM ON OCTOBER 1984

In the Stipulation of Facts and Exhibits attached hereto, petitioner has furnished his regular certificate as a teacher of printing, which is dated October 1984. The facts, and petitioner himself, do not dispute the fact that this was the first regular certificate obtained by petitioner and that, prior to October 1984, petitioner did not have this certificate. Petitioner contends that, although he did not have the aforesaid certificate until October 1984, he effectively was protected by the rights of tenure and that he had attained tenure status at the time that he completed his academic requirements and his vocational skills requirements. Even if this assumption by petitioner is correct, it is a factual basis in the stipulations that petitioner did not complete his academic requirements until at least April 23, 1984, as shown in the letter submitted by petitioner from the Glassboro State College, dated April 23, 1984.

The Board's action in not renewing petitioner's contract for the school year 1984-85 was accomplished by a proper motion passed at a regular advertised meeting of the Board on April 9, 1984. This motion not to renew petitioner's contract was made prior to petitioner's having completed his academic requirements for tenure and prior to petitioner's having obtained his regular certificate, which he received in October 1984.

The Board argues that N.J.S.A. 18A:28-5 is perfectly clear as to the rules of attaining tenure and states as follows:

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title, . . .

The Board observes that said statute excepts "those who are not the holders of proper certificates in full force and effect." Although petitioner alleges that he attained tenure before October 1984, it is the Board's position that this is incorrect and that the aforesaid statute must be strictly construed and that petitioner did not have tenure until he received and was the holder of his regular certificate in October 1984. The Board's action to terminate petitioner's employment took place on April 9, 1984.

The Board contends that the law in New Jersey does not take teacher tenure status lightly and requires that the statute be strictly construed. Zimmerman v. Bd. of Ed. of the City of Newark, 38 N.J. 65 (1962) states as follows:

> As we have already emphasized, teacher tenure is a statutory right imposed upon a teacher's contractual employment status. In order to acquire the status of a permanent teacher under a tenure law and with it the consequent security of permanent employment, a teacher must comply with the precise conditions articulated in the statute. Moriarity v. Bd. of Ed. of Garfield, 133 N.J.L. 73, 42 A. 2d 465 (Sup. Ct. 1945), affirmed by 134 N.J.L. 356, 46 A. 2d 734 (E.&A. 1946); Ahrensfield v. State Bd. of Education, supra; 78 C.J.S. Schools and School Districts 180, p. 1014. (1952).

The above-cited case of Ahrensfield v. State Bd. of Ed. 126 N.J.L. 543 (E.&A. 1939), also stands for the principle that a teacher's right to tenure does not come into being until the precise condition laid down in statute has been met.

The Board argues that it is apparent that the tenure law must be strictly construed and, in this particular case, petitioner is attempting to elaborate upon and to extend the tenure statute so that he can claim tenure status prior to the time he actually attained tenure for the sole reason of litigating his termination by the Board.

POINT II

PETITIONER HAD NOT, IN FACT, COMPLETED THE NECESSARY REQUIREMENTS FOR A STANDARD TEACHER'S CERTIFICATE ON OR BEFORE APRIL 9, 1984

The above issue is the second issue as framed in the Pre-Trial Memorandum with the one correction of changing the date from April 25, 1984 to April 9, 1984, as ascertained by the discovery and research of respondent and as set forth in the Board's Amended Answer to the Petition. The date that the Board took action, as shown by the minutes of the meeting was, in fact, April 9, 1984 and not April 25, 1984. The Board offered that because it had previously cited the statute N.J.S.A. 18A:28-5 and the Zimmerman and Ahrensfield cases in the preceding argument, it will not re-argue or re-cite said argumentative law. The Board did, however, refer to N.J.S.A. 18A:28-14, which states:

> The services of any teaching staff member who is not the holder of an appropriate certificate, in full force and effect, issued by the state board of examiners under rules and regulations prescribed by the state board of education may be terminated without charge or trial, except that any school nurse appointed prior to May 9, 1984 shall be protected in her position as is provided in section 18A:28-4 of this title.

The Board observes that the aforesaid statute allows termination of a person who is not "a holder of an appropriate certificate, in full force and effect, issued by the State Board of Examiners." The Board further observes that it is clear from the Stipulation of Facts and Exhibits that petitioner was not the holder of a certificate until after the Board terminated his employment on April 9, 1984, since the certificate itself was not issued prior to October 1984, which date is typed upon said certificate.

Schulz v. State Bd. of Ed., 132 N.J.L., 345 (E.&A. 1944) discussed the rights of a board of education to terminate employment and held that the teachers' tenure act does not entitle teachers to tenure without having the proper teaching certificates in full force and effect. Again, this case discussed the fact that teachers or other school employees must be the "holders" of a proper certificate. It is the contention of the Board that petitioner was not a holder of a valid certificate until October 1984.

POINT III

ON THE DATE RESPONDENT BOARD TERMINATED THE EMPLOYMENT OF PETITIONER, PETITIONER WAS NOT THE HOLDER OF A REGULAR CERTIFICATE AWARDING HIM TENURE IN HIS POSITION

The Board asserts that there is no question from the Stipulation of Facts and Exhibits that petitioner was teaching under an emergency certificate during the school year of 1983-84 and that he was teaching under this emergency certificate on April 9, 1984, when the Board took its action to terminate petitioner's employment. Petitioner claims that he was the holder of a regular certificate on April 9, 1984, when, in actuality, said certificate was not issued until October 1984. Petitioner thus claims to have been holding two certificates at the same time.

The Board argues that it is improper for an employee to teach under two separate and different certificates at the same time and, since petitioner was clearly teaching under an emergency certificate at the time of the termination action of the Board, petitioner obviously was not the holder of a regular certificate, nor had petitioner attained the protection of tenure status. Therefore, the Board contends that its action in not renewing petitioner's employment was proper and correct.

POINT IV

PETITIONER HAD NOT ACQUIRED TENURE STATUS AS OF THE DATE OF TERMINATION OF APRIL 9, 1984

The Board observes that although petitioner relies heavily upon the April 23, 1984 letter from Glassboro State College stating that he had completed his academic requirements, said letter does not in any way aid petitioner's cause. The Board further observes that said letter proves beyond any doubt whatsoever that petitioner had not completed his academic requirements for tenure on April 9, 1984 and, therefore, petitioner could not avail himself of the protection of the State tenure laws and,

therefore, the respondent Board acted correctly and properly. It is also the position of the Board that a regular vocational certificate is different from a regular academic certificate and that an applicant must complete his required academic requirements and then make a new application for a standard vocational certificate to the State Department of Education. Accordingly, when petitioner completed his academic requirements on April 23, 1984, it was mandatory for him to make a new application to the State Department of Education for his vocational certificate showing that he had completed his vocational requirements as well as his academic requirements, and that his vocational experience had to be re-evaluated and approved by the State vocational division prior to the issuance of the regular certificate. The Board points out that this was not done by petitioner until sometime after April 23, 1984 and, therefore, respondent's action in not renewing petitioner's contract for 1984-85 was correct and proper and should be upheld by the Commissioner of Education.

In conclusion, the Board asserts that its action in terminating the employment of petitioner should be upheld as proper.

FINDINGS OF FACT

In addition to those Stipulations of Facts set forth hereinbefore, which are hereby adopted by reference as FINDINGS OF FACT, I also **FIND** the following FACT:

1. Petitioner completed the requirements and was eligible for the teaching certificate for Teacher-Skilled Trades/Printing with the completion of a 1983 summer school course at the Atlantic County Community College (Exhibit 19).

DISCUSSION AND CONCLUSIONS

The Commission has, in a series of decisions, held that pursuant to statute and regulations an "emergency certificate" is a valid and appropriate teaching certificate. K'Burg; Amato; N.J.S.A. 18A:1-1; N.J.A.C. 6:11-4.3. The State Board of Education rules and regulations grant the State Board of Examiners the authority for the issuance of an emergency certificate, pursuant to the precise conditions of the regulations. Those

precise conditions require, in part, that an emergency certificate is to be issued ". . . only on application of a public school system. . ." N.J.A.C. 6:11-4.3(b). Thus, the facts herein demonstrate, without contradiction, that it was upon application by the Board that petitioner was granted at least eight successive emergency certificates to teach in the Board's school district. Absent the affirmative actions by the Board to apply for petitioner's annual renewal of his emergency certificates, given the facts and circumstances in this matter, petitioner would have been precluded from performing any teaching duties or functions for the Board during the period for which he was only emergency certificate eligible. The Board contends that its action on April 9, 1984, not to renew petitioner's teaching contract for the 1984-85 school year is supported by the provisions as found at N.J.S.A. 18A:28-14, wherein a local board of education may terminate an individual, "who is not the holder of an appropriate certificate, in full force and effect, issued by the state board of examiners. . . ."

The Board misapprehends the construction and application of N.J.S.A. 18A:28-14. The statute provides discretionary authority to a local board of education to terminate a teaching staff member who is teaching a specific discipline without the appropriate certificate or endorsement to instruct in that discipline. For example, a teaching staff member who is the holder of only a teaching certificate in English may not teach in the area of secondary mathematics, notwithstanding that the individual may be competent to do so. Without the appropriate certificate, or an endorsement, the individual is precluded from teaching mathematics. This provision is generally administered by the County Superintendent of Schools who, upon a review of a local school district's teacher certification and teaching duty assignment, determines that a teaching staff member has been misassigned outside of the scope of the teaching certificate and alerts the local board of education to take appropriate corrective action. Further, the Board's argument that petitioner did not possess nor hold an "appropriate certificate," has been put to rest by the Commissioner's language in K'Burg at 639 where he said:

> To hold, as counsel for the Board suggests, that an "emergency certificate" to teach is not a valid nor appropriate certificate, would leave the untenable alternative that the State Board of Education, through its own rules, authorizes the State Board of Examiners to issue invalid and inappropriate certificates to teach. The Board's argument, also, would lead to the conclusion that the Legislature, through its passage of N.J.S.A. 18A:1-1, recognizes an invalid and inappropriate certificate. In neither instance can the Commissioner so hold. While emergency certificates are issued to

> those persons who meet minimal professional qualifications for the field of education, the fact is, that stated requirements are met. In addition, holders of emergency certificates are required to pursue the requirements for the standard teacher certificates as a prerequisite to having their one-year certificates renewed by the County Superintendent at the request of the employing local board of education.

I **CONCLUDE** therefore, that petitioner herein during all times of his teaching employment with the Board taught under a valid and appropriate certificate.

The Board now contends that petitioner is not tenure eligible by virtue of his not holding the standard teaching certificate prior to the Board's action on April 9, 1984, not to renew his teaching contract for the 1984-85 school year. The facts herein demonstrate that subsequent to petitioner's completion of the requirements for the standard certificate, he was eligible for the standard teaching certificate at the conclusion of the 1983 summer session. Thus, petitioner was eligible for the standard teaching certificate prior to the commencement of the 1984-85 school year.

Under similar circumstances, the Commissioner has said that ". . . it would be a matter of placing form over substance to hold that an otherwise eligible candidate should be barred. . . because he did not have the required certificate in his possession, while acknowledging that the candidate was eligible for the certificate." Kane at 17. The Commissioner continued to hold that a teaching staff member's eligibility for the proper certificate is sufficient for appointment. Kane at 17. In the Matter of Jeanne Fulton v. Bd. of Ed. of the City of Long Branch, 1980 S.L.D. ____, aff'd, State Bd. of Ed., February 4, 1981, the Commissioner and the State Board of Education upheld an administrative law judge's determination that certification eligibility, not possession of the valid certificate, was the requisite requirement for employment.

The Commissioner has also held that employment time under an emergency certificate attaches for the purpose of construing a teaching staff member's total employment service for the acquisition of tenure, pursuant to N.J.S.A. 18A:28-5. K'Burg; Amato. This holding, coupled with the holding above that certification eligibility is sufficient for employment, can only lead to a conclusion that petitioner herein acquired a tenure status with the Board.

I **CONCLUDE**, therefore, that petitioner was eligible for a standard certificate on September 1983, which was subsequently issued in October 1984, and that petitioner acquired a tenure status with the Board in September 1983, pursuant to N.J.S.A. 18A:28-5.

I **CONCLUDE**, accordingly, that the Board's action on April 9, 1984, not to renew petitioner's teaching contract for the 1984-85 school year was ultra vires and, consequently, has no force or effect.

ORDER

Accordingly, it is hereby **ORDERED** that the Board of Education of the Atlantic County Vocational-Technical School immediately restore petitioner to the teaching position from which he was improperly dismissed, together with the salary and other emoluments for which he was and is eligible, less mitigation, for the period of his improper removal.

It is further **ORDERED** that summary decision is hereby entered on behalf of petitioner and that the Board's application for summary judgment be, therefore, **DISMISSED**.

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

OAL DKT. NO. EDU 6245-84

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

12 April 1985
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

APR 15 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 17 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

ij/ee

JOHN J. SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ATLANTIC COUNTY VOCATIONAL-TECHNICAL SCHOOL, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision have been reviewed. Exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

In the matter presently controverted petitioner agrees with the finding by the judge that he had acquired tenure status with the Board and that the Board's nonrenewal of his contract in April 1984 was therefore unlawful as a violation of his tenure rights. The judge ordered that petitioner be restored to his teaching position "together with the salary and other emoluments for which he was and is eligible, less mitigation, for the period of his improper removal." (Initial Decision, ante) Petitioner excepts to the fact that the judge did not address his claim to pre-judgment interest on the salary withheld during the same period.

Petitioner states:

> "The power of the Commissioner to award post-judgment interest as to monetary remedies in controversies and disputes arising under the school laws is now clearly established. Board of Education of the City of Newark v. Levitt and Sasloe, [197 N.J. Super. 239 (App. Div. 1984).]"
> (Petitioner's Exceptions, at p. 2)

Further, petitioner notes:

> "As the Court in Levitt and Sasloe, supra, noted, '***particular circumspection in the granting of pre-judgment interest is required and a showing of overriding and compelling equitable reasons must be made in order to justify the award.' [at 244]" (Id., at p.2)

The Board takes no exception to the restoration by the judge of petitioner to his teaching position but argues that pre-judgment interest should not be granted in this matter. The Board contends that there was a valid point in issue herein giving the Board clear legal justification to contest and litigate this

matter. The Board argues further that the failure by petitioner to show malice on the part of the Board renders a punitive award of pre-judgment interest improper.

A close reading of the facts of this case fails to convince the Commissioner that malice has been shown on the part of the Board. The Commissioner fails to perceive a "showing of overriding and compelling equitable reasons." (Levitt and Sasloe, supra) Such failure precludes the award of pre-judgment interest. The Commissioner so determines.

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

Accordingly, the Board of Education of the Atlantic County Vocational-Technical School shall place petitioner in his proper teaching position to which he has acquired a tenure status with salary, emoluments and remuneration as mitigated.

COMMISSIONER OF EDUCATION

MAY 30, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7561-84
AGENCY DKT. NO. 408-9/84 and
OAL DKT. NO. EDU 6992-84
AGENCY DKT. NO. 389-9/84
(CONSOLIDATED)

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Petitioner,
v.
EDNA BOOTH,
Respondent.

APPEARANCES:

Samuel A. Christiano, Board Attorney, for petitioner

Kenneth I. Nowak, Esq., for respondent (Zazzali, Zazzali & Kroll, attorneys)

Record Closed: February 26, 1985 Decided: March 29, 1985

BEFORE **ARNOLD SAMUELS**, ALJ:

I PROCEDURAL HISTORY

On September 26, 1984, the Board of Education of the Township of West Orange (Board) filed tenure charges, pursuant to N.J.S.A. 18A:6-10 et seq., against the respondent, Edna Booth, a tenured teaching staff member. The statement of charges alleged incompetence which, if true, would warrant dismissal or reduction in salary. The respondent was suspended without pay, effective September 19, 1984.

On September 13, 1984, shortly before formal certification of the tenure charges, the respondent had filed a petition with the Commissioner of Education asking for injunctive relief. This petition was addressed to the same charges of incompetence, which had been served upon her by the Board at the end of August 1984, with a request for Ms. Booth to respond to the charges before a Board meeting scheduled to consider the matter on September 17. The respondent asked the Commissioner of Education to rule that the charges of incompetence were in fact charges of inefficiency that would require a 90-day corrective period pursuant to N.J.S.A. 18A:6-12 before formal certification of tenure charges. In addition, the respondent had been assigned to office duties at the beginning of the 1984-85 school year, instead of a teaching assignment. The respondent sought injunctive relief pursuant to N.J.A.C. 6:24-1.5 asking that she be restored to her normal teaching position.

The first petition filed by Mrs. Booth (OAL DKT. NO. EDU 6992-84) was transmitted to the Office of Administrative Law for hearing and determination as a contested case on September 13, 1984, pursuant to N.J.S.A. 52:14F-1 et seq. The petition filed by the Board (OAL Dkt. No. EDU 7561-84) relating to the tenure charges, was subsequently transmitted to the Office of Administrative Law on October 9, 1984. Both matters were consolidated, with consent of counsel, at the time of initial scheduling.

A separate motion hearing was held on September 14, 1984, on the respondent's application for injunctive relief and restoration to a teaching position. The administrative law judge hearing the argument and reviewing the brief entered an order that denied that the charges served on Ms. Booth by the Board should be deemed charges of inefficiency that would allow her rights under N.J.S.A. 18A:6-11 (a 90-day corrective period prior to certification of tenure charges). However, the Board was ordered to assign Ms. Booth to a position commensurate with and comparable to other teacher staff members by September 17.

Suspension of the respondent from her position because of the tenure charges was effective on September 19, and this matter then proceeded to hearing. A prehearing conference was held on November 28, 1984, and a Prehearing Order resulted, defining the

issues and dealing with other procedural matters needed to regulate the forthcoming hearing.

The issues were defined as follows:

A. Did acts or omissions of the respondent, as alleged in the charges, constitute incompetency or other cause for dismissal, pursuant to N.J.S.A. 18A:6-10 et seq., and should the Board's demand for dismissal be sustained?

B. Whether or not any of the charges of incompetency should be characterized instead as inefficiency, which might create differences in procedures that were taken by the Board, in accordance prevailing law and regulations, e.g. N.J.S.A. 18A:6-11.

C. If the charges or any of them are proven, is the penalty of dismissal justified, or should a different penalty be imposed?

The Prehearing Order specifically stated that entry of the prior order did not necessarily preclude the respondent's claims that the charges should be characterized as inefficiency rather than incompetence. That allegation was permitted to be renewed at the time of trial.

The hearing was held at the Office of Administrative Law in Newark, New Jersey, on January 21 and 23, 1985. Three witnesses testified for the Board, and the respondent testified in her own behalf. A list of exhibits marked in evidence is attached hereto. Posthearing briefs were filed by both parties, and the record closed on February 26, 1984, when the last brief was received.

II THE CHARGES

The charges of incompetency against the respondent are divided into nine basic allegations, as follows:

1. Failure to adequately implement the daily lesson plans from the Spanish for Communications Program that she is assigned to teach.

2. Failure to create and maintain an appropriate learning climate in her classroom.

3. Failure to apply sound principles of pupil growth and development.

4. Failure to be reasonable and impartial with her students.

5. Failure to build and maintain an atmosphere of mutual respect.

6. Failure to assign appropriate homework.

7. Failure to be open and receptive to criticism and demonstrate a wilingness to listen and a desire to change.

8. Failure to develop and maintain good relationships with the parents and community.

9. Failure to maintain a pattern of a good attendance and a continuous pattern of excessive absenteeism which has had a deleterious effect on the continuity of instruction.

The specifications underlying each charge, as itemized by the Board, are spelled at length in each paragraph of the allegations, a copy of which is attached to this decision as an exhibit.

After receiving a copy of the charges, the respondent filed a detailed written response. A copy of her answer is also attached hereto as an exhibit.

In opening arguments, counsel for the Board indicated that the Board's case was based upon two overall problems: First, that the respondent's teaching performance and

competence was markedly below standard, and secondly, excessive and continuous absenteeism.

Counsel for the respondent stated that he would attempt to show that the charges were untrue, and that the Board would not be able to prove that she is an incompetent teacher. Additionally, the respondent renewed her argument that the charges or any of them constituted inefficiency, rather than incompetence, and that they therefore should be dismissed because of the Board's failure to permit the 90-day corrective period required by N.J.S.A. 18A:6-11. The respondent further argued that if the charges, or any of them are upheld, then dismissal would be too severe a penalty in any event.

III TESTIMONY AND DOCUMENTARY EXHIBITS

James F. Donovan, Superintendent of Schools in West Orange, testified that he participated in discussions with the Board when the decision was made to file the tenure charges, seeking the respondent's removal. The subject of whether or not the charges constituted inefficiency or incompetency was discussed at length. He felt that the respondent was incapable of correcting her performance because she had been given more than ample opportunity to do so over the past three years without results. Therefore, it was felt that the charges were properly deliniated as incompetence rather than inefficiency.

Dr. Donovan indicated that Ms. Booth had been monitored on an accelerated evaluation program for some time, known as "administrative review." It gives additional help to teachers with problems in the classroom. The respondent was informed of her placement in administrative review as far back as June 1983. The program attempts to improve instruction by providing more frequent and additional evaluations by superiors, followed by conferences.

Vaughn S. Avedian, Principal of Roosevelt Junior High School, also testified for the Board. Ms. Booth taught at Roosevelt between 1979 and 1983. Mr. Avedian completed respondent's evaluations, in 1981-82 and 1982-83. The 1981-82 evaluation

(exhibit P-1) is the first one that showed deficiencies in the respondent's performance. She was given a satisfactory rating for that year in all areas, except in pupil relations, where the performance report indicated that she failed to create an atmosphere of mutual respect. A comment was made that disruptive incidents were not always properly followed up, causing children to lose heart and feel that they should not continue in the respondent's courses. It was recommended that Ms. Booth should establish better communication with the erring students so that a climate of mutual trust and acceptance might be reestablished for the benefit of all concerned.

The respondent replied to the above criticism with a one-page letter of explanation, which in essence disagreed with the criticism and the unsatisfactory rating in pupil relations (exhibit P-2).

The second evaluation performed by Mr. Avedian dealt with the following school year, 1982-83 (exhibit P-3). Two areas were noted that needed improvement and were unsatisfactory: Providing learning opportunities through careful planning, and maintaining classroom discipline. Relating to the first criticism, the written comment stated: "Mrs. Booth has been advised to 'establish clearly defined objectives for the daily lesson and to share these with the students in a formal sense.' Mrs. Booth has also been advised to have her plan book up-to-date showing the objective and the directions to be taken by the teacher to accomplish her objectives with the class." The second criticism carried the following comment: "In observation this year, the need to maintain a climate of student respectfulness for one another and the teacher and attention to the lesson was noted and discussed with the teacher. Also noted was the teacher's need to interrupt her lesson a number of times to admonish student behavior (gum chewing, getting out of one's seat and inattention). Considering the experience of the teacher and the number of times of correction, this points out a disciplinary control situation that is less than satisfactory."

The evaluation report concluded with the further comment that Ms. Booth was recommended for reappointment for the 1983-4 school year, but because of the areas of concern noted in the evaluation, it was recommended that Ms. Booth be placed on administrative review for the 1983-84 school year.

A lengthy written rebuttal to the above evaluation was filed by the respondent (exhibit P-4). Ms. Booth strongly took issue with the evaluator. She also noted that a third category had initially been rated as unsatisfactory: The teacher's effective use of time, equipment and facilities (exhibit P-4).

Mr. Avedian introduced evidence of the respondent's record of absenteeism, which he felt was excessive over the long term. The absences for each year, as listed below, were stipulated to be correct:

School Year	Number of Days Absent
1983/84	16
1982/83	18
1981/82	12
1980/81	20
1979/80	10
1978/79	61 (serious illness and convalescence)
1977/78	19
1976/77	12
1975/76	0 (maternity leave)
1974/75	17
1973/74	16
1972/73	5
1971/72	48
1970/71	18
1969/70	14
1968/69	19
1967/68	12

The above absences represent all of the days that the respondent did not report to work, for all reasons, whether characterized as sick days, personal days, emergency leave or other.

Mr. Avedian testified that in the 1982-83 school year, he spoke to the respondent after each absence. The counseling was related to a letter that had previously been sent to Ms. Booth by the Superintendent of Schools in July 1982, expressing dissatisfaction with her attendance record (exhibit P-5). In that letter, Ms. Booth was advised that she was reappointed for the 1982/83 school year, and that an increment previously withheld because of unsatisfactory attendance was restored to her with the comment that the Board saw no point to withholding the increment any longer since that action seemed to make no appreciable difference in the past. The respondent was given stern warnings about the need for improvement in her overall attendance, and she was specifically told, "Should this attendance problem continue or in any way further deteriorate, the Board will have no choice but to file charges with the Commissioner of Education for your dismissal."

Mr. Avedian concluded his testimony by stating a general belief that the respondent's professional performance had deteriorated to the point where he felt she should be dismissed from her position. In addition to poor classroom and lesson performance, he commented on her difficult relations with students and the excessive absenteeism that had been causing difficulties for the children and the administration because of the loss of daily continuity and constant need to locate hard-to-find substitutes.

For the 1983-84 school year, the respondent was transferred from the Roosevelt Junior High School to the Lincoln Junior High School. Roy C. Knapp, Principal of the Lincoln school, testified at length. Evidently, the respondent started off there on the wrong foot, by failing to report to work on the first day of school, September 7, 1983. When asked for a reason for that absence on such a crucial day, Ms. Booth told Mr. Knapp that she was confused. Soon thereafter, in October 1983, Mr. Knapp performed a direct observation of the respondent, in her classroom, followed by a conference. He stated that her performance was generally good, with two deficiencies, failure to sum up main ideas and a poor transition from one subject to another. His comments were summarized in a written report (exhibit P-6). Appropriate constructive criticism was annexed to the report.

At the beginning of November 1983, noting that Ms. Booth had already been absent from school for six days, Mr. Knapp wrote her a memo on the subject of attendance, expressing his concern. The respondent was specifically told that her absence, for whatever reason, interrupts instruction and subsequently adversely affects student achievement. The principal stated that he was particularly concerned in light of her past record of excessive absences. He noted, that in July 1982, the superintendent had sent her a letter outlining his expectations in terms of improved attendance in the 1982-83 school year (exhibit P-5), but that in spite of this exhortation, she was absent from school 18 times during the year. Mr. Knapp informed the respondent that she simply must find some way to improve her attendance for the rest of the year. He asked her not to hesitate to ask if he could help her in any way.

In September and October 1983, Mr. Knapp had three more conferences with the respondent regarding his expectations in areas in which she was deemed to be deficient. Mr. Knapp emphasized her need to put past problems aside at Lincoln School. He reduced the results of these conferences to writing in a memo to Ms. Booth on January 16, 1984 (exhibit P-8). The memo particularly referred to the classroom observation of October 3, 1983 (exhibit P-6) and a conference held on October 25, 1983, which was also attended by another administrator with responsibility in the language area, Al Lubiner. The memo discussed Mr. Knapp's concern about transitions between activities and culminating activities in the lessons taught by the respondent. She was instructed to closely follow the program as outlined in the daily lesson plans and not to deviate from the curriculum.

Two more conferences were held with Ms. Booth in February 1984, and another memo was written to her by Mr. Knapp on March 2, 1984, to memorialize the results of those conferences. The principal wanted to remind her again of expectations in deficient areas and to clear up any confusion that might still remain on her part (exhibit P-9). That memo was couched in more stern and direct terms. It listed eight clear directives for her to follow with regard to the curriculum, four suggestions to improve her relationships with the children and six personal problem areas. Mr. Knapp testified that by the time the March 2, 1984 memo was written, he had become aware of the existence of serious problems involving the respondent's relationship with the children. This came as a result of direct complaints received by him from children and parents. There is no

question that the tenor of the criticism communicated to the respondent was now showing deep concern about her overall performance.

The respondent was formally observed again on March 12, 1984. A conference was held three days later and a written evaluation resulted (exhibit P-10). Mr. Knapp summarized a primary criticism that was dealt with at length, stating that the children were often not able to keep up with her. It was a first year Spanish class. He suggested that Ms. Booth should prepare the students better for each lesson, in order to increase their efficency and reduce student anxiety about the subject they are learning.

On April 9, 1984, the principal wrote a lengthy memo to the respondent on the subject of relationships with children (exhibit P-11). This followed discussions between them on April 2nd, 4th and 9th, regarding the continuing problems in her relationships with the students. Mr. Knapp indicated that a large number of students had gone to their counselors for help, and that a substantial number of parents called or came to see him personally about continuing and worsening problems with her. Mr. Knapp indicated in the memo that more than 30 of her students had sought some measure of relief or help, and many of them made more than one such contact with guidance or other support personnel. At least seven pupils dropped one Spanish course and a few more indicated that they would complete Spanish I but would change to French I next year. Other students also requested permission to drop Spanish and take alternative languages. Specific complaints in this memo were as follows:

1. She was too "picky," meaning that she sets expectations that are unreasonable and then gives heavy punishments for disobedience.

2. She becomes very arbitrary about things, such as deducting five to ten points on a major test for using pencil rather than pen, or expresses unreasonable dissatisfaction with wrappings for Christmas gifts.

3. She fails to help students when they ask questions or accuses them of asking silly questions on purpose.

4. She becomes impatient when students do not understand and ends up putting them down for not knowing.

5. She takes things personally and becomes defensive. For example, when a child tries to explain something that is bothering him, she will take it personally and will not listen. It was also commented that Ms. Booth carries a grudge against students who get onto her bad side.

6. She is insensitive to students' feelings. Specific examples were given with each criticism. For example, it was noted that on one occasion Ms. Booth did not show up until 8:10 a.m. for a 7:45 a.m. appointment with a student and failed to give the student an explanation.

The memo also indicated Mr. Knapp's feeling that the respondent must become as aware as possible about situations when her professional behavior was having a negative effect on her students. She was asked to analyze the situation so as to identify specific behavior of hers that was leading to the unacceptable results, and to select alternative methods of behaving which have a likelihood of producing better results. The memo ended with a statement that the staus quo was unacceptable.

In his testimony regarding the above, Mr. Knapp referred to three long conferences that preceded the three-page memo (exhibit P-11). Each conference had taken at least 45 minutes. At all times Mr. Knapp felt that his efforts were totally unproductive, because Ms. Booth consistently denied hearing of any of the complaints against her, and her reaction to the criticism was constant denial.

Another formal observation done on April 10, 1984 was followed by a conference and evaluation report (exhibit P-12). This involved a small class of eight students. The report indicates that there was some confusion among the students because they had forgotten previously learned material. Suggestions were made to the respondent that would assist in lesson preparation.

The 1983-84 annual performance report (exhibit P-13) was markedly worse than those for the two prior years. Seven specific areas were indicated that needed improvement. These included "providing learning opportunities through careful planning," "creating appropriate learning climate," "applying sound principles of pupil growth and development," "being reasonable and impartial," "creating an atmosphere of mutual respect," "assigning appropriate homework and tests," and "seeking to improve performance through study and inservice programs." Generally adverse comments followed each of the above. It was noted that the respondent had shown weaknesses in planning, particularly in analyzing lessons to determine when prior learning is needed to support concepts or skills being taught. Under the category of pupil relations, it was noted that Ms. Booth made students feel uncomfortable when they showed that they did not know the material, and that the problems grew to the point where more than the usual number of pupils sought to drop her courses. Other critical comments related to her insensitivity to the students and their problems and a lack of reasonableness on her part. The evaluator wrote that there had been a breakdown in the climate of mutual respect between Ms. Booth and her pupils, many of whom expressed feelings that she put them down and made them feel stupid. There were also some favorable comments, but the general tenor of the evaluation report was decidedly negative.

One subject that was addressed separately by Mr. Knapp in his testimony involved the percentage of the respondent's students who requested a transfer to other language classes. Mr. Knapp concluded that there was a decrease in enrollment for the respondent's next year's class of 30 percent. He felt that this was a markedly higher percentage than in other language classes. The statistics were debated at length when the respondent later testified, and it was obvious that many other factors are involved in transfers from one language to another. Nevertheless, it was a factor considered by the principal in evaluating the respondent's performance.

Mr. Knapp particularly emphasized, in addition to the specific observations related above, his opinion that the respondent was unable and unwilling to accept constructive criticism of any kind. He indicated that she is successful with a relatively small number of students and that because of her defensive attitude, it has not been possible to improve her performance. Mr. Knapp indicated that he does not feel the

deficiencies can be remedied, and he referred to the many hours of conferences over a three-year period that resulted in nothing but a down hill trend in this teacher's performance. He agreed with the other witnesses for the Board that she should be terminated.

The respondent, Edna Booth, testified in her own behalf. She indicated that she began teaching Spanish in the West Orange school district in 1967. The first 12 years were served in the High School (Mountain). After a maternity leave in 1974-76, the curriculum changed from routine Spanish courses to "Spanish for Communication." In 1979-80, Ms. Booth was transferred to the Roosevelt Junior High School where she taught on levels I and II, dealing with students in the eighth and ninth grades. For the next three years, her teaching duties included the Mountain High School as well as Roosevelt Junior High School. For the 1983-84 school year the respondent was transferred to the Lincoln Junior High School. This move was made at her request because she claimed that she was not getting along with the administrators at Roosevelt.

Ms. Booth introduced 14 exhibits into evidence. These documents were observation/evaluation reports, final evaluations and annual performance reports for periods of time between 1968 and 1982 (exhibits R-1 through R-14). In addition, Ms. Booth introduced documents extracted from lesson plans, and a grading system for English (exhibits R-15 through R-17).

The respondent testified at length on the subject of her attendance record. She mentioned that in 1978-79, she was hospitalized several times and needed a long period of recuperation, resulting in an absence for 61 continuous days. In 1974-75, seventeen days of absence all took place in September because of a particular medical problem.

The respondent indicated that in addition to illnesses, she has taken additional time off to care for her daughter. She also observes Martin Luther King's birthday each year, even though it is not a permitted contractual day off. During one year she needed time off to attend court in Trenton. She indicated that aside from the above, she came to work whenever she could, although she realizes that statistically her absences may be more than average.

The respondent acknowledges that she has been continuously warned about excessive absenteeism, especially as memorialized in exhibits P-5 and P7. However, she remarked that she has had no control over her health. When asked if she agreed with her principal's observation that the use of substitute teachers, especially in language courses, presents real difficulties for the students, Ms. Booth remarked that she thinks substitutes can contribute to the learning process, especially if they are competent and qualified.

The respondent then addressed the performance problems that had been presented by the Board's witnesses and that constitute eight of the the nine charges of incompetence.

She described an incident that took place in 1981-82 when two girls threw food at her in the school cafeteria following a series of behavioral problems. That was one of the situations that contributed to the administration's observation that she experienced difficulties in relating to some of the students when they needed intelligent correction. No clear inferences of fault could be drawn from the respondent's testimony about this incident, one way or the other.

Ms. Booth, in her testimony, took issue with the conclusions contained in her evaluations. Criticizing the contents of the October 3, 1983 (exhibit P-6) observation/evaluation report, the respondent argued with the evaluator's statement criticizing her culmination of a lesson. She claims that it would have been impractical to spend more time in culmination activities because of time limitations. Ms. Booth also claimed that her principal, Mr. Knapp, had little expertise in the subject matter in any event.

Referring to another conference that she had with Mr. Knapp and the language coordinator, Mr. Lubiner, who also criticized the transition and culmination portion of the lesson, she again stated that if she were to add time as suggested, it would only take away from lesson time. Furthermore, the respondent claims that she was instructed not to deviate in any way from the daily plan, including a reduction in time.

In response to the charges regarding her poor relationship with the children, Ms. Booth defended the manner in which she related to the students, claiming that her methods were based on experience and practical considerations.

In answer to statements in the charges that she was "picky" when, for example, she compelled students to put all of their books under their chairs, Ms. Booth defended that practice, claiming that it improved the students' concentration during oral presentations. She indicated that afterward she permitted the students to put the books back on their desks.

Responding to charges of arbitrariness when she deducted five to ten points from major tests done in pencil instead of with a pen pursuant to requirements, Ms. Booth referred to the grading system for English, represented by exhibit R-17. That document explained how grades for each marking period are constituted. It states that "zeros for being unprepared (homework not done, book not brought to class, pen and pencil not brought to class, etc.) are averaged in with your group I grades." Although the exhibit does not mention anything specific about a deduction of points from tests for using a pencil instead of a pen, Ms. Booth feels that the grading system permits such an inference.

In reply to charge number three, the respondent denies ever having accused children of asking silly questions.

In response to charge number four, she denied being impatient with the children. Ms. Booth further denies charge number five, which states that she takes too many things personally and becomes defensive. She disagreed with that assessment, indicating that she has made special efforts to look for opportunities to make the children more comfortable if she thought they felt set upon by her.

The respondent testified that no students came to her in 1983 and 1984 to complain that she was putting them down or was being impatient with them. However, she had no knowledge of students who might have voiced their complaints to counselors or administrators, rather than to her. She also denied a comment made in charge number

six that she fails to analyze objectives clearly and to then assign appropriate review homework, so that lessons can proceed in an orderly fashion. Denying that was an accurate statement, she said that she gave the assignments to homeroom teachers to hand out, instead of to the children.

In general, Ms. Booth stated that she never noticed any diminution in the energy, interest or motivation of her students in recent years, as compared to earlier years.

Responding to criticism of her class management activities in the 1983-84 annual performance report (exhibit P-13) Ms. Booth stated that she knows of no existing 30-minute plan. The adverse comment on that subject reads "Observations indicate that she has some difficulty covering the material allotted 30 minutes in the daily lesson plans during the 45 minutes of class, due to lack of anticipation of student needs when she plans."

Replying to the testimony by the Board's witnesses about an excessive number of students requesting to be transferred out of her Spanish classes, the respondent denied that the number was accurate. She acknowledged that some students dropped her courses, but stated that there were many explanations for the transfers. Some students were never fully in the course in the first place, others never showed up at the beginning of the term, and others transferred to different classes that she taught. The point that Ms. Booth made was that fewer students actually dropped her classes than was claimed by the administration.

The respondent also supplied specific data to show that the number of Ds and failing grades she gave were not excessive.

IV FINDINGS OF FACT

Having heard the testimony and observed the witnesses and having reviewed the exhibits and considered the argument of counsel, I **FIND** the following **FACTS**, by a preponderance of the credible evidence:

1. The foregoing discussion and the uncontroverted facts stated therein are incorporated herein by reference.

2. The uncontroverted facts include the respondent's record of absenteeism, stipulated to by counsel and listed above.

3. It was stipulated by counsel and is found to be fact that the respondent's salary increments were withheld twice, once in 1979-80 (which was later restored) and again in 1981-82. Both increments were withheld based upon Ms. Booth's excessive absenteeism.

4. The respondent has taught Spanish in the West Orange School District for approximately 15 years, beginning in 1967. For 12 of those years, except for a continually high rate of absenteeism, her performance was satisfactory.

5. During most of the years that the respondent had been employed in the West Orange School District her annual number of days absent, for all reasons, has exceeded or has been at least equal to the maximum number allowable in the sick leave policy.

6. Beginning in the 1981-82 school year certain noticeable deficiencies began to show-up in the respondent's performance. These deficiencies were pointed out to her immediately and in detail by her supervisors and the administrators. Notice of the problems was given to her orally and in writing, in the form of detailed observation and evaluation reports and conferences.

7. The number of deficiencies and their seriousness accelerated substantially, becoming more pronounced in the 1982-83 school year and even worse in the 1983-84 school.

8. Problem areas were as follows:

   a. The respondent failed to create and maintain an atmosphere of mutual respect with her students;

   b. the respondent did not prepare adequately for each day's lesson;

   c. the respondent had difficulty maintaining classroom discipline;

   d. the respondent's use of lesson time became inefficient;

   e. the respondent failed to accomplish continuity in the lessons through appropriate transitions and in insufficient culmination or recapitulation of materials that were presented in the lessons;

   f. the respondent failed to assign homework that would adequately prepare students for daily lessons;

   g. the respondent departed too often from daily lesson plan formats;

   h. the respondent did not use positive forms of motivation to induce favorable student behavior and academic performance;

   i. respondent's disciplinary measures were often inappropriate and disproportionate to the offenses committed and results desired, and there was a noticeable increase in the level of anxiety among students relating to their participation in class. The respondent's relationship with students had deteriorated. She imposed disproportionately heavy penalties upon them for mere nuisance types of behavior and she required them to comply with unimportant details;

j. the respondent deducted academic points from test results because of failure to follow instructions such as using pen rather than pencil;

k. the respondent was inappropriately impatient with her students and insensitive to their needs;

l. the respondent became defensive with her students and maintained grudges if disagreements arose;

m. the respondent failed to give careful considered answers to questions when students were confused or asked for information.

9. Because of many of the above problems with her students, more than the usual number transferred out of her courses.

10. The respondent became unsuccessful in her teaching efforts with a relatively high percentage of her students.

11. An unusually large number of students and parents complained to the administration about problems with the respondent.

12. In the 1982-83 school year, the respondent was placed on administrative review, which is a system of accelerated evaluation and additional help for teachers with problems in the classroom.

13. Over a period of three years, in 1981-82, 1982-83 and 1983-84, the administration and the respondent's supervisors engaged in many hours of conferences and attempts to help the respondent with her deficiencies.

14. Despite the long-term attempts to help her over the period of three years, the respondent's superiors made no headway, and the problems only worsened and continued to accrue.

15. Most importantly, Ms. Booth resisted all attempts to correct her deficiencies, and she was continually defensive about all complaints. The respondent was unable to accept constructive criticism without becoming unduly defensive. She always seemed to have a reason why any criticism leveled against her, constructive or not, was invalid.

16. All of the negative factors mentioned above in the respondent's performance does not necessarily mean that her teaching was totally ineffective. There were many beneficial and favorable aspects to her performance, as seen in the exhibits. However, the deficiencies mentioned above weighed heavily on the students and depreciated the quality of the learning experience they were entitled to.

V CONCLUSIONS OF FACT AND LAW

Inefficiency or Incompetency

The respondent has repeated her argument that the charges of incompetency should have been characterized as inefficiency instead. The applicable statute, N.J.S.A. 18A:6-11 states that:

> . . . . if the charge is inefficiency, prior to making a determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency.

In 1977, the Department of Education, through its Division of Controversies and Disputes, developed and distributed a document entitled Guidelines for Implementation of the Tenure Employees' Hearing Law. The guidelines are not formal rules and were compiled and distributed merely to assist local boards in their preparation for tenure hearings if such a need for assistance is desired. The guidelines stated that "Inefficiency presumes that the teaching staff member is capable and competent to perform the specific duty or function, but is performing that duty or function in a careless, ineffective or inefficient manner." The guidelines also state that during the 90-day improvement

period allowed to the inefficient teaching staff member, members of the administrative or supervisory staff should make reasonable efforts to provide assistance to the teacher to overcome the specific inefficiencies.

The intent of N.J.S.A. 18A:6-11, as it relates to charges of inefficiency, is designed to give a teacher who has rendered satisfactory service in a school district an opportunity to demonstrate that he or she can still be an effective teacher. A board of education is under no obligation to file charges of inefficiency against any teacher. If it determines through its administrative and supervisory personnel that a teacher lacks the capacity or is no longer capable of performing properly, the board may file charges for those reasons pursuant to the statute. Furthermore, the statute is sufficiently broad so that a board may file tenure charges against a teacher for "just cause." Nevertheless, the statute also provides that a teacher may be charged with inefficiency, so that a board of education can have an opportunity to further measure the teacher's ability to continue to perform well. If and when such a course of action is chose by the board, the teacher then must be given a reasonable opportunity to correct the deficiencies by the end of the improvement period (90 days).

The record in this case is replete with voluminous evidence showing that the respondent's supervisors and the administration put forth long-term, considerable and constant efforts to assist the teacher in improving her performance in the classroom. Those efforts took place over a period of three years, and the respondent consistently failed to respond to the apparently sincere and genuine efforts of the staff to assist her during all of that time. In fact, the opposite was true. Ms. Booth was defensive, unwilling to accept constructive criticism and indeed, hostile. The Board's attempts at correction extended over a much longer period of time than 90 days, as contemplated in the statute.

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); In the Matter of the Tenure Inez Inis McRae, School District of the City of Trenton, Mercer County, 1977 S.L.D. 572; In the Matter of the Tenure Hearing of Francis M. Starego, Borough of Sayreville, Middlesex County, 1967 S.L.D. 271, aff'd State Board of Education 1968, S.L.D. 273; In the Matter of the Tenure Hearing Renee Sokolow, 1982 S.L.D. _____, aff'd State Board of Education 1983, S.L.D. _____.

Under the facts and circumstances involved here, the time within which the Board might have served the 90-day notice of inefficiency in order to give the respondent time to correct her deficiencies had long since passed, and it is **CONCLUDED** that the Board's choice of incompetency was correct and reasonable.

Law Applicable to the Charges

In any case involving tenure charges, a Board of Education has the burden of proving the truth of the charge or charges by a preponderance of the competent and credible evidence. In the Matter of the Tenure Hearing of Arlene Dusel, School District of the Borough of Sayreville, Middlesex County, 1978 S.L.D. 526; In the Matter of the Tenure Hearing of Madeleine Ribacka, Sussex-Wantage Regional School District, Sussex County, 1978 S.L.D. 929; In the Matter of the Tenure Hearing of Fred Brown, School District of the City of Bayonne, 1970 S.L.D. 239.

Nine separate charges of incompetence were filed by the Board. The last charge alleges excessive absenteeism. The first eight charges involve deficient teaching performance and related attitudinal problems.

N.J.S.A. 18A:28-5, dealing with the tenure of teaching staff members provides:

> The services of all teaching staff members including all teachers,. . . 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 a teaching staff member or other just cause.

See also N.J.S.A. 18A:6-10 et seq.

The charges of incompetency involved in this matter, if true, clearly constitute just cause under the statute. Excessive absenteeism can also be characterized as unbecoming conduct.

If it is determined that the charges or any of them are true, it then becomes necessary to address the question of the appropriate penalty action to be taken. The

statute, N.J.S.A. 18A:28-5, speaks of dismissal or reduction in compensation. Factors to be taken into account in making a penalty determination include the nature and circumstances of the incidents or charges, the teacher's prior record and present attitude, and the likelihood of such behavior recurring. In the Matter of the Tenure Hearing of Frederick Ostergren, School District of Franklin Township, Somerset County S.L.D. 185, 187. Also, in determining the respondent's fitness to continue in the position, the courts pronouncement in Redcay v. State Board of Education, serves as a concise guideline.

> . . . . Unfitness for a task is best shown by numerous incidents. Unfitness for 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 . . . 130 N.J. at 371.

Absenteeism

Dealing first with the absenteeism charge, it is axiomatic that a tenured teaching staff member must be available to teach on a consistent basis if he or she is to provide the services which the employer and the students are entitled to expect. The respondent's consistent pattern of absenteeism over the period of many years that she was employed by the Board demonstrate that in her case neither the employer nor the students obtained the full benefit of the services to which they were entitled. The acknowledged record of respondent's absenteeism is decidedly unacceptable and excessive. It is unfortunate that some percentage of the absences were caused by medical or personal problems. However, the respondent also failed to adequately explain much of the absenteeism, and many days were taken off without sufficient justification. Furthermore, the respondent received many stern and clear warnings about the problems her absenteeism was creating and the adverse affect it was having on the educational scheme. None of these warnings were heeded, and the pattern of absenteeism never improved despite them.

Furthermore, the respondent's attitude towards the problem was particularly cavalier. In her answer to the charges (see attachment) she stated:

> - - - -
>
> 9. Finally I am charged with continually poor attendance. I understand that the administration is dissatisfied with my attendance, but is my attendance so bad (14 days in 1983-84) that I should be fired rather than denied an increment?

In her testimony, the respondent acknowledged that her rate of absenteeism was higher than average, and she admitted that she received the formal warnings given her by the Board. Yet, she could point to no instance where she attempted to reverse the pattern. Evidently, she is willing to engage in a permanent trade off: continued excessive absenteeism in exchange for loss of increments. Such a situation is clearly unacceptable. The Board has a right to expect a great deal more.

> Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom . . . . The entire process of education requires a regular continuity of instruction with the teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with the assigned teacher is vital to this process. In the Matter of the Tenure Hearing of Catherine Reilly, 1977 S.L.D. 403, 414.

The Commissioner concluded in Reilly that since pupils are required to be in regular attendance in the public schools, there should be no lesser requirement placed upon the teachers who are there to serve those pupils.

It is therefore **CONCLUDED** that the Board has proven charge nine, excessive absenteeism.

In deciding on an appropriate penalty based upon excessive absenteeism alone, the Commissioner has consistently held in favor of boards in tenure cases where teachers have been found to be excessively absent, In the Matter of the Tenure Hearing of Ada A.

Prince, 1982 S.L.D. _____, aff'd by Commissioner (July 30, 1982); In the Matter of the Tenure Hearing of Rosalind Copel, 1981 S.L.D. _____, aff'd by Commissioner (January 6, 1982); In the Matter of the Tenure Hearing of Elizabeth Merkooloff, 1980 S.L.D. 1364, aff'd State Board of Education (June 3, 1981). In addition, the Commissioner and the courts have consistently upheld board action in withholding increments where excessive absenteeism was found, even when based upon legitimate medical reasons. See Trautwein v. Board of Education of Bound Brook, 1978 S.L.D. 445, aff'd State Board of Education 1979, S.L.D. 876, rev'd per curiam (N.J. App. Div.) 1980 S.L.D. 1539, certif. den. 84 N.J. 469 (1980); Angelucci v. West Orange Board of Education and Nehemiah v. West Orange Board of Education, 1980 S.L.D. 1066, aff'd by Commissioner of Education 1980, S.L.D. 1077.

Of course, the measure of proof needed to uphold the withholding of an increment, which is the mildest statutory disciplinary measure available to a board, is substantially less than the quantum of proof needed to justify a suspension or dismissal for the same reason. Hillman v. Board of Education of Caldwell - West Caldwell School District, Essex County, 1977 S.L.D. 218. In increment withholding cases, the burden of proof is on the teacher to show that the action of the board is arbitrary and capricious, whereas the burden of proof is on the board to justify a suspension or dismissal of a teacher. Certainly, it has been more common for boards to withhold increments when dealing only with problems of absenteeism. In the case at hand, if the absenteeism was all that was involved, there might be a serious question as to whether or not dismissal is too severe a penalty. However, in this case the excessive absenteeism is but one of nine charges all of which must be considered collectively before a penalty decision can be reached.

Charges of Incompetent Performance

In addressing the subject of the respondent's deficiencies in teaching performance, it is obvious that after approximately 12 years of satisfactory service in the district, the respondent has undergone a metamorphosis. Her performance has dropped substantially below normal expectations, and it has been declining and getting worse for a period of three years. The administration has spent the better part of three years in

attempts to help her, and she has been given a great deal of latitude and opportunity. The only result has been a worsening of the situation and of her negative attitude.

The facts lead to the following affirmative **CONCLUSIONS** as to each of the first eight charges:

1. The respondent has failed to adequately implement the daily lesson plans that she is assigned to teach.

2. The respondent has failed to create and maintain an appropriate emotional learning climate in her classroom.

3. The respondent has failed to apply sound principles of pupil growth and development.

4. The respondent has failed to be reasonable and impartial with her students.

5. The respondent has failed to build and maintain an atmosphere of mutual respect with her pupils.

6. The respondent has failed to consistently assign appropriate homework.

7. The respondent has failed to be open and receptive to criticism. She has demonstrated a distinct unwillingness, over a period of three years, to listen to suggestions for improvement and change.

8. The respondent has failed to develop and maintain good relationships with parents of her pupils and with the community.

Penalty

On the question of penalty, the Board should not be compelled to retain a teacher with the foregoing deficiencies unless there is a good possibility that a lesser penalty than dismissal would cause a substantial change for the better in her performance and record of absenteeism. Unfortunately, all of the evidence points in the direction of continuing negative answers. The respondent has had more than ample warning and counseling, but she has not responded positively. Her attitude was and is mainly defiant and defensive, and her performance never rose to the level of reasonable acceptability, despite consistent efforts by the administrative staff over a period of three years. A certain amount of defensiveness, is to be expected when someone is criticized, but that defensiveness must be tempered with a sense of constructive acceptance. No such direction has been shown by the respondent, and the the situation should not be allowed to continue. The tenure laws should not serve to protect incompetence beyond a reasonable amount of due process and consideration for the problems of the employee. The welfare of the students must be the first consideration.

> Evaluation of a teacher's competency is generally a matter of total impression over a period of time.
> In the Matter of the Tenure Hearing of Francis M. Starego, Borough of Sayreville, Middlesex County, 1967 S.L.D. 271, 272 aff'd State Board of Education 1968 S.L.D. 273;
>
> . . . .the findings set forth herein comprise a series of many incidents which demonstrate respondent's unfitness to hold a post. The Commissioner holds, therefore, that respondent is found to be incompetent. . . .
> In the Matter of the Tenure Hearing of Inez McRae, School District of the City of Trenton, Mercer County, 1977 S.L.D. 572, 585.

In Starego, the Commissioner of Education also stated:

> The paramount purpose of the public schools is to provide a thorough and efficient education for the children of the district. That purpose would be vitiated by protection in their employment of teachers who are proven to be inept and incompetent. 1967 S.L.D. 274.

See also, Redcay v. State Board of Education, supra.

It is unfortunate that such an action must be taken after 15 years of teaching experience. However, as mentioned above, the Board has given more than adequate consideration to the length of service by the respondent. After three years of bona fide attempts, without results, to reverse the respondent's incompetence and absenteeism, the Board's position becomes reasonable. See Board of Ed. of Lawrence Towsnhip v. Lester Helmus, 2 N.J.A.R. 334 (1980), where a tenured teacher with 17 years of experience was dismissed from his employment due to his lack of classroom control and incapacity to teach in his assigned area.

It is therefore ultimately **CONCLUDED** that the respondent has given the Board just cause for dismissing her and causing a forfeiture of her tenure protection, pursuant to N.J.S.A. 18A:6-10 et seq. Under the circumstances, the penalty of dismissal is not excessive or unreasonable.

VI ORDER

It is therefore **ORDERED** that the respondent be **DISMISSED** from her position as a tenured teaching staff member employed by the Board of Education of the Township of West Orange, Essex County.

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

OAL DKT. NOS. EDU 7561-84 & EDU 6992-84

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

March 29, 1985
DATE

ARNOLD SAMUELS, ALJ

APR 29 1985
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

APR 29 1985
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

dm/e

IN THE MATTER OF THE TENURE :

HEARING OF EDNA BOOTH, SCHOOL DISTRICT OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

The record and initial decision by the Office of Administrative Law have been reviewed. Exceptions were filed by respondent within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

The thrust of respondent's exceptions focuses on the argument that (1) the judge's summary and findings of fact are wholly unsupported by the record; (2) he repeatedly misstated and omitted facts; and (3) the facts in this case do not support a determination of incompetence. Respondent's lengthy exceptions are summarized below.

Respondent renews the argument that the charges certified against her constitute "inefficiency" as opposed to "incompetence" and that it was legally improper to deny the 90-day corrective period required by statute. With respect to the issue of incompetency versus inefficency she excepts to the judge's summary of the superintendent's testimony. Specifically she alleges that the judge is inaccurate when stating that the superintendent testified she had been "given more than ample opportunity to [correct her performance] over the past three years without results." (Emphasis supplied.) (Initial Decision, ante)

She asserts that the superintendent testified that she had been reviewed during 1983-84 and that her performance during that one year led the Board to conclude that there was no room for improvement. (Tr. I-16) She believes this to be significant given the fact that the charges are of incompetency.

A review of the transcript indicates that the superintendent's testimony with respect to the decision to file incompetency charges is as follows:

> "Q. Why did you come to the conclusion that it was incompetency as opposed to inefficiency?
>
> A. We felt that Mrs. Booth had been placed on an administrative review which is allowed for a continuation or increased number of observations that the individuals there had had numerous meetings with Mrs. Booth during this school year [1983-84] with Mr. Knapp in an attempt to resolve some of the problems.

> At that point, my feeling was, basically, that perhaps there was no room for improvement in this case." (Emphasis supplied.) (Tr. I-16)

Further, respondent asserts that the judge's reading of the record is strained when describing the superintendent's testimony to the effect that she had been "monitored" on an "accelerated" evaluation program (administrative review) for "some time" and that she had been informed of being placed on such review in June 1983. (Initial Decision, ante) She contends that P-3 merely states that she was being "recommended" for administrative review and that the record shows she was not informed until sometime during the 1983-84 school year that she was actually on such review. In addition, she considers it "ironic" that the review program is described as accelerated when she was evaluated once in October 1983 and then not again until March 12, 1984.

Upon review of the record, the Commissioner finds this argument without merit. Respondent was clearly notified in her annual performance evaluation for 1982-83 that she would be subject to administrative review during 1983-84. (P-3) The record amply supports that there were numerous conferences and meetings held between her and the principal regarding her performance for the school year in question, 1983-84.

Respondent's exceptions focus next on the judge's review of her evaluations which she characterizes as "noteworthy for its omissions." (Exceptions, at p. 3) She provides nearly six pages of objections (Exceptions, at pp. 3-8) to his review and summary of facts, eventually asserting that his "summary of facts inevitably influenced his Findings of Fact. And just as the summary is flawed, so are the Findings." (Id., at p. 8)

The Commissioner has conducted a thorough examination of the entire record in this matter to assess the merit of the points raised by respondent with respect to the alleged "flaws" in the factual recitation and findings by the judge. A summary of the alleged flaws and the Commissioner's determination in regard to them will now be addressed:

1. While the judge states the first sign of deficiency in respondent's performance since 1967 appeared in May 1982 and notes that for this evaluation (P-1) 25 out of 26 categories were satisfactory, he totally ignores the underlying event which gave rise to the only negative criticism in that evaluation.

2. With respect to the next evaluation the annual performance report for 1982-83 (P-3),

respondent contends the judge failed to state that the one category in the prior evaluation marked as needing improvement was then "satisfactory." She alleges he focused on the 2 categories out of 26 marked as needing improvement when a review of the entire document "precludes any conclusion that [she] was either an ineffective teacher or one who was incapable of improvement." (Exceptions, at p. 4)

3. For the October 3, 1983 evaluation (P-6), the judge correctly notes it was essentially favorable but for 2 criticisms relating to recap of the lesson and rough transitions. However, respondent stresses that she was concerned that compliance with the principal's suggestion for longer recap would require her to deviate from the district's prescribed daily lesson plans (DLPs). She emphasizes that the principal was under the erroneous assumption then and at the hearing that the DLPs cover only 30 minutes of class, leaving 15 unplanned minutes, when the plans actually cover 40 minutes out of 45 minutes of class time.

4. Respondent alleges that the best example of the judge's "tendentious tone and misleading omissions" deals with the annual performance report of May 1984 (P-13) which is the most negative of all the evaluations. Specifically, she argues he accepts the Board's position that the percentage of students electing to take Spanish II from Spanish I was far below the percentage of other language classes when it simply is untrue. She alleges the judge chose to ignore that the percentage enrolling in Spanish II, although lower than that for French, was far higher than that for Italian.

5. The judge ignored all of respondent's testimony regarding (a) her practice of having the students put their books on a rack beneath their desks only during oral warm-up, as suggested at a foreign language teachers' meeting, and not for the whole class period and (b) her rationale for deducting test score points on major examinations only.

6. The judge misstates a fact on page 11 of the initial decision with respect to the distribution of homework assignments to homeroom teachers. She points out that one of the complaints against her was that she interrupted the administration of a MBS test to give students homework. Her testimony was that the homework was given out during homeroom, not during the test. Further, the judge refused to allow into the record a document verifying this. (Tr. II-45)

7. The judge accepted the Board's assertion that an "excessive" number of respondent's students transferred out of her classes. She argues that, aside from the number of students in Spanish I (1983-84) who enrolled in Spanish II for 1984-85, the Board offered absolutely no evidence of the number who transferred out of her classes. She, on the other hand, provided testimony for each of her five classes that, of those students actually enrolled in September, only two dropped out, leaving early in the semester. (Tr. II-49-54) Hence, Finding No. 9 that "more than the usual number transferred out of her classes" is wrong. (Initial Decision, ante)

8. Finding No. 10 (at p. 19) which states respondent was unsuccessful with "a relatively high percentage of her students" is similarly wrong. She argues that the only evidence of grades was proffered by her which demonstrates very few D's and F's were given; those that were, fell within a range the principal stated would be acceptable. (See Tr. I-126; Tr. II-54-55)

9. Finding No. 11 (at p. 19) concludes "[a]n unusually large number of students and parents" complained about respondent. She asserts the record does not support this. While one evaluation states 30 students complained to a guidance counselor, she contends no such counselor testified, no documents were produced, and the principal himself was aware of only 6 or 7 complaining students. (Tr. I-148-149) No parents or students testified.

10. Finding No. 12 (at p. 19) states she was placed on administrative review in 1982-83 when it was actually 1983-84.

In addition to the above, respondent contends that in all instances the judge accepted the Board's arguments, even when no proof was offered and her proofs showed the Board to be wrong. Further, nowhere does he mention that from 1967-1982 she was continually lauded for (a) her "excellent rapport" and relationship with students; (b) her "commendable" planning and organizing; (c) her encouragement of students; (d) her well-executed lessons; (e) her "successful classroom exercises" and "concern for developing an atmosphere that enhances learning, healthy attitudes and her compassionate concern for the student." (See R-1 through R-13.)

Respondent contends that the above-cited praises (and many more) are relevant not just because they show at least until 1982 she was an excellent teacher but, more importantly, they demonstrate she was praised in the very same areas that she is now condemned. This is relevant she believes because "incompetence" means that she could never improve in these areas.

Further, respondent argues, inter alia, that (1) the judge accepts the administrative review procedure as replacement for the statutory 90-day period, asserting that "this transparent evasion of the law should not be condoned, especially where, as here, the charges clearly sound in traditional inefficiency." (Exceptions, at p. 10)

With respect to respondent's first allegation cited above, the Commissioner notes that the record demonstrates that the first sign of alleged deficiency in respondent's performance arose out of and after an incident in which two students threw food at her. In the Commissioner's judgment the criticism with respect to respondent's need to improve in creating "an atmosphere of mutual respect" is not supported by the record. Given the factual circumstances underlying this criticism as testified to by the principal and respondent, the inclusion of it in her annual performance report (P-1) is determined to have been unreasonable. The principal testified as follows when addressing the area in need of improvement:

> "*** I felt that there was a loss in teacher/pupil communication and rapport throughout the year and I could refer to a specific incident if so need[ed].
>
> Q. Whatever went into your evaluation.
>
> A. There was an incident that continued over a considerable amount of time concerning two girls. They were disciplined. Their parents were contacted. In one case, the parent came into school and, in both cases, both students felt that they had no chance to successfully complete the course and were removed from the course. That was in, I'm going to say, March or April of 1982.

Q. What was Mrs. Booth's relationship with her students, in your opinion?

A. In 1981-82?

Q. Yes.

A. Generally, it was okay." (Tr. I-46-47)

On cross-examination, the principal testified that his recollection was that the students were assigned after-school detention and apologized for the incident. (Tr. I-69) The Commissioner finds the record barren of evidence that respondent acted in any way improperly or deficiently in the events giving rise to the criticism. The record indicates by way of her unrefuted testimony that she reported the students to the appropriate authorities, met with the principal, then the parent and principal, whereupon the students were removed from her class about 10 days after the incident. (Tr. II-16-18)

Given the fact that the circumstances involved in the aforesaid single incident may have had possible racial overtones and given respondent's dissatisfaction with the degree of punishment meted out to the students involved, the removal of such students from respondent's class hardly substantiates an assertion in her evaluation that she needed to improve in creating " an atmosphere of mutual respect."

Having so determined, it is noted that any deficiencies in respondent's performance with respect to the incompetence charges are herein restricted to the school years 1982-83 and 1983-84.

As regards the second allegation summarized above, the Commissioner notes that respondent is correct in pointing out that the annual performance report (P-3) developed for the 1982-83 school year does rate the above-cited area for improvement as satisfactory. Further, he also notes that an observation/evaluation report developed by the high school principal (respondent taught in a junior high and Mountain High School during this year) was extremely favorable with no weakness whatsoever pointed out. (R-14)

The junior high principal testified that he evaluated respondent once during 1982-83 (Tr. I-43) and that the individual evaluation of her performance for that year "was made with her on May 24th of 1983." (Tr. I-50) Because of respondent's disputing the evaluation which required meetings with him, the superintendent and possibly the assistant superintendent, the annual evaluation was not finalized until October 3, 1983. (P-3; Tr. I-50-51) The record does not reveal what input, if any, the high school principal's favorable view of respondent had into this final annual performance report.

There were 3 areas out of 26 rated as needing improvement: (1) provides learning opportunities through careful planning; (2) maintains classroom discipline; and (3) makes efficient use of time, facilities, and equipment. (P-3) With respect to the first area, the establishment of clearly defined objectives to be shared with students and up-to-date plan book "showing the objective and directions to be taken" to accomplish the objectives are cited as items in need of improvement. The second area, discipline, reflects concerns with maintaining a climate of student respectfulness for one another and respondent's need to interrupt her lesson a number of times to admonish students' behavior. In the third area of concern, weaknesses are noted in her ability to conduct out-of-classroom activities, such as field trips and student organization for Foreign Language Week. The principal's testimony does not elaborate on the first two areas. (Tr. I-51) For the third area, he does state that a "field trip really created a tremendous amount of problems for the school." (Tr. I-51) The evaluation report states she left for the New York trip too early and arrived back at school 1 hour and 40 minutes later than scheduled without any notification that they would be late. (P-3, at p. 3)

The principal also testified that "there were other things that were included in my initial report that were subsequently removed because of contract." (Tr. I-51)

Upon careful review of the record including the evaluation reports for the 1982-83 school year (P-3; R-14), the testimony of the junior high principal who developed the annual performance report (Tr. I-50-66) and respondent's rebuttal to the annual report (P-4), the Commissioner finds the three areas in need of improvement do identify weaknesses noted by the junior high principal. However, assuming arguendo the concerns are as so stated, the evaluations unto themselves cannot be seen as supporting a charge of incompetency but must be reviewed within the context of 1983-84. There is, however, a very serious concern relative to respondent's attendance cited in P-3 which consumed a significant amount of testimony in this case. The concern reads, "as of March 15, 1983, Mrs. Booth has been absent from school 10 days; 1 day for personal business and 9 days for illness." (at p. 4)

This is significant because respondent had been subject to an increment withholding during 1981-82 for excessive absence, the second time in three years such action had been levied against her. On July 9, 1982, she was warned by the then superintendent that "[s]hould this attendance problem continue or in any way further deteriorate, the Board will have no choice but to file charges with the Commissioner of Education for your dismissal." (P-5) The record reveals that her total absence for 1982-83 was 18 days despite this clear warning.

The Commissioner will hold in abeyance a determination with respect to the attendance issue until the other allegations raised in respondent's exceptions have been dealt with.

As regards the October 3, 1983 evaluation/observation report (P-6),[1] the Commissioner duly notes that it was done by a different principal than any mentioned previously as respondent was transferred to Lincoln Junior High School for the 1983-84 school year. A review of the record with respect to this observation/ evaluation report indicates that it was a positive one overall. Two areas of weakness were noted, although it is stated all the elements of a good lesson were present.

The two criticisms noted go to the heart of the dispute regarding planning and what flexibility exists for accommodating change as suggested by the principal. There is no question that the Daily Lesson Plans (DLPs) designated in the Spanish for Communication Program to which respondent must adhere are extremely structured plans specifying 50 minute strategies as evidenced by the title of the document itself. (R-15) Each segment of the lesson has very specific time allocations ranging from 1 minute to 6 minutes. Respondent is correct in stating the principal believed the DLPs covered 30 minutes of the 45 minute class period while the record seems to indicate that they actually account for 40 minutes of instructional time. (Tr. I-135) The DLPs submitted to the record by respondent (R-15) all consume 40 minutes of instruction. On cross-examination, the principal stated he believed the DLP reviewed with respondent was for 30 minutes and that there were both 30 minute DLPs and 50 minute ones; however, no documentation was submitted to the record to support his belief. Respondent's testimony must stand in that the Board's attorney chose not to cross-examine her on any issue but attendance/absenteeism and her testimony was supported by the above exhibit.

A memo from the principal to respondent dated January 16, 1984 summarized the October 3, 1983 observation and October 25, 1983 meeting held with the Foreign Language Coordinator. This document (P-8) states:

> "***In our conference with Mr. Lubiner, it was decided that you closely follow the SFC [Spanish For Communication] program as outlined in the daily lesson plans (DLP) provided in the teacher's guide. We agreed you would not deviate from the curricula.***"

The principal goes on to express his belief that within the framework of the DLPs, respondent could accommodate activities to address his concerns.

Upon review of the record, the Commissioner finds that the weight of the evidence demonstrates the DLPs account for 40 minutes of instructional time out of a 45 minute class period. However, he

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[1]It is to be noted that the above report is an additional report as distinguished from the final 1982-83 annual performance report finalized on the same date.

agrees with the principal that there appears to be no significant conflict in respondent structuring her teaching to address his concerns. The Commissioner cannot help but observe that what was unquestionably a favorable observation but for two relatively minor points became a source of conflict. In the Commissioner's judgment this occurred in part because of respondent's defensiveness and lack of receptivity to constructive criticism.

The remaining formal observations for 1983-84, P-10 and P-12, identified problems in student preparation and lesson structure for the former and a problem in a portion of the latter dealing with antonyms. This problem was in relation to a previously stated concern about student recollection of previous lessons and was linked to the final exercise. The first half of the lesson was deemed to have gone well. (P-12) For both evaluations the recommendations for corrective action are directly related to expressed concerns.

Of the three areas identified as needing improvement in the annual performance report for 1982-83, two were rated as satisfactory in the 1983-84 annual report (P-13), "maintains discipline" and "makes efficient use of time, facilities and equipment." The planning item is again rated as in need of improvement. By far, this 1983-84 evaluation is the most severe and highly negative one received by respondent during her teaching service. Seven new items are rated as in need of improvement. Much of the negative criticism focuses on complaints received from students and parents, her resistance to constructive criticism and poor attendance. The performance report includes a chart showing comparative figures for 1983-84 and 1984-85 enrollments in the various foreign language programs at Lincoln Junior High. It attributes the drop in enrollment for Spanish II from Spanish I to weaknesses in respondent's instruction and poor pupil relations. There is also reference to a very high rate of attrition in her classes contained in the report.

The Commissioner finds it unnecessary to examine the factual bases for each of the various criticisms contained in this annual report because a review of the total record has convinced him that, at best, what might be proven, even if arguendo all criticisms were valid, is inefficiency rather than incompetency for the following reasons.

In the Matter of the Tenure Hearing of Patricia Nafash, Ridgefield Bd. of Ed., decided by the Commissioner March 12, 1984, summarizes well the important distinction between an incompetency charge as oppposed to one of inefficiency. It reads in part:

> "***The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of class-

> room teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18A:6-11, would be a useless exercise. (See, Tenure Hearing of Inez McRae, 1977 S.L.D. 572, 584.) Incompetence requires proof that the affected person, regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher. School Dist. of Tp. of East Brunswick, Middlesex Cty. v. Renee Sokolow, OAL DKT. EDU 6440-81 (Nov. 5, 1982), adopted, Comm'r of Ed. (Dec. 20, 1982). [affirmed State Board May 4, 1983]***"
>
> (Slip Opinion, at p. 37)

In the Commissioner's judgment, the only long-term recurring problem sustained by the record is that of poor attendance. At best what is demonstrated beyond this is the fact that in 1982-83 respondent exhibited some problems in planning that continued into 1983-84 and that in 1983-84 many more problems were identified by the principal in terms of pupil relations, planning and executing lessons, willingness to accept constructive criticism and a seemingly high attrition rate in the numbers of students continuing their study of Spanish.

An examination of respondent's teaching service prior to the 1982-83 annual evaluation (P-3) indicates extremely favorable evaluations. Respondent is correct in stating much of the praise received was related to matters later cited as deficiencies by the Board in its incompetency charges. While a prior history of good evaluations does not unto itself preclude incompetency charges, it does demonstrate that respondent has the ability to perform satisfactorily in at least eight of the nine charges.

In the Commissioner's judgment, the record herein does not demonstrate that respondent is so lacking in competency to perform the responsibilities of a classroom teacher that the 90-day improvement period would be a useless exercise. Much of the highly negative information in the record is based on pupil and parent complaints, yet no testimony or documentation was submitted to the record with respect to these complaints. The Commissioner could not in good conscience attribute a cause and effect relationship between respondent's alleged poor pupil relations and weakness in instruction to the decline in the percentage of students enrolling in Spanish I and Spanish II when a multitude of variables affect a student's choice of language to study.

Further, there is much conflicting information in the record with respect to the "drop out" rate in respondent's class enrollments. Her testimony regarding transfers and drops for the five periods of Spanish taught is direct and persuasive (Tr. II-49-54) and yet the Board's attorney declined to cross-examine this testimony and the Board did not submit documentation with respect to

this issue. In addition, the Commissioner cannot help but note that, if reliance on a decline in the percentage of enrollment for the second level of a language were for argument's sake considered appropriate, the attrition rate from Italian I to Italian II is, as respondent asserts, a higher percentage than that for Spanish.

The Board in this matter acted to charge respondent with incompetency rather than inefficiency. The Commissioner determines that the Board has failed to meet its burden of proof that respondent is incompetent for the reasons stated herein and he rejects the judge's conclusions of law that the Board's choice of incompetency was correct and reasonable because the Board's attempts at correction extended over a much longer period than the 90 days contemplated in N.J.S.A. 18A:6-11. He also rejects the conclusion that "***the administration put forth long-term, considerable and constant efforts to assist the teacher in improving her performance***" and that those efforts took place over a period of three years. (Initial Decision, ante) The record demonstrates that 1983-84 was the only year a concerted effort may have been made to help respondent improve on perceived teaching weaknesses. At best what may be documented herein is inefficiency as in Nafash, supra. However, inefficiency has not been charged against respondent and no written notice or 90-day improvement period was provided as required by N.J.S.A. 18A:6-11. This statute mandates that:

> "***if the charge is inefficency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency.***"

The Commissioner does, however, determine that the allegation of excessive absenteeism is supported by the record and that it does constitute just cause for action against respondent. Her absence record, as cited ante, is repeated below:

School Year	Number of Days Absent	
1983-84	16	
1982-83	18	
1981-82	12	
1980-81	20	
1979-80	10	
1978-79	61	(serious illness & convalescence)
1977-78	19	
1976-77	12	
1975-76	0	(maternity leave)
1974-75	17	
1973-74	16	
1972-73	5	

1971-72	48
1970-71	18
1969-70	14
1968-69	19
1967-68	12

The pattern of absence shown above is one of long-term, persistent, chronic absenteeism. Despite two withholding of increments, one in 1979-80 and one in 1981-82, respondent's absenteeism continued to increase. In July 1982 she was warned that, if her attendance did not improve she would be subject to tenure charges and yet her absences increased the next two years. It becomes obvious that increment withholding did not prove to be an effective sanction in relation to her absenteeism.

Numerous school law decisions have repeatedly emphasized that frequent absences of teachers disrupt the continuity of the instructional process and learning as correctly cited by the judge in his analysis of the attendance issue. Prince, supra; Kopel, supra; Merkooloff, supra; Trautwein, supra Excessive absenteeism can result in dismissal or disciplining of a tenured staff member even when the absences are for legitimate reasons. Trautwein, Merkooloff

In considering an appropriate penalty to be levied in this matter, the Commissioner does not believe that a monetary sanction would be effective given that two increment withholdings have proven to be unsuccessful in improving her attendance. In addition, the indifference or "cavalier" attitude respondent showed in her answer to Charge No. 9 does not lend credence to the likelihood a monetary sanction would be any more successful than it was previously. Her answer is repeated below:

> "9. Finally I am charged with continually poor attendance. I understand that the administration is dissatisfied with my attendance, but is my attendance so bad (14 [16] days in 1983-84) that I should be fired rather than denied an increment?"
>
> (Initial Decision, ante)

The Commissioner finds the judge's comments on the above answer very pertinent. It reads:

> "In her testimony, the respondent acknowledged that her rate of absenteeism was higher than average, and she admitted that she received the formal warnings given her by the Board. Yet, she could point to no instance where she attempted to reverse the pattern. Evidently, she is willing to engage in a permanent trade off: continued excessive absenteeism in exchange for loss of increments. Such a situation is clearly unacceptable. The Board has a right to expect a great deal more." (Initial Decision, ante)

Having carefully weighed the record and the factual circumstances regarding respondent's absenteeism, it is the determination of the Commissioner that such absenteeism constitutes just cause for her dismissal. He thus adopts the recommended order of the Office of Administrative Law dismissing respondent from her tenured teaching position but reverses the findings and determinations of the other eight charges due to the Board's failure to demonstrate incompetency.

Accordingly, it is ordered that Respondent Booth be dismissed from her tenured position as of the date of this decision.

COMMISSIONER OF EDUCATION

MAY 31, 1985

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7231-84
AGENCY DKT. NO. 386-9/84

ARLENE KLEIN,
Petitioner,
v.
BOARD OF EDUCATION OF ROSELLE PARK, UNION COUNTY,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner & Hunter, attorneys)

Steven S. Glickman, Esq., for respondent (Pachman & Glickman, P.A., attorneys)

Record Closed: April 8, 1985 Decided: April 17, 1985

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

The Board of Education of Roselle Park (Board) denied an increment for the 1984-85 school year to tenured teaching staff member Arlene Klein. Klein argues that the Board's action was invalid for failure to comply with the written notice requirement of N.J.S.A. 18A:29-14 or arbitrary, capricious and without good cause. The Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

Prehearing was held on November 2, 1984 and the case was heard on January 21, 22 and 23, 1985. (Transcripts designated as 1T, 2T and 3T respectively). During the briefing period, petitioner asked that time be tolled on the briefing schedule so that a motion to dismiss based on facts recently discovered could be filed and determined. Petitioner filed the motion March 4 and the briefing schedule was revised to provide additional time for response to the motion. The record closed April 8, 1985 with receipt of respondent's reply. A list of exhibits entered into evidence is appended to this decision.

The Motion to Dismiss

The parties do not dispute that early in January 1984, all members of petitioner's bargaining unit received a separate retroactive check covering the contract increase, including an incremental step increase. Subsequently petitioner's paycheck covered what she would have received if the Board had not denied an increment for 1984-85. Petitioner did not question anyone in authority to determine why the denied increment was included in her check even though at the time, (January) she attended hearings to contest the denial. No later than February 11, 1985 the superintendent was aware that petitioner was being paid the contested increment. The payment continued at least through March 4, 1985. The Board states that payment was inadvertent and the result of clerical error.

I **FIND** this to be true since none of the facts in petitioner's affidavit are significantly inconsistent with the Board's affidavits. No resolution expressly restoring petitioner's increment was adopted.

I **CONCLUDE** that, absent a resolution expressly restoring petitioner's increment which was previously denied on June 5, 1984 by official action of the Board, payment of the denied increment, whether inadvertent or by directive of the superintendent or other supervisory employee, cannot serve as a basis for overturning official action of the Board. Only the Board is authorized by N.J.S.A. 18A:16-1 to fix and alter the compensation of teaching staff members. While the Board has the power to ratify an action of the superintendent in some circumstances, it has not done so here. Petitioner's arguments seizing upon inadvertent payment as a bar to effectuating increment denial for the school year are without merit.

Petitioner characterizes her motion as one to dismiss for mootness. This is somewhat misleading, since a petitioner's proper stance would be withdrawal of his or her petition if the case were moot. Rather, the motion was to add a new grounds to obtain the remedy sought based on new facts not known until the end of the hearing. The remedy would be to bar recoupment of the increment inadvertently paid. It is entirely proper to consider matters based on new evidence when it can be done expeditiously and will preclude filing of a new petition. Based on my conclusion above, however, the motion must be **DENIED** and if the increment was denied for good cause, inadvertent payment does not bar recoupment.

Procedural Conclusion

This petition seeking restoration of an increment is one of that class of cases in which a Board does not send the teaching staff member a formal writing expressly relating the reasons for denial subsequent to its official vote to deny. While the reasons for the action and the actual knowledge of petitioner of those reasons eventually were clearly set forth through testimony, this did not occur until the Board presented its case, toward the end of the hearing. The petitioner has the burden of proof and thus proceeds first. Without a clear statement of the Board's reasons for denial, however, it is not possible for a petitioner to focus the testimony intensively on the issue of whether or not the Board had a reasonable basis for its factual conclusion, the standard of Kopera v. Bd. of Ed. of West Orange, 60 N.J. Super. 288, 295 (App. Div. 1960). This situation is particularly troublesome in cases where statutory written notice has not been given, but it occurs in every increment denial case because of the review standard which must be applied to discretionary Board actions.

Absent the Board's reasons, the hearer cannot make rational evidentiary rulings on the relevance of counsel's questions to the factual issues. Thus the petitioner's case may be scattershot and wide ranging. Since the respondent feels obligated to meet any points made by petitioner, the entire proceeding becomes unduly attenuated. The procedural problem in increment cases does not appear to have been previously addressed by the Commissioner. The leading case is Huth v. Bd. of Ed. of Morris Plains, 1980 S.L.D. 847. (July 28, 1980).

While it would be preferable for a Board to issue the written notice of increment denial and reasons therefor required by N.J.S.A. 18A:29-14 as soon as it becomes aware of a deficiency in its procedure, an ALJ could direct that this be done in a prehearing order.

At hearing, the teaching staff member has the burden of proving that the Board acted in a patently arbitrary way, without a rational basis or induced by improper motives. Kopera, at 294. The hearer is instructed to determine whether the facts underlying the basis for supervisory opinions and the Board's conclusion of denial are true. To allow the teacher to disprove those facts, the Board must make them known at the hearing. I CONCLUDE that, although a teacher has the burden of proof, the Board should go forward with the burden of the production of evidence of its basis for withholding the increment and the facts underlying it. The petitioner can then focus his or her testimony on whether or not the underlying facts presented are true, and the hearer will know the facts in issue to make relevance rulings and the transcript will be reviewable in an orderly fashion. Consistent with this concluson, I will deal with the Board's testimony first, and then the facts and arguments offered by petitioner.

Discussion of Testimony

The Board presented its superintendent, Ernest J. Finizio, Jr. and Marie Placco, part-time director of pupil services, as witnesses. Arlene Klein holds a position as a school social worker and is on a Child Study Team (CST) member. She is the only social worker employed by the district. As such, she reports to Director Placco who also serves as school psychologist on a CST. Since the district is a small one, and Director Placco actually participates on a CST herself, she is very familiar with the work of the team members, including Klein, whom she evaluates. Placco had determined, as a result of her evaluation of Klein in the 1982-83 school year, that certain areas of Klein's responsibilities needed improvement, and so advised Klein. Placco kept rather careful records of Klein's work in areas where she felt improvement should be made.

Superintendent Finizio had little or no direct interaction with petitioner, and relied on the evaluations, the recommendations and underlying facts presented to him by Placco.

He was unable to recall with specificity much of the information about petitioner which was related to him by Placco. Director Placco, however, was able to recall and testify concerning the facts and data which she related to the superintendent.

The events which constitute the actual notice to petitioner of the reasons for denial of her increment for 1984-85 occurred toward the end of the chronology of facts. The story is more readily understood when recited in chronological order, however; thus facts concerning notice will be set forth near the end of the findings of fact below.

Petitioner Klein testified and called both Finizio and Placco who readily confirmed, inter alia, that they had no complaints concerning the number of hours worked by Klein and that she often put in extra time. Rather, as will be found in the testimony of Placco, the deficiencies they observed in her work related to a failure to organize her work to adhere to specific priorities and complete specific tasks, as directed, so that the CSTs would complete their work within Federal and State mandated time frames.

Petitioner also sought to elicit testimony from the superintendent concerning the propriety of assigning a school social worker duties of an attendance officer, and his understanding of the appropriate number of social workers in a school district. There appeared to be several thrusts to petitioner's theory: first, that petitoner was given too heavy a work load; second, that a State mandate exists for hiring one social worker or CST for a certain pupil population, and third, that assigning a social worker to perform certain attendance functions results in an impermissible conflict with the professional responsibilities of a social worker. On the last point, petitioner called as her witness Jeffrey Faue, a Ph.D. in social work, who was executive director for the National Association of Social Workers in New Jersey for 11 years.

Dr. Faue pointed to standards approved by the Social Workers Association (Exhibit P-15), specifically standard 31 of 32. That standard suggests that risks (of blurring the appropriate function of social workers) arise when social workers assume routine attendance enforcement duties. Parenthetically, the 32nd standard tells social workers they have an obligation to support their professional association. Faue also testified that

the Association considers 1500 pupils to be the maximum number that a CST can work with. This testimony together with some of petitioner's own testimony was properly objected to as irrelevant. The testimony was allowed because until Placco's testimony at the end of petitioner's case the issues to be reviewed under the Kopera standards were insufficiently focused.

While it is possible that in some circumstances, testimony concerning the appropriate terms and conditions of employment could have a bearing on whether or not a Board has a reasonable basis for denial of an increment, the findings below do not exhibit such circumstances. For example, let us assume that one teacher was assigned to do the work of two at year-end due to the unexpected unavailability of another. This might be the subject of a grievance, but conceivably if the teacher had too great a volume of work and could not complete it, the issue might become relevant in an increment denial case. But if the teacher's argument is that he or she was assigned a high school English class of 33, whereas the teachers' association says that its professional standards mandate a maximum class size of 25, that point is not relevant to an increment denial issue under the Kopera rule. Even if the State Board adopted a maximum ratio of CSTs to pupil population, such standard would be for the benefit of school children, not as a control on the terms and conditions of employment of teaching staff members, and the rule would very likely not be relevant to whether a Board had a rational basis for denying an increment.

Another focus of petitioner's testimony was the notice issue. Petitioner professed to have little or no recall of the circumstances of and from her evaluation meeting with the superintendent and his recommendation for a denial of increment through the official action of the Board to deny. For example, at 2T78; Board counsel attempted to elicit from Klein the fact that the superintendent discussed her evaluation and made known his intention to recommend increment withholding:

> **Q:** Do you recall having a meeting on or about March 30th, '84 with the superintendent regarding this evaluation?
>
> **A.** I don't recall it but I believe it took place. I'm sorry.

Q. Do you recall any of the specifics of that meeting?

A. No, I'm sorry.

* * * *

At 2T82:

A. I don't recall the meeting. I just have a complete blank.

Q. Now when you say you don't recall the meeting, previously you said you recall the meeting took place?

A. I said - I believe I said that I think the meeting took place or words to that effect. But I don't honestly - - - I can honestly say that I blanked out on that. I get an increment thing like this and it wasn't pleasant.

Later, Board counsel attempted to elicit from Klein the fact that she knew the basis for the recommendation for withholding an increment because the reasons were only those stated on her evaluations and file memos which documents she had received. (at 2T90).

Q. Now, you mentioned some material that had been supplied to the Board by the superintendent. Do you know what that material was?

A. I never saw it. I don't know - - I was told that it had to do with my file and that I was acquainted with it. I never saw it?

Q. Who told you that?

A. I was told at the Board meeting, but I never saw it.

* * * *

At 2T91:

Q. And you say you were told at the Board meeting that the material that was given to them was material in your file which you were acquainted with?

> **A.** The terminology, I believe, there was nothing from there that Mrs. Klein probably is - - is probably aware of or words to that effect. I did not receive it. I did not see it. I did not at any time even when I submitted my information received from the Board the information that was distributed to the Board.

Board counsel asked Klein whether the superintendent told her he had not yet made his decision to recommend at some point in time after the evaluation conference and prior to his letter of April 19 offering her an opportunity to appear before the Board on May 1: (at 2T95):

> **A.** I don't remember our conversation. I don't remember the date but he did indicate that he was not - - - had not come to a decision.
>
> **Q.** Did he tell you on what basis he would be making his decision?
>
> **A.** Not to my knowledge, I don't remember. I don't believe he did.

Petitioner's testimony must be assessed in the context of the documents, Exhibits R-1 through R-11 and 3T3 to 5; the transcript quotes Klein's representative's opening statement before the informal Board hearing at which petitioner presented her case against the superintendent and supervisor's recommendations to withhold her increment. There is a clear statement by the president of the Board of what petitioner already knew: that her evaluation was the basis for the recommendation and what the Board was considering. Further, in petitioner's filed objection, dated April 2, 1984, to the evaluation on the last page, she states, "I object to the accusations made with regard to my professional responsibilities and the withholding of increment. I believe that the recommendation [of Mrs. Placco] is unfair and is made without understanding my duties as a social worker with additional job of attendance. There also appears to be no regard for improvement or positive performance."

The credibility of petitioner's testimony concerning her knowledge of the proposed

increment withholding and the reasons for it must be viewed in light of the entire record, portions of which are highlighted above, and the fact that subsequent to the evaluation, discussion of it with the director and the superintendent, the filing of an objection to the recommendation, and an invitation to appear on the issues at the Board's consideration, an informal hearing was held before the Board in May 1984 for petitioner to controvert the evaluation and recommendation. The credibility of the witness suffers in this context and the sophistry of the arguments concerning lack of knowledge and lack of notice is apparent.

Findings of Fact:

1. Petitioner has been a school social worker in Roselle Park for 14 years; her work load has changed from time to time, since at one time she was a part-time attendance officer with a stipend; due to a decline in student population to 2,000 in recent years, a half-time social worker position was abolished in June 1981 leaving petitioner as the only regularly employed social worker for one and one-half CSTs.

2. In 1981-82, an attendance officer was hired and the Board also authorized having a social worker on a per case basis if the need arose.

3. In 1980-81, the County monitored the District's special services because backlogs existed: mandatory CST time frames were not being met and documentation of reasons for extensions of time were incomplete in some caes.

4. As a result of the County review and suggestions, Director Placco reorganized the work and procedures of CST personnel and removed or reduced numerous tasks previously a part of petitioner's work load in 1981-82, to assure that she would have time to complete her assigned work. (R-6, page 2 and 3T34:7 to 3T50:13).

5. In her May 1983 evaluation, Placco pointed out deficiencies in petitioner's work, specifying numerous underlying facts such as unreasonable time lags in completing case work and setting forth specific time frames within which case work was to be completed. Portions of this evaluation concerning directives and improvement areas are incorporated by reference in the evalutaion for the year in issue, 1983-84. (Exhibit P-6, page 1).

6. Placco did not recommend withholding of an increment in her May 1983 report, but she did commence monthly monitoring of petitioner's work in 1983-84, advising petitioner of deficiencies of the same type previously noted such as delays in completing CST tasks and giving specific directives for improvement. (September 1983, Exhibits R-9; October 12, 1983, Exhibit R-8; November 15, 1983,Exhibit R-7; January 4, 1984, Exhibit R-10).

7. Due to the small size of the district and Placco's dual functioning as both director and half-time school psychologist, she attended almost every CST meeting and was able to observe, evaluate and monitor petitioner's work very thoroughly (3T51:7 to 56:25).

8. On January 9, 1984, Superintendent Finizio had a conference with petitioner to discuss her progress in removing the deficiencies and making the improvements as stated in his June 13, 1983 review of Placco's evaluation of May 1983. He memorialized certain improvements but noted more improvement was needed in specific areas for which earlier directives had been given (Exhibit R-5).

9. On March 21, 1984, Placco gave petitioner her evalution for school year 1983-84 to date (Exhibit R-3) and recommended that her increment for

1984-85 be withheld. The following deficiencies were listed in support of the recommendation:

1. Lack of an organized system for efficient follow-ups (medical, optical reports, 417 forms, etc.).

2. Lack of organized, efficient system to follow-up attendance and enforcement of Board's attendance policy.

3. Observations and communications with pupil to be included in social histories which should be done in sequence to comply with 60-day time requirement.

4. Requiring reminders to respond when time lines to obtain information or data have previously been given by director.

5. Home visits done days or weeks later when need is immediate.

6. Planning of work not geared to priority of responsibilities.

7. Need for more awareness of outside resources available to parents and students.

10. Placco's evaulation also indicated that petitioner's deficiencies affected the overall program: not meeting the deadlines, ineffective follow-ups and failure to prioritize CST needs adversely impacts CST performance of pupil evaluations.

11. Placco further explained the seriousness of petitioner's work deficiencies: the CST's work cannot proceed when parental consents, medical reports, interviews, social histories, attendance reports and follow ups on missing items are not completed in time to be presented at the CST meeting to classify or evaluate a particular child and draft his or her IEP proposal (3T57:1 to 61:10).

12. For example, the follow-up system required that if no reply was received in two weeks, a second request must be sent, and subsequently,

a third if data is still missing. Each attempt, letter or contact is required to be recorded. Placco reviewed both petitioner's recording system and the individual student's case file and personally observed that the system was not being followed. (3T60:19 to 62:21).

13. Another example of failure to follow directives on time frames concerned the requirement stated in the May 1983 evaluation that the social history be dictated within a week's time of the input conference. (Exhibit R-6, page 1, #4, reocmmendation). Placco had the typists note precisely when each report was received for typing and testified that typing was always completed within a day or two: thus she was able to prove and did prove that petitioner was not following the time lines and that it was not a result of delays in having reports typed (3T89:1-9; 3T106:12-107:24).

14. After giving petitioner a copy of her March 1984 evaluation, Placco discussed it with Superintendent Finizio, showing him memos and reminders she had previously sent to petitioner and some of her own documentation upon which the evaluation was based. (Most of these items were not allowed into evidence based on petitioner's objection that they had not been supplied in discovery 3T67:5-25).

15. Documentation supporting petitioner's adverse evaluation concerning attendance and 417 Form follow-up was among the items given to the superintendent (Exhibit R-7, memo to petitioner dated November 14, 1983).

16. Placco supported her evaluation that social history interviews did not always include observation or interview of pupils, as required by law, with her memo advising petitioner of the problem and several specific examples of cases indicated by pupil's initials. (3T73:21-74:25). She also showed Finizio a list of referrals, their dates, and the dates social

history interviews were done by petitioner to support the fact that they had not been completed in accordance with known 60-day requirements. (3T75:10-77:6).

17. In similar fashion, Placco proved the facts underlying the deficiencies noted in her evaluation, to Superintendent Finizio for all other items noted in it. (3T77:13 to 90:20).

18. Superintendent Finizio requested that Placco show him documentation of her efforts to help petitioner overcome the deficiencies, as a result of which she prepared R-11 on March 29, 1984 which was not given to petitioner, but which is for the most part, merely a list of all the memos, observations, performance reports, conferences and progress reports either sent to or had with petitioner. The only additional items in R-11 are reiterations of deficiencies already noted in the documents.

19. On March 30, petitioner had a conversation with Finizio regarding the date and procedure when the Board would be hearing her evaluation. (3T18:4-15; 3T19:6-14).

20. On April 2, 1984, petitioner submitted her written objections to the March 1984 evaluation, stating, "I object to the accusations made with regard to my professional responsibilities and the withholding of increment." Much of petitioner's rebuttal concerned complaints of unreasonable work load, noting that the Board's newly implemented attendance policy required additional work and that any attendance duties were incompatible with the duties of a social worker.

21. At a Board meeting on April 5, 1984, Placco presented petitioner's March 1984 evaluation including underlying memos and reports) in petitioner's presence and the Board agreed petitioner could appear to

rebut them at its May 1 meeting. (2T69:10-12; 3Tlll:5,6; 3T3-6).

22. On April 19, 1984, Superintendent Finizio notified petitioner in writing that he was recommending withholding of her increment for 1984-85 and that she was entitled to opt for an open Board session (Exhibit R-1).

23. A representative of petitioner asked the superintendent if he could submit information to the Board on her behalf prior to the May meeting; Finizio asked him to deliver the items so that the Board could get them by Friday before its meeting. (3T7:15-20).

24. Finizio told the representative that when he dropped off petitioner's materials, he could pick up a copy of the packet that he, Finizio, was submitting to the Board.

25. The superintendent then went over the documents to be sure that all items had previously been given to petitioner by either Mrs. Placco or himself. The packet contained exhibits R-3 through R-10 in evidence. (The same documents transmitted to petitioner in the course of discovery and retained intact by the superintendent. 3T21:19 and 3T8:1 to 11:3).

26. On the Friday before the Board meeting, petitioner came to the superintendent and told him her representatives advised her not to submit any documentation in advance of her presentation to the Board, and Finizio told her that the packet being submitted to the Board contained only items she had and offered to let her check her personnel file so that if she did not have a copy of a document in the packet, she could make a copy. (3T8:5-21).

27. On May 1, 1984, petitioner was permitted to appear before the Board with her union representative, Ronald Harvey, and present her

objections and rebuttal to the evaluation which was the basis of the recommendation to withhold an increment. (3T:3-6).

28. Notwithstanding that the packet of documents in question had been discussed at the April Board meeting in the presence of petitioner, that a Board member assured her at the May 1 meeting that there were no new or added documents, and that petitioner stated that she received the evaluation including the recommendation to withhold an increment, petitioner and her representatives maintain that they had no notice, either written or oral, of the reasons for the recommendation.

29. The Board deferred action on the superintendent's recommendation until its June 5, 1984 meeting and petitioner was advised by the superintendent in writing on June 1, 1984 that the Board would act upon the question at that time. (Exhibit R-2).

30. The Board voted to withhold petitioner's increment on June 5, 1984, at a meeting at which she was present.

31. No further notice or statement on the matter was sent to petitioner.

Conclusory Findings

32. Petitioner has been aware since June 1983 of almost all of the specific deficiencies noted in her March 1984 evaluation which constitute the reasons for denial of an increment.

33. The March 1984 evaluation and recommendation to withhold an increment, which was in writing, and exhibits R-3 through R-10, which specify in writing facts and directives underlying supervisor Pacco's reasons, were all in petitioner's hands before and through the course of the Board's deliberations.

34. Although neither the superintendent nor the Board ever sent petitioner a writing stating, "For the reasons stated in your evaluation of March 1984 and the facts underlying same, your increment is being denied" (or, "denial of your increment is recommended"), it is patently clear that first the superintendent, and subsequently the Board (after two meetings at which the matter was thoroughly explored), adopted the position Director Placco stated in various writings.

35. Both the superintendent, quite explicitly, and the Board, more generally, were aware of the facts underlying the reasons for denial and petitioner's allegations of unreasonable work load. Although fully set forth before the Board, petitioner's statements did not overcome the good cause shown for denial.

36. Petitioner did not disprove any of the underlying facts, since the director or her agents kept meticulous records of work in progress and the director carefully monitored classified pupil case files in which every action taken was required to be recorded. The statements of fact underlying the evaluation were true.

37. Petitioner's defenses were almost entirely collateral: she claimed that the pupil population, both on a total and classified basis, was beyond her capacity to service; that any attendance duties exacerbated the problem as well as being incompatible with her functions as a social worker, and that she was not responsible for late doctors' reports, "late" interviews with parents or home visits not made when the director thought they should have been made. On the last point, the superintendant made it quite clear that it was the dates of follow-up, not the dates of receipt of the material from others, which were unsatisfactory.

Conclusions of Law

N.J.S.A. 18A:29-14 clearly and unequivocally requires that when a Board withholds an increment, "it shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned." Petitioner argues that the Board's failure to comply with the statutory notice bars implementation of its action. The statute does not, however, state that the Board's action is void absent the required notice. The remedy for non-compliance is not specified.

The Board offered no explanation for its failure to follow clear statutory mandate. The Board could have complied by stating that its reason was the deficiencies stated in the March 1984 evaluation and facts underlying the supervisor's opinion therein. Further, there is no explanation as to why the superintendent did not offer the same explanation in writing to petitioner when advising her that the Board would consider the matter. It is true that the district is a small one and the persons involved are all on a first name basis. Nevertheless, inordinate amounts of hearing and briefing time result from a failure to follow appropriate procedures and notify parties fully in writing.

I would be inclined toward finding the statutory notice to be jurisdictional, in a case where there is no writing subsequent to Board action (as distinguished from when a petitioner argues that the notice was incomplete). The Commissioner has, however, interpreted the statute otherwise in the case of Janet Huth v. Bd. of Ed. of Morris Plains, 1980 S.L.D. 847. In that case, a principal served notice on a teacher of an overall unsatisfactory evaluation. The teacher filed a statement of rebuttal. The superintendent informed the teacher in writing that he would recommend withholding her increment on the basis of her evaluations for that year which he felt spoke for themselves. Subsequently the Board voted to withhold the increment, but did not state its reasons in writing. Although in the instant case, the superintendent did not specify the reasons in the letter stating he was recommending denial but instead relied on the evaluation and recommendation in writing of the director of special services, the proofs here show that the reasons and rebuttal to them were more fully considered by the Board than in the Huth case. Here, petitioner was notified of the Board's consideration of the question and

was permitted to appear twice before them; on the second occasion she was invited to present her case in an informal hearing format, and the Board did not vote on the issue until a third meeting. In the Huth case, the teacher was not offered notice in advance and an opportunity to be heard before the Board.

Based on the precedent of the Huth case and the findings above, **I CONCLUDE** that petitioner was well aware that her evaluation was the reason for the recommendation and the Board, which had the same documents before it which served as the basis for the superintendent's and director's recommendation, together with petitioner's live rebuttal of them, clearly based its vote to withhold an increment on the reasons given to them on the evaluation and underlying facts stated in writing by the director and adopted and transmitted to them by the superintendent. I therefore **DENY** a motion to dismiss based upon failure to strictly adhere to the procedural format prescribed by N.J.S.A. 18A:29-14.

Kopera teaches that it is not for the hearer to determine the evaluation of a teaching staff member and thus substitute the hearer's judgment for that of the supervisory personnel who made the evaluation. Here, the superintendent and the Board acted based upon the evaluation of the director of special services, but neither acted blindly or without full consideration. The superintendent personally ascertained whether the facts underlying the director's statement of deficiencies were true and considered petitioner's filed objections to the evaluation as well as all the supporting documents in her file, all of which she had seen. Then the Board considered the same documents, heard petitioner preliminarily, granted her request to make a full presentation and did not vote until the next meeting following, following her full presentation, which assured time for deliberation.

The deficiencies listed in the evaluation were of the category of inefficiencies. Thus, for example, a conclusion of failure to meet work priorities of CST need, included as one underlying element, failure to provide and record follow-up to obtain required medical reports. That element, in turn, would include data gathered from review of numerous individual files and a card file. It should be obvious that the time and effort to prove or disprove every underlying instance of the conduct complained of at a hearing would seriously inhibit a Board from withholding an increment in a case of this kind

since it would consume thousands of dollars in staff and attorney time. Another underlying element brought out above was the failure to dictate social histories in order of priority and promptly after interviewing. Proof of underlying facts supporting those conclusory facts would present the same procedural problem.

The Board did offer proofs of a number of examples of the conduct complained of which elicited the adverse evaluation. When inefficiency is the basis for Board action, (presupposing numerous "underlying" facts) the intention of the legislature in granting a Board the discretion to withhold increments as interpreted in the Kopera court is frustrated if Kopera is read to require a hearing on all the underlying facts. The review standard in Kopera for discretionary actions of a Board has some analogy to an appellate standard. Since whether or not the teaching staff member was in fact "unsatisfactory" is irrelevant as a matter of law, (Kopera, at 295, 296), in a case such as this, the deficiencies stated as conclusory facts in a case grounded on inefficiency should constitute the underlying facts within the meaning of the Kopera standard, or else, as a practical matter, no school board is likely to pursue withholding an increment based on inefficiency. It should be kept in mind that withholding an increment is not punitive but rather grant of an increment is intended to reward "capable and efficient principals and teachers." and "to separate the able from the sufferable." (Kopera, at 298). I **CONCLUDE** that, where inefficiency, whether that word is actually used or not, is the thrust of an evaluation report, the rating is reasonable if supported by specific factual descriptions of deficiencies, without reference to each and every underlying action or omission which supports that factual statement.

Such an interpretation of the Kopera holding in cases of this type (inefficiencies) would clarify the procedural burdens of the parties. The Board would first go forward with the burden of producing evidence, namely, offering the evaluation or evaluations which formed the basis of withholding the increment. The evaluation itself states the deficiencies or inefficiencies, in this case, seven. (See, #9 of findings). Assuming that these can be understood as statements of fact (e.g. scoial worker lacks an organized system for efficient follow ups for medical and optical reports, 417 forms etc.), the Board needs to produce nothing more. Since the petitoner has the burden to prove unreasonableness (Kopera, at 297), he or she must then show that the facts are not as the

Board claimed and that the conclusion of the Board that the work was performed inefficiently or in an unsatisfactory manner was unreasonable.

Alternatively, the Board can produce all the underlying data and records of minutae initially so as to avoid having to produce them on rebuttal, since petitioner will have attempted to prove the statements of fact in the evaluation are untrue by his or her testimony. In the instant case, petitioner's testimony disproved very few, if any, of the innumerable incidents in the recorded data. From all the testimony and documentation, I **CONCLUDE** that it was not unreasonable for the evaluators to conclude that petitioner's work was insufficiently worthy to support reward of an increment based on the inefficiencies which were proved to exist.

Petitioner accurately describes the holding in Kopera on page 21 of her brief but then adds to the review standard certain arguments without any support in the Kopera holding: "In addition thereto, added elements imposed upon the Commissioner in reviewing increment withholdings are the legality or lack thereof of the Board's action and due process." Petitioner then specifies several alleged illegalities, one of which is alleged lack of notice, that is, lack of a statement of reasons. I have already dealt with the notice issue adversely to petitioner based on Huth.

Petitioner next argues that the Board's conduct is illegal in that it does not employ enough social workers or CST members for its pupil populations, citing Cochran v. Watchung Hills Regional H.S. Bd. of Ed., 1983 S.L.D. ____ (September 26, 1983). Under the facts of that case, the Commissioner found the need for a full time CST with a student population of 1425. Here, the Board has more than one CST. Further, the State Board has not adopted a mandatory staffing standard. Lastly, even if such a standard had been adopted, it would be irrelevant since its existence would not controvert the inefficiencies found or the reasonableness of the Board's action. Whether or not the Board is providing a thorough and efficient education and all the services required by law and rule is not the issue in an increment withholding case.

Next, petitioner social worker alleges that assigning to her attendance duties is "legally and ethically ultra vires." Like the last point, this is not an issue in an increment

withholding case and is irrelevant to the proofs required under a Kopera review standard. I agree that it is a conflict in duties for a social worker to prosecute a nonattendance case in court as distinguished from being required to appear as a witness. It would be educationally preferable for the attendance officer to pursue nonattendance at that level. It is not for me to interfere with the Board's management prerogatives absent violation of some rule of the State Board, however. In any event, nonattendance cases which reached the level of court action were few on an annual basis and therefore did not consume any substantial proportion of petitioner's time. Petitioner argues that the opinion testimony of an officer of her professional association and herself that a social worker should not be performing attendance duties supports allegations of an illegal work assignment. This is tantamount to stating, arguendo, that because the N.E.A. adopts a professional code of ethics stating that no teacher can serve more than 20 children in an elementary classroom, assignments in excess of that number are illegal and no teacher given such an assignment can be found inefficient. The argument is without merit and is not relevant to the review under Kopera standards. The same is true of the argument that a social worker may not be assigned to obtain and follow up on medical records needed by the CST.

Lastly, petitioner argues that the observations of petitioner must be suppressed, not admitted in evidence, or not considered and thus the evaluation must fall. This argument is based on rule N.J.A.C. 6:3-L21 and its interpretation in Carney v. Freehold Regional H.S. Bd. of Ed., 1984 S.L.D. ___ (July 20, 1984), which concerns a guidance counselor and which must be viewed in the context of its factual record from which the Commissioner concluded that the guidance counselor's evaluation had been based on casual contacts, hearsay evidence or gut feelings rather than formal observations. The facts in this case concerning the director's observations are utterly inapposite. The director is herself the psychologist member of petitioner's CST and since the district is very small, the director in both her capacities interacts with the social worker and observes her work almost on a day-to-day basis. The district's observation form is designed for classroom teachers, however (R-7) and is not appropriate for reporting social worker observations. The director thus attached an appropriate observation record of her own. The rule speaks of work stations: much of the social worker's "work" is not observable except through review of individual pupil files and reports prepared for the CST. Indeed, it would

be educationally counterindicated for a supervisor to sit in on the social worker's interviews with children and parents, where confidentiality is essential to the function performed. A review of R-7 shows that the director observed and monitored petitioner's work with considerable care and specified the results after giving petitioner an opportunity to respond to her questions. Petitioner's argument on this point is also without merit.

Based on the findings above and conclusions reached after application of the Kopera review standards, it is therefore **ORDERED** that the action of the Board of Education denying an increment for 1984-85 be upheld and the petition be **DISMISSED.**

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

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

April 17, 1985
DATE

Naomi Dower LaBastille
NAOMI DOWER-LaBASTILLE, ALJ

APR 19 1985
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

APR 22 1985
DATE

Mailed To Parties:
Ronald L. Parker/sbw
FOR OFFICE OF ADMINISTRATIVE LAW

jrp

ARLENE KLEIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision have been reviewed. Exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

Petitioner in primary exceptions contends that the inadvertent payment of the previously denied increment as authorized by the Superintendent of Schools should serve as a proper basis for the restoration of the denied increment. Petitioner argues further that the judge erred in her analysis of the propriety of the Board in the work assignment of petitioner.

In reply exceptions the Board denies the arguments advanced by petitioner. In so doing, note is made that the resolution by the Board denying petitioner's increment was never changed by action of the Board and, further, that no action by any employee of the Board can supersede its resolution once properly established. Further, the Board observes that the documents in the possession of the Superintendent of Schools were all known to petitioner. No proof was offered to disprove that the job assignments given petitioner were in violation of any statute, administrative rule, regulation, or decision. The Commissioner supports the arguments advanced by the Board.

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

Accordingly, it is determined that the action of the Board denying Petitioner Klein's increment for 1984-85 was a proper one and the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

JUNE 3, 1985

ARLENE KLEIN,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,	:	
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, June 3, 1985

For the Petitioner-Appellant, Klausner and Hunter
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Pachman and Glickman
(Steven S. Glickman, Esq., of Counsel)

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

October 2, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY JUDGMENT
OAL DKT. NO. EDU 3762-84
AGENCY DKT. NO. 161-5/84
NAME OF AGENCY: Department of Education

NORBERT WALLICZEK,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,
Respondent.

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

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Bruno & Barger, attorneys)

Record Closed: March 11, 1985 Decided: April 24, 1985

BEFORE **JOSEPH LAVERY,** ALJ

This is an appeal by Norbert Walliczek (hereinafter "petitioner") from a decision by the Board of Education, Township of Holmdel (hereinafter "Board") to reduce his full-time position as a teacher of German to a part-time position (3/5 of full-time). Petitioner also challenges the Board's refusal to acknowledge his tenure as a Spanish teacher. He asserts that others with less entitlement have been retained or appointed full-time in the latter position, despite his overriding seniority.

By way of remedy, petitioner asks for full-time appointment, as a German and/or Spanish teacher during the 1984-85 school year. Additionally, he seeks back pay and any related rights or benefits flowing from his reduction.

PROCEDURAL HISTORY

This appeal was initiated by a verified petition filed on May 8, 1984 with the Commissioner of Education. Timely answer followed on May 16, 1985. Thereafter, the Commissioner of Education declared the dispute a "contested case" pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.. He submitted it for plenary hearing to the Office of Adinistrative Law (OAL) on May 22, 1984. Subsequently, the matter was scheduled for a prehearing conference held on July 2, 1984.

Plenary hearing was then scheduled for September 18, 1984, but adjourned when both parties agreed to stipulate facts and submit briefs in support of summary decision. The facts were stipulated, and briefs followed. However, in the course of these submissions, a dispute as to the factual setting reemerged. The matter was again scheduled for plenary hearing. Following a telephone conference with counsel, on February 11, 1985, the parties agreed that plenary hearing would be unnecessary if additional stipulations supplemented the record. On March 11, 1985, those stipulations were received and on that date the record closed.

ISSUES

The sole issue for resolution is whether petitioner's tenure and seniority status is such that he has been and continues to be entitled to full-time employment as a German and/or Spanish teacher.

Burden of Proof:

The burden of proof falls on petitioner, who must carry it by a preponderance of the credible evidence.

Undisputed Facts:

The parties here seek summary judgment pursuant to N.J.A.C. 1:1-13.1 et seq., agreeing that none of the material facts are in dispute. Toward that end, they have submitted the following stipulation (Exhibit J-1):

1. Petitioner, Norbert Walliczek, is a tenured teaching staff member who has been employed as a teacher within the Holmdel Township School District since September, 1974. Petitioner possesses endorsements as both a Teacher of Spanish and a Teacher of German.

2. Respondent, Holmdel Township Board of Education, is responsible for the operation of and supervision of all schools within the Holmdel Township School District.

3. Petitioner has been employed as a Teacher of German within the Holmdel Township School District on a full-time basis for the 1974-75, 1975-76, 1978-79, 1979-80, 1980-81, 1981-82, 1982-83, and 1983-84 school years. During the 1976-77 school year, Petitioner was employed as both a Teacher of German and as a Teacher of Spanish within the Holmdel Township School District.

4. In a letter dated April 6, 1984, Petitioner was informed by William Satz, Superintendent of Schools for the Holmdel Township School District, that his position as a Teacher of German would be a part-time position during the 1984-85 school year because of anticipated declining enrollment in German language classes.

5. The Board of Education, through its agents and representatives, has taken the position that petitioner acquired tenure within the Holmdel Township School District only as a Teacher of German, and not as a Teacher of Spanish.

Appended to, and incorporated within, this stipulation are subparts (a) through (i), which amplify to a slight degree the foregoing basic facts. Subparts (e) through (h) of Exhibit J-1 show that the Board and its school administrator consistently referred to the status conferred on petitioner as being that of a "teacher of German."

Additionally, Exhibit J-1 was followed by a stipulated seniority list (Exhibit J-2) for all teachers of Spanish, French and German in Holmdel Township as follows:

Name and Subject/s Taught	Date Hired	Certification	Date Issued
Barbara Cannon	9/72	Secondary French	6/68
(Spanish, French)	2/79		
Donna Garcia	9/73	French	5/73
(French, Spanish)		Spanish	10/73
Joyce McNamara	9/76	Spanish	5/76
(Spanish, French)		French	5/76
Judith Reilly	1/73	Spanish	4/73
(Spanish)			
*David Smith	9/83	French	4/80
(French, Spanish)		Spanish	4/82
Norbert Walliczek	9/74	German	4/75
(German)		Spanish	8/77
Margaret Widmeier	9/72	French	9/72
(French)			

* Non-tenure

It is from this factual complex that the parties draw their arguments.

ARGUMENTS OF THE PARTIES:

Petitioner's Argument:

In sum, petitioner argues that he obtained tenure as a teacher of Spanish as well as of German in May of 1977. He asserts alternatively that his rights inhere whether the Commissioner's seniority rules of before or after September 1, 1983 are applied. Moreover, his seniority is a "vested right" which cannot be disturbed by amended regulations. Petitioner arrives at these conclusions through extensive legal analysis. This discussion was briefed in a 5-point sequence, essentially as follows:

First, the law is such that, under N.J.A.C. 6:3-1.10 (k)(27), in effect prior to the amendments of September 1, 1983, petitioner obtained tenure. The permanence thus obtained is not only as a teacher of German, but also as a teacher of Spanish. Under the foregoing regulation, once tenure in one secondary endorsement is obtained, tenure and seniority rights would also attach for any other secondary endorsement then in place, regardless of teaching experience thereunder. Petitioner relies heavily on Mulhearn v. Board of Ed., Sterling Regional High School District, (N.J. App. Div. October 31, 1983 A-5123-81T2) (unreported).

Second, the tenure regulations at N.J.A.C. 6:3-1.10, in effect before that rule's amendment, effective September 1, 1983, must control here. The amendment must apply only prospectively, and should not govern in the circumtances of this appeal. Regulatory changes in seniority calculation cannot affect already approved seniority and/or tenure rights. Whether in a statute or regulation, words imparting or removing substantive rights ought not have retrospective operation unless no other intent can be inferred from their facial reading. Petitioner acquired tenure as a Spanish teacher as well as a German teacher under the old regulations. Neither this status nor its accompanying seniority rights may be abrogated through retroactive application of the amended rule.

Third, even the current rules support the conclusion that petitioner's total service as both a German and a Spanish teacher must be included. N.J.A.C. 6:3-1.10(c) mandates that all prior service be computed when measuring seniority. N.J.A.C. 6:3-1.10(d) makes similar provision. Finally, under the guiding rationale of Mulhearn, seniority arising from petitioner's experience as a Spanish teacher must be "tacked on" pursuant to N.J.A.C. 6:3-1.10(h).

Fourth, petitioner has a "vested right" in the seniority which he acquired through the process described above. This derives from a "property right" conferred by tenure. Seniority is on equal footing, with constitutional protection, as an emolument thereof.

Fifth, even under the new regulations, specifically N.J.A.C. 6:3-1.10(l)(15), petitioner has acquired seniority overriding that of Spanish teachers now retained full-time by the Board. Satisfying the crucial language of that regulation, petitioner "has actually served" under endorsement as a teacher of Spanish during the school year 1976-77.

Board's Argument:

The Board, briefly rejecting the lengthy argument of petitioner, maintains that the essence of the dispute is narrow and uncomplicated. The question is only whether petitioner obtained tenure as a teacher of Spanish. The answer is that he did not. The Board in 1977, dissatisfied with petitioner's performance that year, made clear that tenure was only being granted as a teacher of German (Exhibit J-1 (e) (f) and (g)). The Board also conveyed tenure to 13 other teachers that year, with no such restriction, (Exhibit J-1 (i)). The distinction was conscious. The Board thought it inappropriate to deny tenure to petitioner as teacher of a language in which he excelled (German) simply because of unacceptable performance in teaching a different language (Spanish).

In view of the foregoing, the Board contends, petitioner's other arguments, grounded as they are in seniority discussion, should be dismissed as irrelevant, together with this appeal.

FINDINGS OF FACT

Therefore, after considering the record previously set forth, and independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following **FINDINGS OF FACT:**

As to **UNDISPUTED** facts, I **FIND** those designated on pages 3 and 4 of this opinion.

As to those matters which are **CONTESTED** facts, pursuant to N.J.A.C. 1:1-16.3(c)7, I **FIND** that there are no material facts in dispute.

ANALYSIS

The Board is correct, in part, in stressing the threshold issue of tenure. To the extent the Board seeks to circumscribe the parameters of that tenure, it is incorrect as a matter of law.

Tenure under the school law is provided through N.J.S.A. 18A:28-5. Obtaining tenure depends on employment for the requisite number of years, in a position requiring certification by the Board of Examiners. Three kinds of certification are awarded in three areas by that Board, under rules and regulations prescribed by the State Board of Education, N.J.S.A. 18A:6-38. Those areas of certification are: instructional, N.J.A.C. 6:11-6.1 et seq.; administrative and supervisory, N.J.A.C. 6:11-9.1 et seq. and educational services, N.J.A.C. 6:11-11.1. See also, Howley v. Ewing Board of Education, 6 N.J.A.R. 509 (1982).

Although other "certifications" are mentioned in educational parlance, they are actually one or more of the comprehensive or single field "endorsements" (also a term of art) on a basic certificate. These endorsements are set forth at N.J.A.C. 6:11-5.2. Endorsements are not in themselves the object of tenure, although they are a prerequisite to teaching assignments in a specific field, N.J.A.C. 6:11-6.1(a). Tenure reposes only in the property right to encumber a teaching position on the strength of one of the three basic certifications. With the foregoing in mind, and because of petitioner's instructional certificate, it must be concluded that petitioner has tenure. He acquired it following reappointment by the Board after his completion of the 1976-77 school year. His tenure as a teacher, in a teaching position, was conferred by operation of statute, N.J.S.A. 18A:28-5, without regard to endorsements.

With tenure thus established, as in Mulhearn, the issue now becomes "seniority rights exercisable upon a reduction in force, not tenure rights." Seniority is a concept which only comes into play during a reduction in force. Those rights are set out at N.J.A.C. 6:3-1.10. Rights thereunder are allocated in accord with the categories or endorsements to which an employee may validly lay claim. In this case, there is no disagreement that the particular category in which petitioner has spent his career is "secondary," N.J.A.C. 6:3-1.10(1)(15). The relevant language within that subsection is:

> "Any person holding an instructional certificate with subject area endorsement shall have seniority within the secondary category only in such subject area endorsement(s) under which he or she has actually served." [emphasis added].

In pertinent part, the following subsections of N.J.A.C. 6:3-1.10 also apply.

> (b) Seniority, pursuant to N.J.S.A. 18A:28-9 et seq., shall be determined according to the number of academic or calendar years of employment, or fraction thereof, as the case may be, in the school district in specific categories as hereinafter provided. The periods of unpaid absences not exceeding 30 calendar days aggregate in one academic or calendar year, leaves of absence at full or partial pay and unpaid absences granted for study or research shall be credited toward seniority. All other unpaid absences or leaves of absence shall not receive seniority credit.
>
> (c) In computing length of service for seniority purposes full recognition shall be given to previous years of service within the district and the time of service in or with the military or naval forces of the United States or this State, pursuant to the provisions of N.J.S.A. 18A:28-12.
>
> (f) Not more than one year of employment may be counted toward seniority in any one academic or calendar year. Whenever a person shall hold employment simultaneously under two or more subject area endorsements or in two or more categories, seniority shall be counted in all subject area endorsements and categories in which he or she is or has been employed. [emphasis added]

These subsections, together with the foregoing explication, suggest that the Board, in April of 1984, should have awarded seniority rights to petitioner as follows:

> (A) For all time dating from the beginning of the 1974 school year when petitioner was employed as a teacher instructing under the German language endorsement:
>
> 1974-75
> 1975-76
> 1976-77
> 1977-78

1978-79
1979-80
1980-81
1981-82
1982-83
1983-84

(B) For all time dating from the beginning of the 1976-77 school year, when petitioner was called on to teach Spanish (endorsement followed in August of 1977):

1976-77
1977-78
1978-79
1979-80
1980-81
1981-82
1982-83
1983-84

The import of this analysis is that petitioner (who "has actually served" as a Spanish teacher) was entitled to full-time employment as a German and/or Spanish teacher during the 1984-85 school year. At least one of those teachers whose seniority status was tabulated on the list (Exhibit J-2)* set forth on page 4 of this Initial Decision should have given way to petitioner, Camilli v. Northern Highlands Regional High School, Board of Education, 1985 S.L.D. __ (January 3, 1985). The Board, at its meeting of April 25, 1984 was obliged to have afforded petitioner his rights as a tenured teacher consistent with the seniority calculation set forth above.

In view of the foregoing reasoning, the remedy which petitioner seeks must be granted. His alternative pleading, focusing on: (a) retrospective application of N.J.A.C. 6:3-1.10, and (b) constitutionally vested rights, need not be discussed. Further, it should be noted that the Board's allusion to petitioner's alleged shortcomings as a teacher of Spanish are not germane to the issues on appeal.

* This list does not make clear when employment occurred for the other teachers (if at all) under the specific endorsements. Thus, accurate calculation of relative seniority is not possible here.

CONCLUSION

I **CONCLUDE,** therefore, based on my review of the entire record that:

1. Petitioner was entitled to full-time employment as a German and/or Spanish teacher during the school year 1984-85 because of his status as a tenured teacher, and because of the seniority rights outlined in the ANALYSIS portion of this opinion, supra.

2. Petitioner should be awarded back pay and any related benefits in proportion to that time lost as a full-time teacher of Spanish and/or German. Petitioner's employment record should reflect full-time employment for the school year 1984-85, for purposes of seniority.

ORDER

I **ORDER,** therefore, that petitioner be awarded back pay and related benefits as well as credit for seniority purposes for the 1984-85 school year, in accord with the **ANALYSIS** and **CONCLUSION** set forth above.

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

OAL DKT. NO. EDU 3762-84

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for considerati

April 24, 1985
DATE

Joseph Lavery
JOSEPH LAVERY, ALJ

Receipt Acknowledged:

4-25-85
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 29, 1985
DATE

Ronald J. Parker /xs
OFFICE OF ADMINISTRATIVE LAW

bc

NORBERT WALLICZEK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law in the form of Summary Judgment have been reviewed. No exceptions were filed by the parties.

The Commissioner concurs with the conclusion of the Office of Administrative Law that petitioner had seniority entitlement to a Spanish position during the 1984-85 school year pursuant to N.J.A.C. 6:3-1.10(1)15, effective September 1, 1983, because he had actually served under his Spanish endorsement.

In reviewing the record in this matter, the Commissioner is constrained to emphasize that Mulhearn, supra, has no applicability herein because that case dealt with an interpretation of the prior seniority regulations. Consequently, Mulhearn has bearing only on seniority determinations that spring from reductions in force occurring prior to September 1, 1983.

Petitioner has prevailed in this matter exclusively on the basis of the current regulations since the reduction in force to which he was subject occurred after the amended seniority regulations went into effect. Any vested seniority rights petitioner enjoys are strictly limited to those dictated by the current regulations. As the Commissioner stressed in Camilli, supra, no one subject to a reduction in force after September 1, 1983 has any vested rights or seniority entitlement pursuant to the prior regulations because seniority comes into play only when a reduction in force actually occurs.

Having determined that petitioner in the present matter had entitlement to a Spanish position for the 1984-85 school year, the Commissioner adopts the judge's order as the final decision in this matter. Accordingly, the Board is to immediately provide petitioner any full-time teaching position to which he has seniority entitlement. Further, the Board is to award him any differential in pay, emoluments and benefits to which he has entitlement as a result of improper denial of his seniority rights to a full-time teaching position during 1984-85. Seniority credit for 1984-85 is to be calculated as directed in the initial decision.

COMMISSIONER OF EDUCATION

JUNE 7, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DOCKET NO. EDU 5113-84
AGENCY DKT. NO. 225-6/84

MARY T. HART,
Petitioner,

V.

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,
Respondent.

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

Dennis G. Harraka, Esq., for respondent
(Gallo and Geffner, attorneys)

Record Closed: February 28, 1985 Decided: April 10, 1985

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

Mary T. Hart, a tenured teaching staff member employed since 1966 by the Board of Education of the Borough of Ridgefield, Bergen County, alleged action of the Board in reducing her home economics teaching staff position to 2/5 time by virtue of a reduction in force for 1984-85 and in employing others with less seniority for 1984-85 in the Family Life Education Program was violative of her tenure and seniority rights under N.J.S.A. 18A:28-5 and N.J.A.C. 6:3-1.10 et seq. She sought judgment directing the Board to assign her to a full-time position for 1984-85 and retroactively to compensate her for all salary or benefits lost as a result of Board action. The Board denied the allegations and contended it acted within its legal authority.

A petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on June 19, 1984. The Board's answer was filed there on July 2, 1984. Accordingly, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on July 13, 1984, for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On notice to the parties, a prehearing conference was conducted in the Office of Administrative Law on August 14, 1984 and an order entered. A hearing established for November 19, 1984 was adjourned at request and/or with the consent of the parties. A hearing was conducted on December 13, 1984. Thereafter, posthearing submissions having been completed, the record closed. At issue in the matter generally is whether petitioner's seniority rights were violated by Board action in its teaching assignment of petitioner and others for 1984-85, under N.J.A.C. 6:3-1.10. No issue of propriety of reduction in force vel non under N.J.S.A. 18A:28-9 is presented.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so admitted and/or stipulated, I make the following findings of fact:

1. Petitioner was originally hired by the Board of Education of Ridgefield in September, 1966 and served continuously as a full-time home economics teacher through the 1983-84 school year.

2. Petitioner has taught in grades 6 (self-contained) as well as in grades 7 and/or 8 beginning in 1966 and in each year thereafter. Grades 7 and 8 have been departmentalized at least since petitioner was first hired. In 1982-83 petitioner also taught one period of home economics to a mixed group of high school students (grades 9-12). Petitioner taught two periods of high school home economics in 1983-84.

3. Petitioner has possessed certification as a home economics teacher (K-12) throughout her employment in Ridgefield.

4. By letter of April 30, 1984 (P-2), petitioner was advised her teaching position for 1984-85 would be reduced to a 5/8 part-time position due to declining enrollment.

5. By letter of August 20, 1984 (P-3), petitioner was advised her teaching position for 1984-85 would be further reduced to a 2/5 part-time position.

6. For 1984-85 petitioner was paid at an annual rate of $12,256 as a 2/5 classroom teacher, calculated on a potential full-time salary of $30,390 plus an unprorated longevity increment of $100.

7. For 1984-85 petitioner's 2/5 position consisted of three periods per week of 6th grade family life instruction, three periods of 6th grade home economics and four periods of 7th grade home economics.[1]

8. As of September 1, 1984 petitioner's health insurance coverage was terminated by respondent due to the fact that her assignment was part-time. Since September petitioner has paid $48.33 per month to provide herself with non-group Blue Cross and Blue Shield coverage.

9. Teachers in Ridgefield assigned full-time receive full health insurance coverage without cost to them.

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1 As of January 1, 1985, petitioner's teaching position was increased by respondent. The fact had no bearing on the proceeding except as to ultimate calculation of damages by the parties.

10. Since September 1, 1984, all petitioner's assigned classes have met after 12:10 p.m. (P-1).

11. Petitioner has been paid $10.19 per 42 minute period to work as a substitute for the Board, prior to her regularly scheduled classes. Her substitute schedule has varied in nature and extent.

12. A normal full-time teaching load in Ridgefield is 25 periods per week (five periods per day, five days per week).

13. The Board initiated its Family Life Education program, as currently constituted, in the 1983-84 school year.

14. Prior to 1983-84 petitioner taught aspects of family living (exclusive of sex education) in such areas as 'getting along with family and friends' and 'understanding one's self' as part of her 6, 7 and 8th grade home economics curriculum. That began in 1978.

15. Petitioner's 1984-85 Family Life assignment included all aspects, including sex education.

16. For 1984-85 Jay Levine has been assigned to teach high school Family Life from 8:10 a.m. to 8:55 a.m., for a total of five periods per week. (P-7).

17. For 1984-85 Charles Manto was assigned to teach high school Family Life from 9:46 a.m. to 10:31 a.m., for a total of five periods per week. (P-8).

18. Levine was initially hired by the Board in September, 1970 as a teacher of physical education, driver education, first aid and health and served in that capacity full-time through June 30, 1983.

19. For 1983-84 Levine taught 9th grade Family Life for one period per day, five days per week, in addition to subjects previously taught. Levine was a full-time employee for 1983-84 and 1984-85.

20 Levine has been certified as a teacher of physical education (K-12) and as a teacher of health (K-12) since his career in Ridgefield began.

21. Charles Manto does not hold any of the certificates mandated by N.J.A.C. 6:29-7.1(e) in order to qualify a person to teach Family Life.

22. The Board's administrators assigned Family Life courses to teachers for 1984-85 without considering seniority.

DISCUSSION

N.J.A.C. 6:29-7.1[2] provides in part as follows:

> (a) "Family Life Education Program" means instruction to develop an understanding of the physical, mental, emotional, social, economic and psychological aspects of interpersonal relationships; the physiological, psychological and cultural foundations of human development, sexuality and reproduction, at various stages of growth; the opportunity for pupils to acquire knowledge which will support the development of responsible personal behavior, strengthen their own family life now, and aid in establishing strong family life for themselves in the future, thereby contributing to the enrichment of the community. . .
>
> (b) The family life education curriculum shall be developed through appropriate consultation on participation of teachers, school administrators, parents and guardians, pupils in grades 9-12, community members, physicians, members of the clergy, and representative members of the community. . . .

---

2 Adoption of the above regulation by the State Board of Education was held by the Supreme Court of New Jersey as not violative of the free exercise clause or the establishment clause of the First Amendment nor violative of the due process of the Fourteenth Amendment. Smith v. Ricci, 89 N.J. 514 (1982).

(c) The district's family life education program shall be implemented comprehensively through the coordinate sequential elementary/secondary curriculum within instructional units appropriate to the age, growth and development, and maturity of the pupils.

(d) Districts that develop their program with an interdisciplinary approach may use teachers from other disciplines to assist those staff members authorized to give instruction in family life education.

(e) Teaching staff members holding one of the following certificates are authorized to teach in the district's family life education program:

1. Biology
2. Comprehensive science
3. Elementary
4. Health education
5. Health and physical education
6. Home economics
7. Nursery
8. School nurse
9. Teacher of psychology. . . .

In an interim report of Ridgefield's Family Life Education District Committee in December 1982 (P-6), it was recommended that Family Life Education programs should contain four major units: family life, physical growth and development, social and emotional growth and special topics (problems). Duration of such programs should be at least 38 hours of instruction per year or the equivalent of one instructional period per week for a full year. On the elementary school level, such programs should be taught in regular classroom by classroom teachers. On the middle school level, where departmentalization existed, such programs should be taught as part of an affective education class or as part of health education. On the high school level, such programs should be taught as part of health education. (P-6, last page).

In a written declaration of policy, the Board recognized its responsibility in providing a comprehensive education for all students and recognized the importance of family life education as an area of knowledge and skill and as an integral part of the total educational program offered in the school district. The policy required the superintendent to develop and implement, no later than September 1983, a coordinated, sequential Family Life Education program in the elementary and secondary levels in accordance with N.J.A.C. 6:29-7.1. (P-6, p. 7). The program and its curriculum was instituted and in force in the district for the 1983-84 school year. (Finding no. 13).

Declining enrollment compelled the Board to revise its staffing of family life teaching assignments for 1984-85. Petitioner and two others, Levine and Manto, suffered reductions in their positions: petitioner to three periods of sixth grade family life instructions and the others to one period each per day per week. The overall result was petitioner's reduction from full-time employment to 2/5 employment. Levine is certified as a teacher of health and physical education under N.J.A.C. 6:11-8.4(b), (c). Petitioner is certified in home economics under N.J.A.C. 6:11.8.4(c)(7). Manto, on the other hand, unlike petitioner and Levine, holds no certification that would authorize his teaching in the district's Family Life Education program under N.J.A.C. 6:29-7.1(e). (Findings nos. 3, 20, 21).

Although the Board conceded Manto's lack of express certification, and thus authority to teach in the Family Life Education curriculum, it argued Manto's assignment to do so was primarily because of his involvement with the curriculum when it began and when he served on the curriculum sub-committee formed as early as the Fall of 1980. His involvement with the program, it said, dated back to its inception. Manto's only certifications are as teacher of history, social studies, English and foreign languages (Italian). Both he and Levine hold masters degrees and Levine has some 30 credits toward a doctorate in education.

According to the district's seniority list (R-1), compared to petitioner's 18 years seniority in the category of home economics, Levine has 14 years seniority under his certifications in physical education and health, while Manto has 14 years seniority under his certifications in social studies, English and reading.

It is apparent, and I so **FIND,** the Board here has developed its Family Life Education program with an interdisciplinary approach and thus may utilize teachers from other disciplines to assist in giving instruction in the program under N.J.S.A. 6:29-7.1(d), (e). The question results, therefore, whether the Board in that interdisciplinary approach not only may use teachers from other discipline but must do so only in order of seniority of assisting teachers chosen, under the mandate of N.J.A.C. 6:3-1.10. If the Board's teaching assignments are so mandated thereby, it will be seen, reduction of petitioner's teaching assignment to 2/5 time in face of employment of two other less senior employees would be violative thereof. In Johnson v. Bd. of Ed., Borough of Glen Rock, 1984 S.L.D. — (Comm'r's dec. May 21, 1984), a tenured teacher of home economics was riffed to a 3/10 time position. She challenged the position held by another non-tenured or less senior teacher in a family life education program. The Board had adopted an interdisciplinary approach to implement its family life education curriculum. There was no separate course offered for it. Instead, it was integrated broadly and generally into the district's health education courses. Petitioner argued the Board was obligated to assign her to teach family living education. The Commissioner held, however, the mere fact a district may utilize any other variety of disciplines within which to include family life education, or to use various disciplines to teach excerpts of such in a variety of courses, did not imply it was compelled to divide in two its course to implement seniority rules. The interpretation of the regulation that a local board is required to grant a priority on a seniority basis to teach in a discipline that encompasses family life and also instructional units beyond the scope of one's endorsement was held to be over-broad. The Board's action in assignment was found to have been a reasonable exercise of its discretionary authority. [Slip op. at 6-13].

Based on the foregoing, therefore, I **FIND** and **DETERMINE** the Board's employment of a less senior health and physical education teacher, Levine, than petitioner, whose seniority of 18 years is in the category of home economics and not health or health education, is neither unreasonable nor violative of petitioner's seniority rights under N.J.A.C. 6:3-1.10. Contrary to petitioner's argument, I **FIND**, she accrued no family life seniority under her home economics certificate by merit of any authorization under N.J.A.C. 6:21-7.1 to assist in an interdisciplinary Family Life Education program. There is no separate certificate endorsement for family life education.

On the other hand, I **FIND** and **DETERMINE** the Board's employment of Manto in its interdisciplinary Family Life Education program to be an improper assignment since his certifications were not those expressly authorized by N.J.A.C. 6:29-7.1(e). The assignment, therefore, is contrary to N.J.S.A. 18A:26-2 and N.J.A.C. 6:11-3.1(a). The Board is **ORDERED** to discontinue Manto's employment in the interdisciplinary Family Life Education program for and until such time as he becomes eligible to serve therein under certifications authorized by N.J.A.C. 6:29-7.1(e). It shall remain within the Board's discretion hereafter to consider assignment of petitioner or others to such portions of the interdisciplinary program as it finds necessary to staff, without limitations of seniority regulations.

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

OAL DKT. NO. EDU 5113-84

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

April 10, 1985
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

APR 12 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 15 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

js

MARY HART,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision have been reviewed. Exceptions were received from the parties beyond the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

The Commissioner concurs with the findings and determinations reached by the Office of Administrative Law that (1) petitioner's seniority rights have not been violated in assigning a less senior high school physical education and health teacher to teach 5 periods of its family life program rather than assigning some portion of such assignment to petitioner; (2) petitioner accrued no family life seniority under her home economics endorsement by merit of any authorization under N.J.A.C. 6:29-7.1 to assist in an interdisciplinary family life education program; and (3) the assignment by the Board of an individual not authorized to teach such program is improper. However, there is a point of clarification necessary in regard to the Johnson, supra, case relied on by the judge so that no confusion exists as to a board of education's responsibilities in regard to family life assignments and seniority.

Johnson involved a family life curriculum that was not just interdisciplinary in its approach but it was also infused into a variety of subject areas. It was not a separate course offered during specified class periods devoted strictly to family life instruction. Portions of the family life program were infused into the regular academic curriculum. Notwithstanding a number of distinguishable factual circumstances between Johnson and the matter herein, the Commissioner reiterates his determination in regard to family life teaching assignments and seniority articulated in Johnson. That determination rejected the argument that a board of education is legally obligated to implement its family life curriculum in such a manner as to accommodate a seniority claim.

N.J.A.C. 6:29-7.1 authorizes individuals with nine different types of endorsements to teach in a district's family life education program. The intent of the State Board in so acting was to allow local boards flexibility in implementing their family life program and to permit an interdisciplinary approach to such

programming. The regulation is clear and unambiguous that a diversity of individuals may teach family life education. A board of education is under no obligation to assign family life instruction to staff members with any one type of endorsement; nor must the implementation of its program be controlled by seniority claims.

If seniority claims were controlling for family life assignments, severe constraint would result in a board's designation of which discipline it deems appropriate to teach specific portions of its family life curriculum. It could also create a burdensome strain in the scheduling of instruction not for only pupils but teachers as well. The Commissioner firmly believes that acceptance of petitioner's arguments to the contrary would lead to results far beyond the contemplation of the Legislature and State Board and it would be to the detriment of both the orderly administration of the public schools of this State and the effective implementation of family life education.

A board of education must be accorded a presumption of correctness in assigning a particular discipline(s) to teach various portions of its family life education program. The Commissioner will not overturn a board's action unless (1) such assignment is not deemed to be based on educational reasons; (2) it was done in bad faith; or (3) it contravenes the family life education regulations (as was determined in the assignment of Mr. Manto herein who was not authorized to teach the program).

Seniority comes into play in the assignment of family life teaching when a reduction in force occurs in a district wherein a board of education has designated a particular discipline (such as health or biology) as appropriate to teach a given level or sequence in its family life program. For example, when a reduction in force occurs in a district wherein the board has designated that specific portions of its family life education program at the secondary level are to be taught by an individual with a biology endorsement, seniority would come into play in determining which biology teacher is to be assigned. Seniority would not come into play in terms of the board being compelled to assign a teacher with home economics endorsement to any portion of its family life program it has designated to be taught by a teacher with biology endorsement merely because N.J.A.C. 6:29-7.1 permits individuals with home economics endorsements to teach in the family life program.

Consequently, it is determined that petitioner is not entitled by virtue of her home economics seniority to teach the family life program segments the Board has designated as appropriate for instruction by a staff member with a health endorsement. Nor does she have a priori seniority entitlement to that portion of the curriculum taught by Mr. Manto. If the Board for sound educational reasons and in good faith determines that those segments taught by Mr. Manto are best taught by an individual with a home economics endorsement, as opposed to any other authorized endorsement, then

petitioner may be assigned those class periods of family life education which he taught. However, the Commissioner is constrained to emphasize, as he did in Dorothy Godwin Davis v. Bd. of Ed. of Ewing, decided by the Commissioner April 29, 1985, that a board of education is not compelled to rearrange its schedule to suit petitioner and maximize its schedule of course offerings to coincide with her instructional endorsement.

In Davis the Commissioner affirmed the judge's determination that a board does not have to adjust its teaching schedule to arrange a position for the petitioner. While there are distinguishable factual circumstances between Davis and the instant matter, petitioners' arguments in both cases would have full-time staff reduced to part-time so that petitioners might teach the classes they also are endorsed to teach. As in Davis, the Commissioner can find nothing in statutory or case law that would require the result petitioner seeks in the present case.

Accordingly, the Commissioner dismisses the Petition of Appeal for the reasons stated in the initial decision and as clarified herein. He directs that the Board carry out the judge's order to discontinue Mr. Manto's teaching assignment in its family life program.

COMMISSIONER OF EDUCATION

JUNE 7, 1985

MARY HART,

PETITIONER-APPELLANT,

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY, : DECISION

RESPONDENT-RESPONDENT.

Decided by the Commissioner of Education, June 7, 1985

For the Petitioner-Appellant, Bucceri and Pincus
(Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Gallo, Geffner, Ferster, Farrell and Turitz (Dennis G. Harraka, of Counsel)

The State Board of Education affirms the decision of the Commissioner for the reasons expressed therein. We also wish to emphasize that eligibility to teach segments of family life within other disciplines pursuant to N.J.A.C. 6:29-7.1(e) does not confer tenure or seniority rights in the area of family life since this is not a specific discipline for which certification is required and to which tenure and seniority therefore attach. See Bartz v. Board of Education of the Township of Green Brook, decided by the State Board, November 8, 1985.

DECEMBER 4, 1985

Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7118-84
AGENCY DKT. NO. 324-7/84

THOMAS C. CONTI & ERNESTINE CUTLER,
Petitioners,
v.
MONTGOMERY TOWNSHIP BOARD OF EDUCATION, SOMERSET COUNTY,
Respondent.

Stephen E. Klausner, Esq., for the petitioner (Klausner & Hunter, attorneys)

Allan P. Dzwilewski, Esq., for respondent (Green & Dzwilewski, attorneys)

Record Closed: March 11, 1985 Decided: April 25, 1985

BEFORE **BRUCE R. CAMPBELL,** ALJ:

Action for an order directing the placement of Thomas C. Conti at step ten of the Master's Level Teacher Salary Schedule for school year 1984-85 and the placement of Ernestine Cutler at step five at the Bachelor's Level Teacher Salary Guide Schedule for the school year 1984-85.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on November 2, 1984. Among other things, it was settled that the issue to be tried is whether the petitioners are entitled to the asserted placements on the Teacher Salary

Guide of the Montgomery Township Board of Education under the circumstances of this case. The matter was heard on February 20, 1985, in the Montgomery Township Municipal Court. Counsel timely filed post-hearing submissions and the record was closed on March 11, 1985.

I.

At the beginning of hearing, counsel set forth the following stipulations:

1. Petitioner Conti is a nontenured teaching staff member in the Board's employ.

2. On or about September 7, 1983, after discussions with the superintendent of schools about placement on the salary guide, Petitioner Conti entered into a written contract with the Board. In recognition of his prior years of experience it was agreed between the petitioner and the Board that the petitioner was to be placed on the ninth step of the Master's Degree Salary Schedule.

3. Petitioner Conti received salary throughout school year 1983-84 on the ninth step of that guide.

4. Despite requests to do so, the Board has failed and refused to place Petitioner Conti on the tenth step of the Master's Level Salary Schedule for the school year 1984-85.

5. Petitioner Cutler is a nontenured teaching staff member in the Board's employ.

6. On or about September 7, 1983, the petitioner and the Board entered into a written contract. In recognition of her prior years of experience, it was agreed that Petitioner Cutler was to be placed at the fourth step of the Bachelor's Degree Salary Schedule.

7. Petitioner Cutler received salary throughout school year 1983-84 at that step of the guide.

8. Despite requests to do so, the Board has failed and refused to place Petitioner Cutler on the 5th step of the Bachelor's Level Salary Schedule for school year 1984-85.

Counsel also agreed to the admission into evidence of eight documents as Joint Exhibits. They are:

J-1 Employment contract, Thomas Conti, September 1, 1983 - June 30, 1984 at step nine, Master's Schedule, $23,357

J-2 Salary Schedule for 1983-84, Montgomery Township Public Schools

J-3 Letter, 4/11/84, Evans to Conti

J-4 Letter, 4/25/84, Evans to Conti

J-5 Pages 9 and 10, Board minutes of 4/23/84

J-6 Employment contract, Ernestine Cutler, September 1, 1983 - June 30, 1984, step four of Bachelor's Guide, $17,982

J-7 Letter, 4/11/84, Evans to Cutler

J-8 Letter, 4/25/84, Evans to Cutler

II.

The petitioners contend that they applied for positions in the Montgomery district and were interviewed by the superintendent of schools. Salaries were proffered and the petitioners agreed to those salaries. N.J.S.A. 18A:29-9. The petitioners entered into written contacts with the Board (J-1, J-6). Nine months later, the superintendent informed the petitioners that their respective placements violated the labor agreement between the Board and the teachers' bargaining unit. Thereupon, the Board acted to freeze the petitioners' 1984-85 salaries to get the petitioners "back on place."

N.J.S.A. 18A:29-9 cannot be overruled by the terms of a labor agreement. In the petitioners' view, the Board is attempting to repudiate agreements made pursuant to statute and to lessen the rightful salary expectency of the petitioners.

Petitioner Conti testified that in an initial meeting with the superintendent in June 1983, the superintendent turned to some handwritten figures, mentioned that negotiations were in progress, and told the petitioner that his placement would be at step eleven of the Master's Degree Salary Guide. Later in the summer, the superintendent telephoned Conti and stated that under the new labor contract Conti would be placed on step nine. The contract he executed (J-1) states that he is on step nine.

The first salary figure mentioned by the superintendent in the June 1983 meeting was in excess of $27,000. In the conversation in the telephone call from the superintendent later that summer, the figure was reduced to $23,357. This amount appears on the contract that is Exhibit J-1 in this matter.

On cross-examination, the witness recalled speaking with the superintendent before signing his contract. The superintendent told him at that time that the labor agreement required consolidation of steps on the salary schedule. Experience was no longer given on a "one-for-one" basis. When he saw the contract, the petitioner believed the compression of guide steps did not necessarily apply to him. He went to the superintendent and to the Montgomery Township Education Association president. The president told him that the intent was not to consolidate the guide but rather to bring in new and more experienced teachers to the district.

Petitioner Conti also testified that the April 11 letter from the superintendent (J-3) was the first notice he had that he was incorrectly placed on the teachers' salary guide. He accepted placement on step nine and began work on step nine. There was no challenge to placement at that time; that is, he did not challenge the change from step eleven which had been mentioned in the initial interview to step nine which was the step on which he actually began. He does, however, challenge the superintendent's recommendation to the Board that he be held on step nine for 1984-85 because the Board erroneously placed him on step nine in 1983-84.

Petitioner Cutler testified similarly. She was interviewed in late June or early July 1983 for a position in the district. Salary was not mentioned in the first interview.

At some time subsequent to the interview, she received a call from the superintendent who mentioned a salary of $17,900. The petitioner agreed to that salary.

The witness did not sign her employment contract immediately. She did sign an agreement to work because the superintendent represented that the labor agreement was "in the making."

At some time after the school year had begun, Petitioner Cutler received her contract which stated a salary of $17,982 and showed her to be on step four of the Bachelor's Degree Schedule (J-6). Subsequently, she received a letter dated April 11, 1984 (J-7), advising her that she had been placed in error one step above where she should have been placed. This letter also informed her that the superintendent would recommend that the Board hold her at step four for the 1984-85 year "thus bringing you into conformity with other Montgomery teachers with similar teaching experience" (Ibid.).

III.

The Board maintains that the joint exhibits present all relevant facts in the case. There is no dispute as to the petitioners' experience. The district has not attempted to recoup salary overpaid in the 1983-84 school year. The Board simply wishes to hold the petitioners at their present salaries until the guide "catches up with them."

The salary guide in the labor contract for 1983-84 was a dramatic change from prior contracts. Some steps on the salary guide were eliminated. Except for the petitioners, who commenced employment in that year, all other teaching staff members are on guide. The Board has made the adjustment of the petitioners' salaries prospective. All of its actions have been legal and proper and have been intended to place the petitioners on equal footing with all other staff members.

The superintendent testified and essentially confirmed the testimony of the two petitioners. He stated that he did call Petitioner Conti at some time after his interview and apologized and informed him that the salary would be less than had been mentioned at the initial interview.

As to Petitioner Cutler, he believes her testimony to be accurate. He does not recall the telephone call to her but believes that it could have been made. Because of his embarrassment with Petitioner Conti, he was being "super careful."

The April 11 letter was sent after the Board had authorized a study of recordkeeping and personnel management by an outside consultant (R-2). Persons who were not correctly placed on the salary guides were identified and recommendations were made to achieve their proper placements. Five persons were identified as being off guide. One resigned and moved, obviating that question. One was found not to be off guide. Three others, two of whom are the petitioners here, were found to be off guide and steps were taken so that they might be on their proper salary steps for the 1984-85 school year. The Board introduced a document showing salaries of professional staff for the school years 1981-82 through 1984-85 (R-3). The document was designed to show how teachers moved as a result of compression of the salary guide and thereafter.

The superintendent also testified that he recommended hiring of the petitioners, the Board acted by resolution, and at the time of hire, the step and salary for each of the petitioners was not part of the resolution because the labor agreement had not been ratified. The superintendent also testified that the Board has no policy concerning salary credit for prior experience. Historically, the district has not brought in teachers at salaries above the appropriate steps on guide. There is a liberal interpretation given to what constitutes prior experience, but credit has been given only for actual prior experience.

IV.

The petitioners assert that, based upon the above, they should receive judgment ordering the Board, retroactively to September 1, 1984, to restore all monies wrongfully withheld and to move each to the appropriate step on the respective salary guide.

N.J.S.A. 18A:29-9 provides:

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

That is precisely what happened here. Each petitioner was offered initial employment at a specified salary which did not reflect the actual years of experience. Each agreed to the placement, each signed a contract at the agreed rate and each performed pursuant to the contract for eight months. Only then were they advised of an error.

School law decisions dating back to the case of Harris v. Pemberton Tp. Bd. of Ed., 1939-49 S.L.D. 164 have held that if there is a mistake in the placement of a teacher on a salary guide and if the teacher is not responsible for the error, the teacher cannot be deprived of the rights he or she acquired by the original resolution of the Board fixing that teacher's salary. See, e.g., Galop v. Hanover Tp. Bd. of Ed., 1975 S.L.D. 358, aff'd St. Bd. 366; DeRenzo v. Passaic Board of Education, 1973 S.L.D. 236; Anson v. Bridgeton Bd. of Ed., 1972 S.L.D. 638. These cases establish that when a board of education sets a teacher's salary for a particular school year, it cannot at a later date reduce the amount because of clerical or administrative error it originally made.

In Galop, above, the Commissioner held that although the petitioner did not possess the required number of graduate level credits to merit her placement on the Master's plus 45 credits salary guide, the Board was still required to pay her the salary which was called for by the 16th step on the guide. The superintendent had inadvertently and in error caused Galop's name to be recommended to the Board for placement on that salary step. The superintendent acknowledged that this error was in no way attributable to the petitioner. The Commissioner concluded that the Board had to compensate the petitioner in accordance with the Board's original action.

The Commissioner also cautioned local boards and their administrators to examine in minute detail those documents which are submitted for official resolutions authorizing contractual salaries. Boards would thereby avoid the payment of unnecessary sums and avoid the disharmony and unnecessary litigation caused by careless and inadvertent error.

In DeRenzo, above, the Commissioner held that the Board improperly and illegally altered the originally established salary of an assistant principal when it reduced his salary. The Board had argued that the original Board resolution was based on a misinterpretation of existing policy relating the salaries for administrative and supervisory personnel including eligibility for the receipt of an annual increment. The Commissioner stated an acquired right through the adoption of a resolution by a Board

cannot be invalidated by a rescinding resolution at a subsequent meeting. The decision specifically rejected the Board's argument that payments made by municipal corporations or agents thereof under mistake of law are recoverable. The Commissioner held that given the facts in DeRenzo and other similar "clerical error" cases, there was not nor will there be payment of monies under mistake of law (1973 S.L.D. at 246).

The petitioners further argue that this rule has most recently been recognized by the Commissioner of Education and the State Board in Bree v. Boonton Bd. of Ed., OAL DKT. EDU 0737-84 (Jun. 21, 1984) adopted Comm'r of Ed. (Aug. 6, 1984), mod. St. Bd. (Feb. 6, 1985). The petitioners state that Bree is substantially the same as the case at bar. Bree alleged that the Board had improperly reduced his salary for 1983-84 and frozen his 1984-85 salary. The Board asserted it was merely correcting an error that had occurred when it had improperly granted Bree's salary credit for two years of teaching experience acquired while he was an undergraduate student. The ALJ found that Bree did not misrepresent his teaching experience for salary credit. Whether the superintendent and the Board wished to credit him for teaching experience gained while he was a college undergraduate was a management prerogative. If an error in salary placement was in fact made, it was unilateral and the responsibility for it lay with the Board and its agent. The ALJ ordered the monies restored. He grounded his decision on previous school law decisions cited above, particularly Galop. The Commissioner adopted the initial decision and stated that there was no statutory prohibition concerning the offer of salary for initial employment above the statutory minimum. Nor is there anything to prevent a superintendent or Board from crediting teaching experience gained as a undergraduate or volunteer teacher if so desired.

On appeal, the State Board modified the decision but not in a respect relevant to this case. The State Board agreed that it was the local board's obligation to resolve any concerns it had about the petitioner's application at the time of initial employment and that, in absence of fraud or misrepresentation, a Board may not later wihhold increases in salary to which a teaching staff member is otherwise entitled.

The petitioners conclude that it is not alleged in any way that they were involved in any misrepresentation or deceitful practices. If an error or mistake occurred it was the Board's doing and not theirs.

V.

The Board argues that its action of April 23, 1984 affecting these nontenured petitioners did not reduce their salaries or attempt to recoup monies already paid on the basis of the erroneous step placement. Rather, the 1983-84 salary was continued through June 1984 and the correct step placement was made to be effective for the 1984-85 school year.

As the superintendent testified and as is borne out by Exhibit R-3, the compressed guide and step structure has remained effective since it was developed for initiation in the 1982-83 school year. Thus, for example, Teacher A., initially hired for 1983-84 with 13 years' of experience was on step ten while Teacher D., initially hired for 1984-85 with five years' of experience is on step two (Ibid.) The Board points out that the formula of years of experience minus three does not apply to those with 0, 1 or 2 years of experience who were "clustered" on the compressed guide (See R-2 and J-9, page 29, illustrations). All staff members except these petitioners are being compensated on the basis of this step placement formula.

Based on these uncontroverted facts, the legal question for this tribunal to determined is whether the Board can, on a prospective basis, correct these petitioners' steps on guide to accurately reflect their experience, thereby compensating them on the same basis as all other teachers in the district.

In Honaker v. Hillsdale Bd. of Ed., 1980 S.L.D. 898, a tenured teacher was erroneously advanced one step on the salary guide by including the time spent on a leave of absence without pay which the Board approved conditioned upon the leave not being creditable as experience on the salary guide. On discovering this error, the Board adopted a resolution setting Honaker's salary at the same step for the ensuing year. The administrative law judge and the Commissioner affirmed this correction. The ALJ stated, among other things:

> I CONCLUDE that the Board's corrective action in this matter was not only consistent with its own stated policy but also consistent with its discharge of its fiduciary responsibility of operating its schools evenhandedly in the interest of the taxpayers and its other employees. That petitioner was paid a higher amount for two years than was the intent of the Board members is stipulated. This worked to her temporary advantage. [citation omitted.] However,

> the Board has no legal obligation, within the factual context presented herein, to continue that unintended salary discrepency beyond the 1977-78 school year. At no time did the Board either reduce petitioner's salary or withhold an increment to which she was legally entitled. It was, however, within its authority to correct its prior error when fixing her salary for 1978-79 by holding her at the same step on the guide which she had attained for 1977-78 [citation omitted].

The Commissioner's affirmation noted, "the Board, in the matter herein contested, properly moved to correct its prior error by holding petitioner at the same step of the guide which she had previously obtained."

In Massa v. Kearny Bd. of Ed., 1980 S.L.D. 972, the Commissioner of Education reversed the ALJ's recommendation that the Board's action freezing the petitioner's salary to correct an earlier error violated N.J.S.A. 18A:29-14 by withholding an increment. The Commissioner, citing Honaker, above, and related cases stated that, once discovered, the error must be corrected.

The Board recognizes that attempts to reduce the compensation of tenured teachers, recouping monies paid, and disputes involving the amount of teaching experience granted, may have different results from the case at bar. However, as the facts here clearly demonstrate, this Board acted legally and properly in correcting an error prospectively and thus protected the taxpayers as well as the other employees who were being compensated on the proper basis.

The Board also urges that, assuming arguendo that N.J.S.A. 18A:29-14 applies, it has complied with its statutory obligations. Despite the Commissioner's refusal in at least one prior decision, Massa, above, to view this mater has subject to N.J.S.A. 18A:29-14, the Board has in fact complied. It gave the petitioner's notice of the recommendation (J-3, J-7), took public action by a majority vote of six to one, and notified the petitioners of both the action and the reason therefor within ten days (J-4, J-8).

Certainly the Board had good cause to correct the error both in the interest of the taxpayers and the other employees being compensated on the salary schedule. Certainly, it would not be proper for this tribunal or the Commissioner to substitute their

judgment for that of the Board in this matter. Kopera v. W. Orange Bd. of Ed., 60 N.J. Super. 288 (1960).

Not only has the Commissioner recognized the obligation to correct the error, but the petitioners' own collective bargaining agent, the Montgomery Township Education Association has agreed that:

> B. Any individual contract between the Board and an individual teacher, heretofore or hereafter executed, shall be subject to and consistent with the terms and conditions of this agreement. If an individual contract contains language inconsistent with this Agreement, then this Agreement, during its duration, shall be controlling (J-9, J-10, page 27).

The individual employment contracts between the Board and these petitioners did not comply with the agreed upon salary guide placement and had to be reformed both under the Education Law and the collective agreement.

VI.

In the case of Petigrow v. N. Warren Reg'l H.S. Dist. Bd. of Ed., OAL DKT. EDU 5564-80 (Mar. 11, 1980) adopted Comm'r of Ed. (Apr. 24, 1980), the ALJ and the Commissioner concluded that the petitioner could not be credited on the salary guide for certain service since she did not begin employment until after the January 1 date in the union contract. The Board had properly corrected its error in a timely fashion before the petitioner began service in the district. The petitioner had rendered no services under the flawed contract. In Galop, above, in contrast, a tenured teaching staff member's salary was fixed and paid for a period of time at a higher level on the salary guide than that to which she was entitled. In that matter, as here, the error was not attributable to the teaching staff member's actions. When the Board sought to recoup overpayments and reduce Galop's salary to a figure consistent with the academic credits she had acquired, the Commissioner held that the petitioner was in no way responsible for the unfortunate error and, having received notice of the higher salary and payment for a period of several months at that rate, she had reason to rely on the Board's official act establishing her salary at that level for the period of one school year. [emphasis added.]

Similarly, in Anson, above, the Commissioner held that petitioners acquire vested rights to their salaries estabished for them by the Board's adoption of their salary

placements. The Commissioner found that the Board in that case only computed and offered salaries to petitioners for the school year 1970-71, which the petitioner had accepted and were receiving. The Board's unilateral action to reduce their salaries during that school year was in violation of vested rights as protected by the provision of the Tenure Act. Therefore, since the petitioners' salaries were improperly reduced, the Board was directed to pay petitioners the amounts of the differences in earnings to which they were entitled in accordance with his determination.

I **FIND** that these and related decisions of the Commissioner and the State Board stand as controlling precedents and must be applied to the facts of the instant matter which are substantially the same. I **CONCLUDE** that once the Board had fixed and paid to Conti and Cutler their 1983-84 salaries, it had no authority to reduce those salaries. And it is not alleged that the Board did so. But the petitioners contend that the Board must continue to fix their salaries applying subsequent annual increments for satisfactory service. In consideration of the foregoing, I further **CONCLUDE** that the Board is correct when it contends that it may legally hold the petitioners at their present salary steps until the guide, in effect, catches up with them. This conclusion is grounded on the holdings of the Commissioner in Honaker, above, Galop, above, and the related cases.

The Board's action in establishing the petitioners' 1984-85 salaries and guide placements having been in all ways legal and proper, it is not necessary to address the Board's argument as to compliance with N.J.S.A. 18A:29-14 dealing with the withholding of increments.

Judgment is entered in favor of the Montgomery Township Board of Education and the petition of appeal is **DISMISSED.** It is so **ORDERED.**

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

OAL DKT. NO. EDU 7118-84

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

25 APRIL 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

APR 26 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 30 1985
DATE

Ronald L. Parker/sw
OFFICE OF ADMINISTRATIVE LAW

ml

THOMAS C. CONTI AND ERNESTINE CUTLER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were received from the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

Petitioners except to the determination reached by the judge that their employment contracts did not comply with the agreed upon salary guide placement of the district and therefore had to be reformed both under the Education Law and collective agreement. They believe this determination to be erroneous, avowing that no statute, rule, regulation or decision was violated when they negotiated their initial salaries with the Board through the superintendent pursuant to N.J.S.A. 18A:29-9. Petitioners rely on Galop, supra; DeRenzo, supra; Bree, supra; and Larsen v. Bd. of Ed. of East Windsor, 1978 S.L.D. 948 as support of their position.

The Board in its reply exceptions affirms the judge's decision as correct and urges the Commissioner to adopt it in its entirety. It contends that petitioners' reliance on the above-cited cases is misplaced.

Upon review of the record, the Commissioner determines that the Board acted erroneously in freezing petitioners' salaries at the 1983-84 level for the following reasons.

N.J.S.A. 18A:29-9 is clear and unambiguous that decision-making with respect to initial salary is solely based upon the agreement reached between the Board and the prospective employee, not as a result of or controlled by a collective bargaining agreement. (See Reilly v. Bd. of Ed. of Kearny (decided by the Commissioner April 25, 1985) and Shulman v. Bd. of Ed. of Morris School District (decided by the Commissioner April 15, 1985).) In the instant matter each petitioner came to agreement with the Board, albeit through its superintendent, regarding initial salary. A contract specifying the amount of salary was duly entered into with each petitioner and the Board at the commencement of the 1983-84 school year. (J-1, J-6) The fact that the amounts reflected in the

contracts coincided with particular steps of the salary guide negotiated between the Montgomery Education Association and the Board does not make the collective bargaining agreement the controlling issue. On the contrary, a collective bargaining agreement cannot supersede N.J.S.A. 18A:29-9, a statute that specifically addresses the setting of initial salaries.

Petitioners are correct when arguing that Bree, supra, is on point with the issues presented in the instant matter. As in Bree, if any error were made in the setting of an initial salary for each of the petitioners herein, it was not of their making. Thus, responsibility for any alleged error lies with the Board and its agent. The principle articulated in Galop, supra, which was cited by the Commissioner in Bree has applicability in this case as well. This principle reads:

> "***The Commissioner is constrained to caution all local boards of education and their administrative officers to examine in minute detail those documents which are submitted for official resolution authorizing contractual salaries of the numerous employees of school districts. In every instance such matters shoud be thoroughly scrutinized prior to official action. By so doing, boards will avoid the payment of unnecessary sums, as herein, and avoid the disharmony and unnecessary litigation occasioned by careless and inadvertent error.***"
>
> (1975 S.L.D. at 365)

The State Board of Education affirmed the determination in Bree that the Board therein could not withhold an increment/increase in salary to which a teaching staff member is otherwise entitled. That decision states:

> "***The State Board agrees that it was the Board's obligation to resolve any concerns it had about [Bree's] application at the time of initial employment and that, in the absence of fraud or misrepresentation, a board may not later withhold increases in salary to which a teaching staff member is otherwise entitled.***"
>
> (Slip Opinion, at 3)

Accordingly, the Commissioner determines that petitioners' salaries may not be "frozen" until they conform with the salary step of other teaching staff members with the same number of years of experience. Such action would violate N.J.S.A. 18A:29-14 which authorizes the withholding of an increment only for inefficiency or other just cause. This determination is not in conflict with the cases relied on by the judge in the initial decision, Galop, supra;

Honaker, supra; Anson, supra; and Petigrow; supra. None of those decisions dealt with an alleged error for initial salary as herein and in Bree.

The Commissioner cannot but reemphasize to local boards the importance of ascertaining the "correctness" of initial salaries reached with prospective employees because, unless fraud or misrepresentation is demonstrated, the Commissioner will not sustain any action by a board to "correct" for alleged error in initial salaries that results in the freezing of salary or withholding of salary increment(s).

Accordingly, the Commissioner reverses the finding and determination of the Office of Administrative Law and orders the Board to pay petitioners the salary increments denied them through its failure to move them to the appropropriate steps on the salary guide to which they were legally entitled by virtue of their satisfactory performance. The Commissioner notes that petitioners, by way of their exceptions, seek an award of interest. Such relief is herein denied. While the Commissioner has determined that the Board erred in its belief it could maintain petitioners' salaries at the 1983-84 levels, there has been no showing that it acted in bad faith. Consequently, the Commissioner determines that the factual circumstances do not warrant pre-judgment interest as articulated in Bd. of Ed. of City of Newark v. Levitt and Sasloe, 197 N.J. Super. 239 (App. Div. 1984) which states:

> "***Pre-judgment interest is in contemplation of law 'damages' for the illegal detention of a legitimate claim or indebtedness. *** It therefore serves to 'indemnify the claimant for the loss of what the monies due him would presumably have earned if payment had not been delayed.' [cite omitted]***"
>
> (197 N.J., Super. at 246)

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

JUNE 10, 1985

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7109-84
AGENCY DKT. NO. 367-8/84

LORRAINE KORNETT & SAYREVILLE EDUCATION ASSOCIATION,
Petitioners,
v.
SAYREVILLE BOARD OF EDUCATION,
Respondent.

Stephen B. Hunter, Esq., for petitioners (Klausner & Hunter, attorneys)

Casper P. Boehm, Jr., Esq., for respondent (Boehm and Campbell, attorneys)

Record Closed: March 13, 1985 Decided: April 29, 1985

BEFORE **BRUCE R. CAMPBELL,** ALJ:

Action for an order directing the Sayreville Board of Education to disseminate seniority lists and preferred eligible lists to teaching staff members who were subject to a reduction in force in the end of the 1983-84 school year and to the Sayreville Education Association upon demand and directing immediate reinstatement of Petitioner Kornett to a teaching staff position within the scope of her certification, with all back pay, benefits, emoluments and pension credit due and owing.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held on November 2, 1984. Among other things, it was determined that the issues to be tried are (1) was Petitioner Kornett reduced in force in derogation of her tenure and

seniority rights, (2) must the Sayreville Board of Education disseminate seniority and preferred eligible lists to teaching staff members reduced in force, and (3) must the Sayreville Board of Education disseminate seniority and preferred eligible lists to the Sayreville Education Association upon a reduction in force.

Counsel were directed to submit a joint stipulation of facts which was received in this office on February 1, 1985. Thereafter, the parties cross-moved for summary decision. All relevant and material facts having been stipulated, I determined the matter is ripe for summary disposition.

I.

The following facts are stipulated by the parties and I hereby adopt them as **FINDINGS OF FACT.** The documents referred to in the stipulation are deemed admitted in evidence by consent.

1. Petitioner Lorraine Kornett is a tenured teaching staff member in Respondent's employ, duly certified as an Elementary School Teacher.

2. Respondent, Sayreville Board of Education, is responsible for the operation and supervision of the Sayreville School District.

3. Petitioner Kornett was first employed within the Sayreville School District for the 1978-79 school year and was assigned to a position as a seventh grade teacher in the Sayreville Junior High School. During said year, she was assigned to teach Mathematics. The Mathematics Department in the Sayreville Junior High School is a departmentalized program.

4. Petitioner Kornett was employed during the 1979-80 school year and was assigned to teach in the Sayreville Junior High School. During this school year, she taught eighth grade English, Reading and Social Studies. These departments as well are a departmentalized program within the Junior High School.

5. The assignment during the 1978-79 school year was made based upon her elementary certification.

6. Any reference to Petitioner Kornett's service under her elementary certification does not represent a waive of any of the Petitioner's legal contentions.

7. Petitioner Kornett was employed during the 1980-81 school year and was assigned to work at the Sayreville Junior High School. She did Minimum Basic Skills work primarily in the Mathematics area at grade levels eight and nine. Mrs. Kornett's elementary certification permitted the varied assignment needed in the Minimum Basic Skills work.

8. Petitioner Kornett was employed from February 1, 1982 through June 30, 1982 and was assigned to the Sayreville Junior High School. Her assignment at said school building was to teach Mathematics at grade levels seven through eight.

9. Petitioner Kornett was employed for the 1982-83 school year as an Elementary School Teacher and was assigned to the Eisenhower Elementary School. During that year, she was assigned to a fourth grade classroom and taught all subjects to the fourth grade based upon her elementary certification.

10. Petitioner Kornett was employed for the 1983-84 school year and was assigned to the Sayreville Junior High School. During that year, she was assigned in said school building to teach English and Reading at the seventh and eighth grade levels.

11. On or about March 30, 1984, the Respondent Board of Education notified Petitioner Kornett that her employment would be terminated, effective June 30, 1984, because of a reduction in force within the district affecting the teaching complement within the Sayreville School District.

12. Petitioner Kornett was recalled from a RIF list when an opening became available in the Sayreville School District on September 6, 1984. At that time, she was employed effective that date and was assigned to teach at the Sayreville Junior High School. Her assignment effective September 6, 1984, was as an eighth grade Science teacher. This

assignment was permitted based upon her elementary certification. Mrs. Kornett had not taught Science at the Junior High School level prior to this year and her only experience in teaching Science would have been when assigned to the Eisenhower Elementary School in grade level four in the 1982-83 school year. Petitioner did not receive any salary for the period between September 1, 1984 and September 6, 1984. Petitioner has been advised that the Board of Education will not credit her with one full year of seniority at the conclusion of the 1984-85 school year inasmuch as she was not employed within the District until September 6, 1984.

13. Attached hereto and made a part hereof and designated Exhibits A through V are the employment records of other teachers employed by the Respondent. Said teachers were employed based upon their certification and were assigned for the period of time noted to the school listed to teach the grade and subject matter noted thereon. The employment records of said individuals are hereby stipulated but the parties hereto reserve the right to argue the relevance of particular employees as designated in Exhibits A through V to the within matter.

14. During the course of negotiations for the 1984-85 academic year, representatives of the Sayreville Education Association requested that the Board of Education supply the Association, on behalf of its membership, with a complete district seniority list of all teaching personnel employed by the Respondent Board of Education. The Board of Education did not supply said list to the Association.

15. On March 30, 1984, a letter was sent to Miss Patricia Compton, then President of the Sayreville Education Association, notifying her of the reduction in force that would take place with the professional staff. Enclosed with that letter were the seniority lists that were applicable to the reductions taking place. In addition, on May 1, 1984, June 5, 1984, and July 12, 1984, letters were additionally sent to Miss Compton informing her fully of all actions being taken regarding the assignment of District personnel and showing the desire of the District to return as

many professionals to full-time work as quickly as possible. (Attached hereto are copies of these letters designated Exhibits W through Z.)

16. Attached hereto and designated at Exhibit AA is a letter from the attorney for the Sayreville Education Association addressed to the attorney for the Sayreville Board of Education dated July 6, 1984, requesting a complete District seniority list.

17. Attached hereto and desginated as Exhibit BB is a response by the attorney for the Sayreville Board of Education to the attorney for the Sayreville Association dated July 19, 1984.

18. Lorraine Kornett, the Petitioner herein, was spoken to by Miss Rita Whitney, Principal of the Sayreville Junior High School, concerning the non-renewal of her teaching assignment for 1984-85. Further, Mrs. Kornett received the original of the attached letter dated March 30, 1984 which is attached hereto and designated as Exhibit CC. A copy of this letter was also sent to the Bargaining Unit.

19. On April 11, 1984, Mrs. Kornett was notified by official memorandum that she would not be offered a contract for employment beginning with the 1984-85 school year. Attached hereto is a copy of said memorandum designated as Exhibit DD.

20. On September 5, 1984, Mrs. Kornett was notified by letter that she would be re-employed by the Sayreville School District. (See Exhibit EE)

21. Petitioner Sayreville Education Association is, in pertinent part, the recognized majority representative of all non-supervisory teaching staff member within the Sayreville School District.

22. Annexed hereto is a copy of an official memorandum from the District's payroll master listing Petitioner's 1984-85 annual salary and the amount of money that was deducted for the two days in September when Petitioner Kornett was not employed by the Respondent Board of Education. (See Exhibit FF)

II.

The petitioner argues that the Board violated her seniority rights when it failed to employ her in a seventh or eighth grade departmentalized teaching capacity at the start of the 1984-85 school year. With the exception of her assignment during the 1982-83 school year to a self-contained fourth grade, the petitioner has been employed in a series of departmentalized seventh and eighth grade subject areas since the start of her employment within the district in the 1978-79 school year.

The petitioner was called by the Board to teach at the Sayreville Junior High School effective September 6, 1984, several days into the 1984-85 school year. The Board will not credit her with a full year's seniority at the conclusion of the 1984-85 school year inasmuch as she was not employed within the district until the September 6th date. In addition, the petitioner has been paid only since September 6, 1984. Teachers who were employed at the beginning of the academic year received two days' more salary than she.

The petitioner contends that there are at least four teachers in the district, Barbara Waldron, Ellen Giordano, Phyllis Newman and Karen Rubio, who were employed in departmentalized seventh and eighth grade teaching capacities at the start of the 1984-85 school year who had never before taught in a departmentalized junior high school situation within the Sayreville School District. The petitioner urges, therefore, that in accordance with the new seniority regulations, N.J.A.C. 6:1.10 et seq., as interpreted by the Commissioner of Education and the State Board of Education, these four teachers were employed at the start of the 1984-85 school year in contravention of the petitioner's seniority status within the district.

The pertinent administrative regulations and a recent State Board decision interpreting pertinent aspects of the new seniority regulations support the petitioner's legal contentions and mandate a conclusion that her seniority rights were violated by the Board when it failed to employ her in a departmentalized teaching capacity within the seventh and eighth grades, consistent with her subject area experience, at the start of the 1984-85 school year.

It is not controverted that the amended seniority regulations, effective September 1, 1983, applied to the present matter. The amended regulations define "elementary" as "kingergarten, grades 1-6 and grade 7-8 without departmental

instruction." N.J.A.C. 6:3.1.10(l)(16) (emphasis added). The definition of "secondary" has been retained as in the former regulations. N.J.A.C. 6:3-1.10 (l)(15).

In In the Matter of the Seniority Rights of Teaching Staff Members Employed by the Old Bridge Township Board of Education and the Edison Township Board of Education, 1984 S.L.D. ___ (Aug. 6, 1984), aff'd St. Bd. (Jan. 2, 1985) appeal pending, App. Div., No. A-2241-84T6, the Commissioner ruled that teachers with only elementary certification who taught departmentalized seventh and eighth grade classes prior to the 1983-84 school year accrued only elementary seniority. Beginning with the 1983-84 school year, a teacher with elementary certification and prior seventh and eighth grade departmentalized experience within a school district, who taught a particular academic subject in a departmentalized seventh or eighth grade class, would receive secondary seniority in the specific subject area taught, limited to grades seven and eight. The Commissioner's rationale was that prior to the 1983-84 school year, departmentalized seventh and eighth grade classes were in the elementary category as then defined. Since the amendment of the rules, such classes are solely within the secondary category.

No teacher in possession of only an elementary endorsement could be properly assigned, after September 1, 1983, to teach for the first time any seventh or eighth grade departmentalized subjects, regardless of the scope of the elementary certification. Only teachers with prior departmentalized teaching experience in the particular subject area could be so assigned after September 1, 1983.

In the present case, as shown by the employment histories, Exhibits A, E, F and K, teachers Waldron, Giordano, Newman and Rubio were assigned seventh and eighth grade departmentalized subject area duties for the first time in their employment careers at the start of the 1984-85 school year. In fact, they were assigned departmentalized subjects that had been taught by the petitioner prior to the effective date of the new regulations. Furthermore, in addition to her elementary seniority, the petitioner had accrued one year of secondary seniority under the categories of secondary Teacher of Reading and secondary Teacher of English as of the conclusion of the 1983-84 school year. (Stipulation 10).

By reference to Exhibit W, the seniority list of February 1984, the petitioner's placement on the list is in position 121, with 55 months of seniority credited as of the conclusion of the 1983-84 school year. As of the start of the 1984-85 school year,

teachers in positions 117 and 120 were appropriately employed within their elementary certification as self-contained classroom teachers. However, Waldron (tied for 117), Newman (115), Giordano (113) and Rubio (106) were employed as of the start of the 1984-85 school year in departmentalized teaching positions to which they could not be assigned in accordance with the prescriptions of the new seniority regulations as interpreted by the Commissioner in the Old Bridge-Edison decision.

The petitioner points out that the Board has not asserted there were any individuals on preferred eligible lists for teachers of secondary English, reading or social studies who could have "bumped down" into seventh and eighth grade departmentalized teaching positions as of the start of the 1984-85 school year. Inasmuch as the four above mentioned teachers were not properly appointed to departmentalized seventh and eighth grade teaching positions at the start of the 1984-85 school year, it is submitted that the petitioner clearly had greater seniority entitlements to the positions occupied by these teachers.

Even if the petitioner did not have secondary seniority as a teacher of English and Reading based upon her 1983-84 service, her pre-September 1983 service in the subject areas of social studies, English, reading and mathematics would have given her seniority rights under elementary certification as against these particular subject area departmentalized positions in the present school year.

The petitioner further argues that the Board violated state seniority statutes by failing to disseminate a complete, district-wide seniority list and all appropriate preferred eligible lists to teaching staff members affected by reductions in force and to the Sayreville Education Association which is the majority representative for all teaching staff members in the district. All that the petitioner received was the letter dated March 30, 1984 (Exhibit CC), the memorandum dated April 11, 1984 (Exhibit DD), and the letter of September 5, 1984, notifying her that she would be re-employed by the district (Exhibit EE). No seniority lists were annexed to any of these documents. No preferred eligible list was annexed to any of these documents. The petitioner submits that N.J.S.A. 18A:28-11 and 28-12 mandate that all teaching staff members affected by reductions in force received copies of the district-wide seniority lists and preferred eligible lists as adopted by the Board. She further submits that boards of education must have these lists in place in order to determine the teaching staff members who are to be affected by any reductions in force. The dissemination of documentation already developed by the Board

to the few affected teaching staff members does no more than clearly notify an affected person as to his or her seniority status and would serve to avoid the attendant confusion that arises in many instances when reductions in force are announced. Absent the dissemination of district-wide seniority lists and/or preferred eligible lists to affected persons, rumors, misinformation and unnecessary litigation may result. The petitioner does not claim that the Board shrouded the entire reduction in force in secrecy. Exhibit W establishes that at least parts of the district-wide seniority list were given to the president of the Sayreville Education Association. The petitioners object to the extent that the seniority list materials disseminated were incomplete.

The petitioners also assert that the Board would have acted in compliance with N.J.S.A. 18A:28-11 if in its letter to the petitioner dated March 30, a complete, district-wide seniority list had been enclosed. And the cases of Red Bank Reg'l Ed. Ass'n v. Red Bank Reg'l H.S. Bd. of Ed., 79 N.J. 122 (1978) and State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978) established that an association, such as the Sayreville Education Association, has standing under N.J.S.A. 18A:28-11, to demand revelant district-wide seniority lists. Moreover, it has a statutory obligation to do so given its contractual responsibilities and the incorporation of the prescriptions of N.J.S.A.18A:28-11 within collective bargaining agreements in compliance with the legal principles enunciated in State Superivsory Employees, above.

III.

The Board argues that Petitioner Kornett was properly reduced in force in the beginning of the 1984-85 school year. The factual question is simply the meaning of an elementary endorsement on a teaching endorsement as is provided in N.J.A.C. 6:11-6.2 and as it relates to the new seniority regulations at N.J.A.C. 6:3-1.10.

The petitioners have set forth that the above questions have already been answered by the Commissioner and the State Board in the Old Bridge-Edison case, above. However, the Board urges that several issues or at least factual possiblities were not fully discussed in that decision. Furthermore, counsel for the local education association in Old Bridge-Edison argued a position which went to extremes and did not comply with the intent of both the Commissioner and the State Board.

The Sayreville Board urges that a middle ground approached to the problem is the solution. As was pointed out by the petitioner in the Old Bridge-Edison case, the rules concerning elementary certification are precisely the same as they were prior to the amendment of the seniority regulations. These certification regulations have not been amended. The elementary endorsement authorizes the holder to teach all subjects, grades kingergarten through eight. N.J.A.C. 6:11-6.2(a). The history of instruction in the Sayreville Junior High School has already been before the Commissioner of Education in Nancy Prysiazny and Sayreville Ed. Ass'n v. Sayreville Bd. of Ed., OAL Dkt. No. EDU 2722-79 (Mar. 26, 1980) aff'd Comm'r of Ed. (May 5, 1980). The Education Association in the Old Bridge-Edison case relied on Prysiazny in stating that "irrespective of changes in the seniority regulations, these cases are perfectly valid in defining the scope of elementary certification."

Historically, boards of education have been given the right to transfer teaching staff members within the scope of their certifications pursuant to the provisions of N.J.S.A. 18A:25-1. This ability to transfer has led to the assignment of teachers with elementary certifications both in a school designated exclusively for kindergarten through sixth grade and in junior high schools or middle schools with seventh and eighth grades. Many of these junior high schools and middle schools have departmentalized programs. However, teaching staff have been retained to teach subjects such as English, spelling, arithmetic and social studies who have acquired only elementary certification. The Board suggests that school districts do not advertize for a seventh grade arithmetic teacher. Specifically, a teacher with elementary certification has been hired and assigned to the seventh grade. From time to time, depending upon fluctuating enrollments, teachers have been reassigned from an elementary school to a junior high school and in the reverse to accomodate changings in enrollment patterns.

The Board contends that Petitioner Kornett properly belongs on an elementary seniority list. Old Bridge-Edison, above. The disagreement occurs as to whether or not there should be a special list which discriminates against those teachers who are properly certified to teach seventh or eighth grade arithmetic, social studies, or other subjects, and who, but for the vagaries of assignments, worked in self-contained situations and shall now lose their jobs to a teacher with the same certification with less seniority but who, by good fortune, happens to have taught in a departmentalized situation.

The Board submits that Exhibit W properly reflects the only seniority to which the petitioner is entitled. Those individuals pointed out by the petitioner in their brief all have more seniority than Petitioner Kornett even though they were assigned exclusively in the past to teach elementary classes.

Old Bridge-Edison leads to the conclusion that if a special category of secondary English is created for those persons with elementary certification who have taught in Sayreville Junior High School in the seventh and eighth grades, this category would transcend to the Sayreville Senior High School and thus would include persons who hold a certificate as a teacher of English and who have taught English in the Sayreville High School for sufficient time to have gained tenure and, thus, seniority. The Board urges that there can be only one category that Petitioner Kornett is entitled to by reason of her certification and that is as an elementary school teacher with an elementary endorsement.

The conclusion that the petitioners urge that no teacher could be assigned after September 1, 1983, to teach for the first time any seventh or eighth grade departmentalized subject, regardless of the scope of the elementary certification, simply is not contained in the Old Bridge-Edison decision, above. It certainly is not contained in either the new seniority regulations or the certification regulations set forth at N.J.A.C. 6:11-6.2 et seq.

Furthermore, assuming no reduction in force, the Board of Education would have the ability to make transfers pursuant to N.J.S.A. 18A:25-1, as long as the teaching staff members involved are transferred to a position within their certifications.

Petitioner Kornett has certification only in the elementary category and has seniority only in the elementary category. Petitioner Kornett could be assigned to teach common branch subjects in the seventh, eighth or any grade through the twelfth grade. However, she does not develop seniority in those subjects and could not replace a tenured teacher with seniority in those categories who has a certification with a specific endorsement such as, for example, English. The petitioner can obtain seniority only in the area of her certification. However, this gives the petitioner, in this case, the right to acquire seniority over a second grade teacher who was employed after the petitioner even though the petitioner has not taught at the second grade level. This interpretation of the seniority rules as they relate to the certification rules and further as they relate to the

common practice of most school districts, is reasonable and clearly complies with the intent and purpose of the regulations as adopted by the State Board of Education.

Petitioner Kornett was properly reduced in force and properly placed upon the appropriate recall list. She is not entitled to any additional seniority nor entitled to any damages.

The Board insists it complied with all requirements concerning seniority lists and recall lists in this matter. A review of the Joint Stipulation of Facts indicates that Exhibit W, a letter from the superintendent of schools to the Association president, provided the president with a seniority list for the elementary school teachers. Further, the provisions of N.J.S.A. 18A:28-11 provide that the Board shall notify each such person, such person being the person reduced in force, as to his seniority status. This provision does not require the dissemination of a complete district-wide list as is contended by the petitioners. Exhibit CC, a letter from the superintendent to the petitioner, notifies her that her contract would not be renewed based upon declining enrollment. This is a notification of seniority status of the petitioner. This letter was dated March 3, 1984. There is no contention that the petitioner did not receive the letter.

Stipulation 21 indicates that the Sayreville Education Association is the recognized majority representative of all non-superivsory teaching staff members within the district. Receipt by the Association president is tantamount to receipt by the individual petitioner herein.

Although the petitioners cite N.J.S.A. 18A:28-12 in reciting that a person shall remain upon a preferred eligible list in the order of seniority for re-employment, there appears to be no allegation that Petitioner Kornett was not kept on such a list or that she was not re-employed. The only contention is that she was not kept on the appropriate list. This point, however, is addressed above. There is nothing contained in either section of the statute that is cited by petitioner which would require complete seniority lists to be furnished to the individual petitioner herein. In fact, complete seniority lists are not necessarily required as long as those persons at the bottom of the list are those persons that will be affected by a reduction in force and are kept in proper order.

Lastly, it is not necessary to address the issue of standing of the Association. In this case, the Board did disseminate the seniority list to the Association President.

IV.

Tenure is a legislatively created status acquired by teaching staff members who have been employed for the requisite time. N.J.S.A. 18A:28-5. Until tenure attaches, no seniority accrues. Until tenure has been achieved, a Board has broad discretionary authority to decide whether a teaching staff member should be re-employed. Donaldson v. N. Wildwood Bd. of Ed., 65 N.J. 236 (1974). Once tenure has been attained, the teacher may be dismissed only for cause, N.J.S.A. 18A:28-5 or reduced in force, pursuant to N.J.S.A. 18A:28-9. In deciding which tenured teachers to dismiss in a reduction in force, a board of education must follow the seniority standards established by regulation. N.J.A.C. 6:3-1.10.

Petitioner Kornett served as a seventh grade mathematics teacher in the 1978-79 school year. She served as an eighth grade English, reading and social studies teacher in the 1979-80 school year. In 1980-81, she was a minimum basic skills teacher primarily in the areas of mathematics and she worked with pupils in grades eight and nine. She was not employed at the beginning of the 1981-82 school year. She was employed from February 1, 1982 through June 30, 1983 as a teacher of mathematics in the seventh and eighth grades. Pursuant to N.J.S.A. 18A:28-5, she achieved a tenure status in the district on February 1, 1982. In the 1982-83 school year she taught a self-contained fourth grade. In 1983-84, she taught English and reading at the seventh and eighth levels. Near the end of that school year, Petitioner Kornett was notified of a reduction in force. She was, in fact, reduced in force. She was, however, recalled shortly after the beginning of the 1984-85 academic year and accepted a position teaching eighth grade science.

The Board's argument seems to suggest that the new seniority regulations did nothing to change the state of the law concerning the certificates and endorsements to be required of teaching staff members involved in the teaching of departmentalized seventh and eighth grade subjects after September 1, 1983. The Board believes that it may assign an individual teacher in possession of an elementary certificate to a seventh or eighth grade departmentalized assignment regardless of whether that teacher has ever taught any departmentalized seventh or eighth grade classes before. The petitioners urge that the Board's position ignores the Old Bridge-Edison decision.

In the Old Bridge-Edison opinion, the Commissioner stated that teaching staff members who had taught departmentalized seventh and eighth grade subjects under an elementary endorsement prior to September 1, 1983, were "entitled to accrue seniority in the departmentally-organized grades seven and eight limited to the specific subject actually taught" (at page 11). In view of the Commissioner's clear language, I cannot accept the Board's argument in this regard. Petitioner Kornett, given her English and reading teaching responsibilities at the seventh and eighth grade levels at the 1983-84 school year acquired one year of seniority in each of these secondary categories. She was also permitted to tack on one more year to her previously accrued elementary seniority. The same may be said of her departmentalized teaching experience in the 1978-79 and 1979-80 school years as well as the half year in which she served as a mathematics teacher in 1982.

From the documents submitted, it is clear that certain teaching staff members were assigned for the first time by the Board to teach departmentalized subjects at the seventh and eighth grade levels in the 1984-85 school year while in possession of only elementary certification. This violated Petitioner Kornett's seniority rights. Since the reduction in force that affected her took place after the adoption of the September 1, 1983 amendments of N.J.A.C. 6:3-1.10, she was more senior as of the start of the 1984-85 school year in appropriate departmentalized seventh and eighth grade teaching capacities then were certain persons assigned. I so **FIND.**

Old Bridge-Edison also seems to say that elementary endorsed persons who have served in departmentally organized grades seven and eight, prior to the rules amendment, will be protected but it is the intent for the future to limit assignments to departmentally-organized grades seven and eight to persons holding specific subject matter endorsement. Related to this, the State Board decision in Old Bridge-Edison establishes that the Commissioner and the State Board rendered the decision in that matter even while acknowledging the need for amendments to rules governing elementary certification and endorsement matters. Nevertheless, it seems that a board of education will be free to use elementary endorsed teachers in seventh and eighth grade departmentalized assignments where they have had experience before September 1, 1983 in departmentalized subject areas. Of course, boards may now, as previously, employ individuals with appropriate secondary endorsements to teach specific subjects at the junior high school level.

N.J.S.A. 18A:28-11 states, in pertinent part:

> In the case of any such reduction the Board of Education shall determine the seniority of the persons affected according to such standards [as developed by the Commissioner] and shall notify each such person as to his seniority status. . . .

N.J.S.A. 18A:28-12 states, in pertinent part:

> 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 re-employment when ever a vacancy occurs in a position for which such person shall be qualified and he shall be re-employed by the body causing dismissal, if and when such vacancy occur. . . .

Having reviewed the record, I **FIND** that the Sayreville Board of Education failed to notify individuals affected by the subject reduction in force of their seniority status in accordance with the provisions of N.J.S.A. 18A:28-11. Accordingly, the Board is **DIRECTED** in any subsequent reduction in force to notify every affected individual as to his or her seniority status including an indication that the person is on not merely the elementary seniority list but also, where appropriate, on specific subject area seniority lists for seventh and eighth grades having departmentalized instruction.

I do not preceive the remaining issue, whether the Board must disseminate seniority and preferred eligible lists to the Sayreville Education Association, actually to be in controversy here. The record indicates that the Association president was provided pertinent seniority data. I **FIND** this issue not to be justiciable at this time.

I **CONCLUDE** that the reduction in force of Lorraine Kornett at the conclusion of the 1983-84 school year was improper. I further **CONCLUDE** that the Board has failed to notify reduced individuals of their seniority status, pursuant to the requirements of N.J.S.A. 18A:28-11. I further **CONCLUDE** that there has been no showing of violation of N.J.S.A. 18A:28-12.

Therefore, the Sayreville Board of Education is **ORDERED** to deem Lorraine Kornett as having been employed from the beginning of the 1984-85 school year, to make her whole as to salary and emoluments, and the Board is further **ORDERED** to comply with the seniority list requirements set forth above.

OAL DKT. NO. EDU 7109-84

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

29 APRIL 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 02 1985
DATE

Ronald L. Parker /gbb
OFFICE OF ADMINISTRATIVE LAW

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LORRAINE KORNETT AND SAYREVILLE EDUCATION ASSOCIATION,

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF SAYREVILLE, MIDDLESEX COUNTY, : DECISION

RESPONDENT. :

:

The record and initial decision have been reviewed. No exceptions were filed within the time prescribed in N.J.A.C. 1:1-16.4a, b and c.

The Commissioner notes a statement made by the judge hereby set down in pertinent part:

> "No teacher in possession of only an elementary endorsement could be properly assigned, after September 1, 1983, to teach for the first time any seventh or eighth grade departmentalized subjects, regardless of the scope of the elementary certification. Only teachers with prior departmentalized teaching experience in the particular subject area could be so assigned after September 1, 1983."
>
> (Initial Decision, ante)

Inasmuch as this makes reference to the Old Bridge - Edison, supra, decision, the Commissioner notes that the right of an elementary endorsed teacher to teach or be assigned in any seventh or eighth grade departmentalized area in a particular subject assignment as endorsed has not been disturbed. The revised regulations as they have been interpreted in Old Bridge sets forth their seniority entitlement and do not interfere with the scope of the endorsement authorization. The Commissioner affirms the findings and determination as modified in the initial decision in this matter and adopts them as his own.

The Commissioner endorses the instruction by the judge to the Sayreville Board of Education concerning seniority modification to each affected individual and, in particular, Petitioner Kornett who shall be made whole.

COMMISSIONER OF EDUCATION

JUNE 14, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8418-84

AGENCY DKT. NO. 447-10/84

NEWARK TEACHERS' UNION LOCAL 481, AFT, AFL-CIO; THEODORE A. BURNS, JR.; KATHLEEN CAPORASO; THELMA COLLIER; ROBERT DURKIN; CHRISTIAN O'NEAL; EDWARD PATRICK; JAMES SCALA; DONALD SHAW; REYES TORRES AND BENNIE WILLIAMS,

Petitioners,

v.

NEWARK BOARD OF EDUCATION,

Respondent.

Ida L. Castro, Esq., for petitioners (Giblin & Giblin, attorneys)

Carolyn Ryan Reed, Esq., for respondent (Vickie A. Donaldson, General Counsel, Newark Board of Education)

Record Closed: March 29, 1985 Decided: May 10, 1985

BEFORE **BRUCE R. CAMPBELL,** ALJ:

The Newark Teachers' Union, Local 481, and 13 individuals sought a determination that the salary increments of the named individuals were improperly withheld for the 1984-85 school year. The petitioners further sought an order restoring all increments, including longevity increments, and removing all adverse materials related to the withholdings from the personnel records of each affected individual. Subsequently,

three petitioners withdrew from the action and the caption of the case was amended to read as above by order dated April 4, 1985.

Subsequent to the matter being joined before the Commissioner of Education, it was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq After notice, a prehearing conference was held on December 18, 1984. The issue to be tried was identified as whether the withholding procedures now in effect in the Newark Public Schools are defective and, if so, to what relief the named petitioners are entitled.

The matter was set down for hearing on March 11-15, 1985. Counsel were directed to submit a joint stipulation of facts on or before January 31, 1985. Upon submission of the joint stipulation, it became apparent that no material facts were in controversy. Accordingly, it was agreed that the matter would proceed on cross-motions for summary judgment. The parties timely submitted their motions and supporting papers. The record closed on March 29, 1985, with receipt of the Board's last submission.

I.

The parties stipulate and I **FIND** the following to be **FACTS** in this matter:

1. As to Petitioner Theodore Burns, Jr., the undersigned parties stipulate to the following:

   (a) On or about July 16, 1984, Respondent Newark Board of Education (NBE), sent to Petitioner Burns a letter informing him that the Human Resources Services Committee would conduct hearings on the denial of increments. The letter further stated that Mr. Burns' hearing would be on July 21, 1984.

   (b) On or about August 9, 1984 Respondent NBE send [sic] a letter by mail to Petitioner Burns stating that the Committee (referred to in Paragraph 1(a)) would recommend to the Board denial of his 1984-85 salary increment and that he would receive notice of the Board's action a [sic] a later date.

2. As to Petitioner Kathleen Caporaso, the undersigned parties stipulate to the following:

   (a) On or about July 16, 1984, Respondent NBE send [sic] to Petitioner Caporaso a letter informing her that the

Human Resources Services Committee would conduct hearings on the denial of increments. The letter further stated that Ms. Caporaso's hearing would be on July 21, 1984.

(b) On or about August 30, 1984, Respondent NBE mailed a letter to Petitioner Caporaso stating that she had not been advised as to the result of the Committee's deliberations and extended Respondent's apologies to the Petitioner.

(c) On or about September 25, 1984, the NBE sent a letter to Petitioner Caporaso stating that the NBE had taken action at a special meeting held on August 31, 1984 to withhold her increment and stating as reasons "Litigation and/or investigation; Abuse of Sick Leave".

. . . .

4. As to Petitioner Thelma Collier the undersigned parties stipulate the following:

(a) On or about August 8, 1984, the NBE mailed a letter to Petitioner Collier stating that the Committee would recommend withholdal of increment due to "unsatisfactory performance". The letter stated that she would receive notice of the Board's actions.

(b) On or about August 30, 1984, Respondent NBE mailed to Petitioner Collier a letter stating that she had not been advised as to the results of the Committee and extended Respondent's apologies to Petitioner Collier.

(c) On or about September 25, 1984 the NBE sent a letter by mail to Petitioner Collier stating that the NBE had taken action by a special meeting on August 31, 1984 to withhold her 1984-85 increment.

5. As to Petitioner Robert Durkin the undersigned parties stipulate the following:

(a) On or about July 16, 1984, Respondent NBE sent to Petitioner Durkin a letter informing him that the Human Resource [sic] Services Committee would conduct hearings on the denial of increments. The letter further stated that Mr. Durkin's hearing would be on July 21, 1984.

(b) On or about September 25, 1984, the NBE sent a letter by mail to Petitioner Durkin stating that the NBE had taken action by a special meeting on August 31, 1984 to withhold his 1984-85 increment.

6. As to Petitioner Christian O'Neal, the undersigned parties stipulate to the following:

   (a) On or about August 28, 1984 Respondent NBE sent a letter to Petitioner O'Neal by mail stating that there would be a recommendation to the Board to withhold Petitioner O'Neal's 1984-85 increment based on "unsatisfactory teaching performance and other good cause". The letter states date, place and time of the NBE special meeting.

   (b) On or about August 30, 1984 Respondent NBE mailed to Petitioner O'Neal a letter stating that she had not been advised as to the result of the Committee and extended Respondent' apologies to Petitioner O'Neal.

7. As to Petitioner Edward Patrick the undersigned parties stipulate the following:

   (a) On or about July 16, 1984 Respondent NBE sent to Petitioner Patrick a letter informing him that the Human Resources Services Committee would conduct hearings on the denial of increments. The letter further stated that Mr. Patrick's hearing would beon July 21, 1984.

   (b) On or about August 28, 1984, Respondent NBE sent a letter by mail to Petitioner Patrick stating that there would be a recommendation to the Board to withhold Petitioner Patrick's 1984-85 increment based on "unsatisfactory teaching performance and other good cause". The letter states date, place and time of the NBE special meeting.

   (c) On or about August 30, 1984, Respondent NBE mailed to Petitioner Patrick a letter stating that he had not been advised as to the results of the Committee and extended Respondent's apologies to Petitioner Patrick.

8. As to Petitioner James Scala, the undersigned parties stipulate the following:

   (a) On or about July 16, 1984 Respondent NBE sent to Petitioner Scala a letter informing him that the Human Resources Services Committee would conduct hearings on the denial of increments. The letter further stated that Mr. Scala's hearing would be on July 21, 1984.

   (b) On or about August 28, 1984, Respondent NBE sent a letter to Petitioner Scala by mail stating that there would be a recommendation to the Board to withhold Petitioner Scala's 1984-85 increment based on "unsatisfactory teaching performance and other good cause." The letter states date, place and time of the NBE special meeting.

(c) On or about September 25, 1984, the NBE sent a letter by mail to Petitioner Scala stating that the NBE had taken action by a special meeting on August 31, 1984 to withhold his 1984-85 increment.

9. As to Petitioner Donald Shaw, the undersigned parties stipulate to the following:

(a) On or about July 16, 1984, Respondent NBE sent to Petitioner Shaw a letter informing him that the Human Resources Services Committee would conduct hearings on the denial of increments. The letter further stated that Mr. Shaw's hearing would be on July 21, 1984.

(b) On or about August 28, 1984, Respondent NBE sent a letter to Petitioner Shaw by mail stating that there would be a recommendation to the Board to withhold Petitioner Shaw's 1984-85 increment based on "unsatisfactory teaching performance and other good cause". The letter states date, place and time of the NBE special meeting.

. . . .

11. As to Petitioner Reyes Torres, the undersigned stipulates as follows:

(a) On or about July 23, 1984, the Respondent NBE sent to Petitioner Torres a letter informing him that the Human Resources Services Committee would conduct hearings on the denial of increments. The letter further stated that Mr. Torres's hearing would be on July 21, 1984.

(b) On or about August 8, 1984 the NBE mailed a letter to Petitioner Torres stating the Committee would recommend withholdal of increment due to unsatisfactory performance. The letter stated that she would receive notice of the Board's action.

(c) On or about September 25, 1984 the NBE sent a letter by mail to Petitioner Torres stating that the NBE had taken action by a special meeting on August 31, to withhold her 1984-85 increment.

12. As to Petitioner Bennie Williams the undersigned stipulates the following:

(a) On or about July 16, 1984 Respondent NBE sent to Petitioner Williams a letter informing him that the Human Resources Services Committee would conduct hearings on the denial of increments. The letter further stated that Mr. Williams' hearing would be on July 21, 1984.

(b) On or about August 28, 1984 Respondent NBE sent a letter to Petitioner Williams by mail stating that there would be a recommendation to the Board to withhold Petitioner Williams [sic] 1984-85 increment based on "unsatisfactory teaching performance and other good cause". The letter states date, place and time of the NBE special meeting.

Paragraphs of the foregoing stipulations dealing with those petitioners who have withdrawn from the case have been deleted.

II.

The Board argues that summary judgment must be granted in its favor because no genuine issue of material fact exists. The Board asserts that the petitioners have failed to establish that the requirements of N.J.S.A. 18A:29-14 have not been met.

The classic formulation of the standard to be applied in determining a summary judgment motion was set forth in the landmark case of Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 74 (1954):

> The standards of decision governing the grant or denial of a summary judgment emphasize that a party sustain the burden of showing clearly the absence of a genuine issue of material fact. At the same time, the standards are to be applied with discriminating care so as to not to defeat a summary judgment if the movant is justly entitled to one.

In this matter, the Board is entitled to summary judgment for the reasons set forth below.

The Board states the general proposition that actions of boards of education carry a presumption of correctness. One who challenges the actions of a board must demonstrate that the board's action has been arbitrary, capricious, unreasonable or otherwise inconsistent with statutory or constitutional requirements.

In the present case, the Board has substantially complied with its statutory duty and has not deprived the petitioners of a fair and adequate opportunity to be made aware of the specific reasons for denial of their increments. The procedure followed with respect to the withholdings was consistent with the spirit of the statute. To restore the petitioners' increments on the grounds that the Board did not properly notify the

petitioners within ten days of the action is unjustified and would serve no useful purpose. Such a procedural defect is not fatal.

The Board concedes that the there might have been some discrepency between its action and the actual requirements of N.J.S.A. 18A:29-14 as to the ten-day notice. However, the Board strictly complied with all other aspects of the statute. Notices for the Board meetings and agenda were printed twice in a newspaper circulating in the community and were distributed at Board meetings. (R-1, R-2, R-3, R-4, R-5).

On June 26, 1984, the Board lacked a quorum; therefore it could not vote on the withholdings. The agenda and the names of the petitioners recommended for withholding were again published in a newspaper circulating in the community for the August 31, 1984 meeting. All petitioners were notified prior to the August 31, 1984 meeting. The Board submits that these petitioners were not only well aware that a recommendation to withhold their increments would be made, but were also aware of the reasons such recommendations would be made. (R-6 through R-39, R-51 through R-91, R-99 through R-115 and R-122).

The Board maintains that it has met the legislative intent of N.J.S.A. 18A:29-14 and, therefore, its determination should not be set aside. Baker v. Bergenfield Bd. of Ed., 1978 S.L.D. 740. In Baker, the Commissioner said at 744:

> He [the Commissioner] finds that the Board was remiss in not following the letter of the law by its failure to notify petitioner in writing of its reasons to withhold his salary increment within ten days of its action.
>
> He determines, however, that such failure is not fatal in the total circumstances of the instant matter. For full compliance with the statute, albeit tardy, the Commissioner now directs the Board to provide the petitioner with a complete statement of its reasons to withhold his salary increment.

See also, Marshall v. Southern Reg'l H.S. Dist. Bd. of Ed., 1978 S.L.D. 593, 596.

In Marshall the petitioner argued that the Board failed to notify him within ten days of withholding his increment and failed to state its reasons for withholding his increment. The Commissioner noted that the petitioner was in receipt of his evaluation and was well aware that the superintendent had recommended that the Board withhold his increment. The petitioner was even afforded the opportunity to meet and discuss the

matter in private. Furthermore, the petitioner was in attendance at the Board's subsequent open public meeting when it acted to withhold his increment.

In the instant case, the Board sent letters to all of the petitioners inviting them to meet with the Human Resources Committee of the Board prior to the Board's determination. (See exhibits, above.)

The petitioners here were not prejudiced by the Board's action. "The intent of the notification requirement in N.J.S.A. 18A:29-14 is to give the affected employee opportunity to appeal the action to the Commissioner." Hillman v. Caldwell-W. Caldwell Bd. of Ed., 1977 S.L.D. 218, 226. The petitioners here were provided timely notice so they could timely appeal to the Commissioner. The petitioners have failed to show that they have been prejudiced by the Board's action.

On June 23, 1984, the Board agenda appeared in the Star-Ledger, listing the petitioners being considered for denial of increments. (R-1, R-2). On June 26, the petitioners' names, with accompanying resolutions, were printed in the Board agenda. (R-122). The resolutions for denial were not voted on on Tuesday, June 26, 1984, because the Board lacked a quorum at that meeting.

Between July 16 and 23, 1984, letters were sent to the petitioners from the Human Resources Committee of the Board. The letters informed the petitioners that a recommendation would be made to the whole Board to withhold their increments. The petitioners were asked to indicate whether they desired to have a hearing before the Human Resources Committee. (R-6, R-26, R-44, R-52, R-60, R-68, R-75, R-88, R-104 and R-109). On August 28, the petitioners were notified by mail that a notification for denial of increment would be made to the Board at its August 31 meeting. (R-9, R-30A, R-54, R-61, R-70, R-78, R-90, R-106 and R-112).

On August 28, the agenda and notices of the August 31 special Board meeting were posted and printed in the Star-Ledger. The agenda listed the names of petitioners being considered for denial of increments. (R-3, R-5). At this special Board meeting on August 31, the Board voted to deny increments to the petitioners for the 1984-85 school year. (R-4). On September 25, the Board notified the petitioners that their increments would be withheld. (R-10, R-31, R-55, R-66, R-72, R-79, R-90, R-109 and R-114).

The Board further asserts that the above facts apply to all the petitioners. In addition, as to petitioner Kathleen Caporaso, the Board received information that Caporaso had been employed by the Belleville School District as a home tutor since February 1981, while still employed by the Newark Board. (R-11 through R-33). The Board received information that Caporaso worked for the Belleville School District while being paid by the Newark Board of Education for using the same days as sick days. (R-12, R-13, R-14, R-15, R-16, R-18 and R-19). Caporaso has been employed by the Newark Board of Education since September 1973 as a Learning Disabilities Teacher Consultant.

Petitioner Thelma Collier received unsatisfactory evaluations on October 24, 1983, November 2, 1983, December 7, 1983, March 16, 1984, and June 1984. (R-34 through R-39).

Petitioner Robert Durkin's increment was recommended withheld by Lawrence Major, principal of Weequahic High School because of excessive absenteeism. (R-51).

Petitioner Christian O'Neal was sent a letter on June 21, 1984, advising her that a recommedation would be made to the Board to withhold her increment. (R-59).

On February 15 and April 13, 1984, conferences were held with petitioner Edward Patrick concerning his absences. (R-64 through R-72). On June 5, 1984, Robert Luongo, principal, recommended withholding petitioner Patrick's increment as a result of excessive incidental absences. (R-66). On June 21, 1984, a letter was sent to the petitioner advising him that a recommendation would be made to the Board to withhold his increment. (R-67).

On May 25, 1984, James Scala was suspended for conduct unbecoming a teacher. (R-74).

On December 6, 1983 and January 12, 1984, conferences were held with petitioner Donald Shaw to discuss his absences. (R-81 through R-84). On March 19, 1984, James Vasselli, Jr., principal, forwarded an updated memorandum of Shaw's absences. (R-86). On June 21, 1984, a letter was sent to petitioner Shaw advising him that a recommendation would be made to the Board to withhold his increment. (R-21).

In consideration of the foregoing documentation, the Board respectfully submits that the petitioners' action should be dismissed.

III.

The petitioners submit that in the course of this proceeding they made a request for discovery and the respondent Board instead filed a motion for summary judgment. The petitioners oppose the Board's motion and cross-move for summary judgment in their favor.

The petitioners allege that the Board has violated N.J.S.A. 18A:6-10, 18A:29-14 and N.J.A.C. 6:24-4.1 et seq. They state that, should the Board be found to have committed these violations, the nature and repetitiveness of them warrant an order to reinstate the increments withheld. The petitioners allege in the alternative that as to each and every one of them, the Board's determination to withhold their increments was arbitrary and capricious.

The petitioners further allege that there is a collective bargaining agreement between the Board and the Newark Teachers' Union which establishes July 1 as the date upon which salary schedules become effective. The Board included in its agenda a list of those teachers to be considered for denial of increments and printed resolutions accordingly as stated above. Prior to July 1, the petitioners were not specifically notified of the recommendations about to be made to the Board nor the reasons upon which the Board would base its determinations. The Human Resources Committee of the Board forwarded a letter announcing hearings which were to be held regarding the Board's withholding of increments. Petitioner O'Neal did not receive a letter requesting her to attend the Human Resources Committee meeting. The remaining petitioners did receive it. (See joint stipulations, above).

Petitioners Burns, O'Neal and Torres did not attend the hearings scheduled by the Human Resources Committee. The chairman of the committee indicated to the petitioners who did attend the hearing that they would be advised of the action taken by the committee prior to the Board's meeting. (P-1 through P-4). The Board waited until August 28, 1984, to send notices of intent to recommend withholding of the petitioners' increments. The letters vaguely stated the reasons for the withholdings as well as the date and place of the Board meeting at which action would be taken. These letters state

specifically that the petitioners were to be informed in writing within ten days as to the action taken and the reasons therefor. (R-9, R-30A, R-34, R-54, R-61, R-70, R-78, R-90, R106 and R-112). The Board sent this letter by certified mail to petitioner Patrick. The return receipt is stamped "received" by the post office on August 30, 1984. There is no delivery date. (R-71).

The petitioners contend that the Board has failed to provide evidence that the petitioners in fact received the letters notifying them of the Board's intent to withhold increments prior to the date of the Board meeting of August 31, 1984. (R-5).

The Board approved the withholdings of the petitioners' increments without any discussion whatsoever. (R-4 at 3). On September 14, 1984, all named petitioners received their regular paychecks, which included the increments. The petitioners reasonably believed that the Board had not taken action to withhold their increments. However, on September 25, 25 days after the Board took action and ten days after the petitioners had in fact received their increments, the Board issued a letter notifying the petitioners of its action. (R-10, R-31, R-55, R-63, R-72, R-79, R-107 and R-114).

On September 28, the Board withheld the increments from the petitioners' paychecks.

The Newark Teachers' Union and another member, not a petitioner here, litigated the question of violation of N.J.S.A. 18A:29-14 before the Commissioner of Education in 1984. Newark Teachers' Union et al. v. Newark Bd. of Ed., OAL DKT. EDU 9836-83 (Apr. 26, 1984), adopted, Comm'r of Ed. (Jun. 13, 1984). The initial decision concluded that since the Board acted to withhold a teaching staff member's increment subsequent to July 1, 1983, when the negotiated agreement became effective, the withholding was void and of no effect. The Commissioner affirmed the findings and determination in the initial decision with the modification that boards may take withholding actions after July 1 but such actions must be taken prior to September 1 of a given school year for ten-month employees. In the 1984 case, the Board should have acted to withhold the teaching staff member's increment prior to September 1, the commencement of the academic year.

In mid-February 1983, the Board filed tenure charges against Theodore A. Burns, Jr., based on his absenteeism record. Burns appealed to the Commissioner of Education pursuant to N.J.S.A. 18A:6-9. The initial decision held that the Board's request to dismiss Burns would be denied and that the penalty of 120 days' suspension without pay as well as the 1983-84 increment withholding was to be the exclusive and sufficient punishment. In re Theodore Augustine Burns, Jr., OAL DKT. EDU 3128-83 (Jan. 23, 1984), aff'd, Comm'r of Ed. (Mar. 8, 1984) with modification that denial of increment could not be permanent. The petitioners here assert that because there were no further appeals taken in that matter, the Commissioner's decision represents the final resolution. Yet, on September 25, 1984, the Board sent to Burns a letter stating that his 1984-85 increment would be withheld based upon the "suspension with or without pay during the 1983-84 school year." (R-10). This suspension was based upon facts properly alleged and fully litigated in the aforementioned case in which Burns prevailed. The Board does not rely on any additional facts to underpin the withholding of Burns' 1984-85 increment.

On September 25, 1984, the Board mailed to petitioner Caporaso a letter stating that her increment would be withheld "based upon litigation and/or investigation: abuse of sick leave." (R-31). Caporaso is not a party to any litigation aside from the present matter nor has she been called to an investigation of any kind by the Board at this point. The Board submits documents which refer to allegations of possible wrongdoings by Caporaso but it must be noted that all of these are unilateral communications in which Caporaso has not been afforded the opportunity to provide any response. There has been no investigation in which Caporaso has been involved nor have there been any decisions in regard to these allegations. (See R-31).

The memorandum upon which the Board relies to recommend withholding of Caporaso's increment is permeated with misstatements of fact and ill-founded innuendoes which Caporaso has never had the opportunity to refute.

Caporaso was employed by the Belleville School District as a home tutor beginning in February 1981 while she was on a leave without pay from the Newark Board of Education pursuant to a duly authorized maternity and child care leave. She was not due to return to her post until September 1983. (P-6).

The Board sent to petitioner O'Neal a letter stating the the reason for withholding her increment was based on incidental absences. (R-63). A representative of

the union asked what amount of absences were to be penalized under the above-mentioned category of "incident of absences" and was told by the then Acting Executive Superintendent that the amount is 20 absences. (See P-7).

The Board submits documentation which demonstrates, and petitioner O'Neal admits, ten absences. Other teachers with fewer than 20 absences were removed from the initial list published in June 1984. (See P-7). Petitioner O'Neal was out of state during the summer vacation and did not attend nor was she aware of the hearings held during the month of July 1984. The Board's determination to withhold O'Neal's increment was arbitrary and capricious inasmuch as the Board did not rely on any additional facts which would warrant differential treatment of O'Neal.

On May 25, 1984, petitioner Scala was suspended with pay "as a result of a possible action on your part." (R-74). Scala has not received any further communications concerning this matter from the Board nor has he been interviewed by anyone until such time as he was notified of the hearing before the Board committee. Scala attended the hearing accompanied by his union representative. At the hearing, Scala was asked whether or not he had been suspended with pay. Scala, of course, responded in the affirmative and was subsequently informed that his increment would be withheld on the basis that he was suspended. (P-7).

The Board did not see nor did it have knowledge of any information relative to the underlying reasons for Scala's suspension at the time it made the determination to withhold his increment. The Board's action in respect of Scala was arbitrary and capricious as it had no reasonable basis.

On February 3, 1984, petitioner Williams was suspended with pay pending the outcome of a criminal investigation concerning him. That investigation has not been completed. The Board has not performed its own independent investigation as to the facts alleged and underlying the original investigation. The Board's only basis to determine to withhold Williams' increment was the suspension itself. The Board's action in respect of Williams is arbitrary and capricious as it penalizes him for mere allegations which it has not proved, raised or litigated.

Inasmuch as the Board deliberately failed to adhere to the requirements of N.J.S.A. 18A:29-14, that defect is fatal to the withholding actions in this case. Baker v.

Bergenfield Bd. of Ed., above, makes clear that a board's failure to strictly adhere to the notice requirements when withholding a salary increment shall be determined fatal given the total circumstances of the matter (emphasis added). While the Board defends its actions claiming that it has complied with "the spirit of the statute," a careful review of the documents submitted by the Board, however, does not support that assertion.

The petitioners admit that the Board published its agenda in the Star-Ledger approximately three days prior to the June 26, 1984 Board meeting. On its face, however, it is clear that the notice would have only noticed the petitioners as to the intent to withhold their increments and not as to the reasons underlying the withholdings. A failure to convey to each petitioner its reasons for withholding his or her salary ignores all the basic elements of fair play. The Commissioner has held in various cases that "the most elemental requirements of due process demand at least that the employee to be so deprived be put on notice." See, e.g., Fitzpatrick v. Montvale Bd. of Ed., 1969 S.L.D. 4.

During the months of July and August, the Human Resources Committee held hearings to determine whether or not it would recommend withholding of increments to the Board. (P-7).

All petitioners, except petitioner O'Neal, were duly notified of the hearings and many of them attended the hearings. The union representative was present at all hearings. (P-7). Of those petitioners who attended the hearings, all were informed by the chairman of the committee, who was also a member of the Board, that they would receive notice of the decisions of this committee prior to the Board meeting. (P-1 through P-4). Those notices did not arrive prior to August 31, 1984. (P-1 through P-4). It is a well known rule that once the Board establishes its policy and procedure, it is bound to adhere to them. Shifrinson v. Marlboro Tp. Bd. of Ed., OAL DKT. EDU 6363-83 (Apr. 19, 1984), adopted, Comm'r of Ed. (June 4, 1984).

The petitioners challenge the Board's statements regarding adequate notice. The record, in their view, simply does not support the contention. The only copy of proof of service is that with respect to Petitioner O'Neal. The receipt is postmarked August 30, 1984, one day prior to the Board meeting. However, the delivery date section is blank. It cannot be inferred that O'Neal actually received the notice even one day prior to the meeting. There is absolutely no proof of service as to the other petitioners.

The last hearing of the Human Resources Committee was August 8, 1984. (P-7). Yet, the Board did not, by its own admission, issue any letter until August 28, merely three days prior to the scheduled Board meeting. And this latter statement assumes that the letters were actually mailed on that date.

The petitioners also challenge the Board's reliance on Baker, above. In that case as well as in most cases relevant to this action, the Commissioner has stressed that the requirements must be adhered to strictly. The Board conspicuously omits any reference to Newark Teachers' Union, above. Furthermore, the petitioners point to the language of the Commissioner in his affirmance of Judge Weiss, stating "that as a matter of fundamental fairness, board action to withhold an increment must be prior to the date the ten-month period of service commences."

In this case, the Board did not comply with the Commissioner's directions. In this case, the petitioners were not informed of any such action when notified of their salaries for the forthcoming school year. Instead, the Board notified the petitioners of the withholding of increments 15 days after it had de facto granted the increments. Once again, the Board fails to provide any reason whatsoever for its nonadherence to the statutory requirements. Rather, it takes upon itself to interpret and define the "spirit and intent" of N.J.S.A. 18A:29-14. The Board conveniently ignores case law which clearly indicates that when interpreting a statute, "the intent is to be found within the four corners of the document itself. The language employed by the statute should be given its ordinary common signifiance." Lane v. Holderman, 23 N.J. 304 (1975).

The Board would have this tribunal decide that despite the clear language set forth in N.J.S.A. 18A:29-14, the Board need not comply because in a recent decision the Commissioner has not found a failure to adhere strictly to the ten-day notice requirement to be fatal to a board's determination. Yet the facts underlying these cases are clearly different from the present case. Unlike all other cases, this matter presents unique circumstances. Hearings were held allegedly to discuss the reasons for the withholdings of increments, and the petitioners, those who attended, were informed that they would receive notices of the ultimate recommendations to the full Board. The petitioners did not receive those notices prior to August 31, 1984. The petitioners did receive paychecks reflecting increments on September 14, 1984, and reasonably believed that the Board had not taken action to withhold their increments. Then, the petitioners ultimately were

notified of the withholding of increments after September 25, 1984, either through letters sent by the Board or when actually receiving subsequent paychecks reflecting a reduction in salary.

These facts stand in stark contrast to the Commissioner's statement in Newark Teachers' Union, above, where it was made clear that notions of fair play, equity and fundamental fairness could be served only by providing that action to withhold increments be taken with sufficient time to insure that the affected teachers be notified at the same time they are informed of the salary for the ensuing school year. Ibid. at 13. In the present case, the petitioners were de facto notified of their salary for the ensuing year when they received their first paychecks which including the expected increments. Two weeks later, the Board then proceeded to strip the petitioners of their salary increments without providing them or this tribunal any valid reasons for the haphazard action. The Board contends simply that they have adhered to the "spirit of the law."

As recited above, the Board's actions against Petitioner Burns were arbitrary, capricious and in violation of fundamental principles of due process of law. The notice issued to him stated that his 1984-85 increment was withheld based upon "the suspension with or without pay during the 1983-84 school year." (R-10). The matter was adjudicated and the penalty of 120 days' suspension without pay as well as the withholding of the increment for the 1983-84 school year were the exclusive punishments invoked. For the Board, without more, to now deprive Petitioner Burns of his increment for 1984-85 violates due process of law.

The Board's action to withhold Petitioner Caporaso's increment was arbitrary and capricious and in violation of principles of fundamental fairness. The Board's purported reasons for withholding Caporaso's increment are discussed above. The letter of September 25, 1984, directed to her states that the reason for the withholding is "litigation and/or investigation of abuse of sick leave." (R-31).

Caporaso is not a party to any litigation other than the instant case and has not been called to testify or to respond to the documents included in the Board's motion. She has not been afforded any opportunity to either read or respond to any of the documents presented in the Board's motion. A board of education must convey to the teaching staff member its reasons for withholding a salary increment. The power of a

board to withhold increments is broad. That power, however, is not limitless. As in Zucaro v. Red Bank Reg'l H.S. Bd. of Ed., OAL DKT. EDU 5484-81 (Apr. 26, 1982), adopted, Comm'r of Ed. (Jun. 24, 1982), Caporaso has not been afforded the opportunity to review and respond to the record upon which the Board based its decision. Rather, based on documents which on their face reflect lack of involvement or input by Caporaso, the Board tries and convicts her of alleged wrongdoings and proceeds to penalize her. These actions fly in the face of basic notions of fairness as well as statutory and decisional law.

The Board's actions to withhold petitioner O'Neal's increment is arbitrary and capricious and in violation of principles of fundamental fairness. When a board of education decides to withhold an increment, it must follow the policies it sets forth to do so, even if said policies go beyond the requirements of law and are self-imposed. Shifrinson, above.

In the present case, the Board decided it would withhold increments of teaching staff members who had been absent in excess of 20 days during one school year. Pursuant to this policy, many teaching staff members who had been recommended for withholding of increment were, in fact, removed from the list. (R-2, R-3 and P-7).

Petitioner O'Neal was unaware that her increment was to be withhheld until after the meeting of August 31, 1984. The information provided by the Board indicates total absences of ten days. (R-57, R-58). Based on the Board's own policies, O'Neal's increment ought not to have been withheld. The Board did not rely on any other facts which would warrant distinction between O'Neal and the other teaching staff members with fewer than 20 absences who were not subject to a withholding.

The Board's actions to withhold petitioner Scala's increment are arbitrary and capricious and in violation of principles of fundamental fairness. On September 25, 1984, the Board issued a letter to Scala stating that the basis for the withholding of his increment was his "suspension with or without pay during the 1983-84 school year." (R-79).

A board of education does not have the right to charge, try, convict and punish a teaching staff member without a hearing in a proper forum. Banick v. Riverside Tp. Bd. of Ed., 1975 S.L.D. 518. Scala was the subject of an administrative suspension with pay in 1984. At that time, he was informed that he was suspended "as a result of possible

actions on your part." (R-74). Scala has not been approached by any agent of the Board with respect to these "possible actions." He has not been shown nor has he been given the opportunity to respond to any of the "possible actions" alleged to be the reasons for the suspension. Moreover, during the hearing held by the Human Resources Committee of the Board, all that was ascertained was whether or not Scala was, in fact, suspended. When asked by the petitioner's representative why Scala had been suspended, the Committee failed to inform him. (P-7). Hence, the reasons not only for the suspension, but for the withholding of increment have become well kept secrets. To state in a letter that the petitioner's increment is withheld because of a suspension simply begs the question. That action clearly does not have a reasonable basis and is de facto, arbitrary and capricious. Scala is entitled to judgment against the Board. At the very least, decision should be stayed until an investigation is completed and results announced.

The Board's actions to withhold Petitioner Williams' increment is arbitrary and capricious and in violation of principles of fundamental fairness.

On September 25, 1984, the Board issued a letter to Petitioner Williams stating that the determination to withhold his increment was based on "suspension with or without pay during the 1983-84 school year." (R-114). As with Petitioner Scala, Williams has not been the subject of any investigation carried out by the Board. Williams has not been convicted by any court of law nor has he been subject to any type of proceeding wherein the Board could make a determination based on any allegations which may have been lodged against him.

Petitioner Williams also attended the hearing as scheduled and was not shown any additional document which would make him aware as to the reasonable basis for the Board's determination to withhold his increment.

The Board cannot be prosecutor, judge and jury. Banick, above.

The petitioners also submit that withdrawing payment of their increments on September 28, 1984, constitutes a reduction in salary in violation of N.J.S.A. 18A:6-10. Because the petitioners had received paychecks, including the expected increments, covering the first pay period in September, when the second paycheck was in a lower

amount, the Board violated the Tenure Employees Hearing Law which requires that a reduction in salary may occur only after preferment of written charges and subsequent proof thereof.

It is conceded that the withholding of potential increments does not constitute reduction of salary until said increments have accrued. Greenway v. Camden Bd. of Ed., 129 N.J.L. 461 (E.&A. 1943).

In the present case, the petitioners' rights and entitlements to their increments vested at the time of the September 14 payment. The petitioners understood, as of September 14, 1984, they had been granted and in fact had received the 1984-85 increments pursuant to statutory law and their collective bargaining agreement.

On or about September 28, 1984, the Board unilaterally reduced the petitioners' salaries in derogation of the statutes. This is not the same as recent cases in which teachers have protested the withholding of an increment to be received in the near future. In this case, the Board had actually granted the increases by issuing payment in accordance with the appropriate salary guides. The petitioners received those payments without any notice that they were provided by mistake or that they would be subsequently taken away. Accordingly, the Board is obliged to adhere to the procedures set forth in N.J.S.A. 18A:6-10.

In this matter, the petitioners and the Board do not dispute the material facts with the exception that the petitioners do not admit to the Board's allegation that it properly notified all petitioners. To this extent, the essential facts stand undisputed.

IV.

THEODORE A. BURNS, JR.

In addition to the findings set forth in Section I of this initial decision, I **FIND** that the withholding of increment voted by the Board at its August 31, 1984 meeting was without rational basis. Although the withholding appears to have been effected in a procedurally correct manner (R-5 through R-10), "the Board does not have an absolute

power to withhold increments for any reason for no reason, . . ." Edison Tp. Bd. of Ed. v. Edison Tp. Ed. Ass'n, 161 N.J. Super. 115, 160 (App. Div. 1978). Rather, the Board must withhold an increment on the basis of a specific, valid reason. In the present case, the reason given for the withholding was "the suspension with or without pay during the 1983-84 school year." (R-10).

However, as has been set forth above, this matter was fully adjudicated by the Commissioner. And the Commissioner's decision specifically removed the requirement that the increment denial effected in the prior year be permanent. Burns, above, at 33.

The Commissioner of Education and, hence, the Office of Administrative Law do not ordinarily look behind observations and evaluations in withholding matters on the sound premise that withholding cases are not tenure trials in miniature. In the peculiar circumstances of petitioner Burns, however, it is necessary to look behind the mere notice that withholding would be effected. Examination of the record shows no basis for the withholding. In fact, the Commissioner's decision in Burns, above, points in the opposite direction.

Therefore, I further **FIND** that the withholding of the increments of Theodore A. Burns, Jr., for the 1984-85 school year are without basis in this record.

KATHLEEN CAPORASO

The petitioners submit that petitioner Caporaso has, in effect, been charged, tried and convicted by the Board of wrongdoing without benefit of a hearing. A review of documents R-11 through R-33, however, indicates that petitioner Caporaso worked for the Belleville School District not merely while on leave of absence from the Newark district but also on days on which she was in the Newark Board's employ but claimed to be ill. See, e.g., R-12.

While this does not excuse the Board from full compliance with N.J.S.A. 18A:29-14, it is enough that the Board may base a withholding action upon it. I so **FIND**.

CHRISTIAN O'NEAL

In petitioner O'Neal's case, the Board decided it would withhold her increment because of absences in excess of 20 days during one school year. Pursuant to this policy, many teaching staff members who had originally been recommended for withholdings of increments were, in fact, removed from the list. (R-2, R-3 and P-7).

The petitioners assert that O'Neal was unaware that her increment was to be withheld until after the meeting of August 31, 1984. The information provided by the Board indicates total absences of ten days. (R-57, R-58). Based on the Board's own policies and actions, O'Neal's increment ought not to have been withheld. The record does not reveal any other facts upon which the Board relied which could have warranted a distinction between O'Neal and the other teaching staff members with fewer than 20 absences who were not subject to a withholding.

While the Newark Board of Education, unlike the Marlboro Township Board of Education in Shifrinson, above, may not have had an express policy as to the number of absences that would constitute cause for a withholding, it has pursued a course of action as to other teaching staff members that bespeaks an implied policy. Without more, the Board cannot treat O'Neal differently from other teaching staff members who had fewer than 20 absences during the subject school year. I **FIND** the withholding of O'Neal's increment for 1984-85 on this basis to be arbitrary, capricious and in violation of the principles of fundamental fairness.

JAMES SCALA

The Board issued a letter to James Scala on September 25, 1984, stating that his increment for the 1984-85 school year had been withheld because of his "suspension with or without pay during the 1983-84 school year." (R-79). A letter dated May 25, 1984, from the Executive Superintendent and the Board President to Scala states, "Please be informed that as a result of a possible action on your part involving 'conduct unbecoming', you are hereby suspended with pay, from your position at Valesburg High School." (R-74). On July 16, the chairman of the Human Resources Committee sent Scala a letter advising him that the Committee would conduct hearings on July 21 on the denial of increments. (R-75). Under date of August 9, the chairman of the Human Resources Committee wrote

to Scala stating that the committee had reviewed the supporting documentation submitted with the recommendation of the Executive Superintendent to withhold Scala's increment and/or salary adjustment for the 1984-85 school year. The letter further stated that the committee determined that sufficient grounds existed to forward the recommendation to the full Board for action. The letter concluded by stating, "You will receive written notice of the Board's action at a later date." (R-77).

On August 28, 1984, an agent of the Board directed a letter to Scala stating that a recommendation would be made to the Board to withhold his increment and/or salary adjustment for the 1984-85 school year. The increments were to be withheld based on unsatisfactory teaching performance and "other good cause". The letter advised that the meeting at which the withholding would be considered would be held on August 31, 1984 at the Spencer School, beginning at 5:00 p.m.

The letter also states:

> If the Board votes to withhold your increment(s), you will be given "written notice of such action, together with the reasons therefore" within ten days after the action. Should the Board reject the recommendation to withhold your increment(s), you will be advised of that action. [R-78].

The Board did take action to withhold Scala's increment. A review of the record indicates that the Board had before it enough to warrant a withholding as to this petitioner. I so **FIND.** It cannot be denied, however, that the Board failed to inform Scala of the action within ten days as required by N.J.S.A. 18A:29-14.

THELMA COLLIER

A review of the record reveals that Petitioner Collier received unsatisfactory evaluations on October 24, 1983, November 2, 1983, December 7, 1983, March 16, 1984 and June 1984. (R-34 through R-39). On the basis of these documents alone, it cannot be said that Collier was without knowledge that her performance was perceived to be less than satisfactory and that a recommendation would be made that her increment for 1984-85 be withheld. The record shows adequate support for the Board's action in this regard. I so **FIND.** Once again, however, the Board failed to timely advise this petitioner that the withholding had been effected.

ROBERT DURKIN

On June 7, 1984, the principal of Weequahic High School recommended the withholding of Durkin's increment due to excessive absenteeism (R-51). The chairman of the Human Resources Committee sent Durkin a letter under date of July 23, 1984, advising him that the Committee would conduct hearings on August 1, regarding the denial of increments. (R-52). Durkin was later advised that the Board would meet on August 31, 1984, at the Spencer School for purposes of considering the Committee's recommendation regarding withholding. (R-54).

From a review of the record, I **FIND** that the Board had sufficient basis for the withholding it effected in Durkin's case. The Board did not, however, until 25 days later, advise Durkin that the withholding had been effected.

EDWARD PATRICK

On February 15 and April 13, 1984, conferences were held with petitioner Patrick concerning absences. Patrick had actual and constructive notice that his absences were beyond a number considered acceptable and could be the basis for the withholding of an increment. (R-64 through R-72). He was advised that a recommendation would be made to the Board to withhold his increment. (R-67).

A review of the record indicates that the Board had sufficient basis upon which to effect the withholding of the increment of Edward Patrick for the 1984-85 school year. I so **FIND**. It is clear, as in the cases of the other petitioners, that the Board did not timely notify petitioner Patrick of the withholding within the ten days prescribed by N.J.S.A. 18A:29-14.

DONALD SHAW

The record concerning petitioner Shaw is clear. On December 6, 1983 and January 12, 1984, conferences were held with him concerning excessive absence. Exhibits show referrals, informal conferences and formal conferences concerning absenteeism and petitioner Shaw. (R-82 through R-86). On June 21, 1984, Shaw was noticed that a

recommendation would be made to the Board to withhold his employment and/or adjustment increments for the ensuing school year. The letter also advised him of the time and place of the meeting. (R-87). As to petitioner Shaw, I **FIND** that the Board had a reasonable basis upon which to act to withhold Shaw's increment for the 1984-85 school year. Once again, the Board failed to notify the affected teaching staff member within the ten days required by N.J.S.A. 18A:29-14.

REYES TORRES

Exhibits R-99 through R-108 indicate a clear pattern of unsatisfactory teacher observation, post-observation conferences, suggestions for improvement, a Professional Improvement Plan dated June 25, 1984, and notices concerning hearings on the proposed denial of increments.

I **FIND** that the Board had clearly sufficient grounds for the withholding of petitioner Torres' increment. The Board did fail to comply with the ten-day notice requirement of N.J.S.A. 18A:29-14.

BENNIE WILLIAMS

Exhibit R-114, a letter under date of September 25, 1984, informs petitioner Williams that the Board took action to withhold his 1984-85 increment at a special meeting on August 31, 1984, based upon "suspension with or without pay during the 1983-84 school year." The Board provides no other documentation in relation to whatever it based the withholding upon. There is documentation of notice to Williams that the Human Resources Committee and the Board would consider denial of his increment. But, without more, this record does not support a rational basis for the actual withholding. I so **FIND**. And once again it is noted that the ten-day notice required by N.J.S.A. 18A:29-14 is not observed.

V.

In consideration of the foregoing and having carefully reviewed the whole record, including the arguments presented by counsel, I **FIND:**

1. The withholdings from petitioners Caporaso, Collier, Durkin, Patrick, Scala, Shaw and Torres rest on rational grounds.

2. The withholdings from petitioners Burns, O'Neal and Williams cannot be so justified.

In effecting or attempting to effect the subject withholdings, the Board barely complied with statutory and case law prescriptions. It is true that a long line of cases holds that a withholding action may be sustained even where the board has failed timely to provide reasons for the withholding where the employee had knowledge of deficiencies. See, e.g., Huth v. Morris Plains Bd. of Ed., 1980 S.L.D. 847. And it is well known that retroactive withholding of increments is not permitted; a withholding must be effected prior to the start of the academic year. Gersie v. Clifton Bd. of Ed., 1972 S.L.D. 462.

Nothing in the present record explains the last-minute frenetic actions of the Board to effect the subject withholdings. In fact, the record indicates that there was time aplenty in which the Board could have and should have acted. In the cases of the seven petitioners named in Finding 1, above, the Board substantially complied with the letter if not the spirit of the law. And I am aware of the cases such as Baker v. Bergenfield Bd. of Ed., 1978 S.L.D. 740 that hold that a failure to advise a petitioner whose increment has been withheld of the reasons therefor, in writing, within ten days is not necessarily fatal to the action. In Baker and several related cases, the Commissioner directed the Board to provide the petitioners with complete statements of the reasons for the salary withholdings.

In the present case, the Board states it sent letters to all of the petitioners inviting them to meet with the Human Resources Committee of the Board prior to the Board's determination. This does not, however, satisfy the requirement in N.J.S.A. 18A:29-14 that a board of education, within ten days, give written notice of such action, together with the reasons therefor, to the member or members concerned.

Accordingly, as to the seven petitioners named in Finding 1, above, it is **ORDERED** that the Newark Board of Education provide them not later than ten days following the date of the final decision in this matter the reasons, in writing, for the subject increment withholdings.

As to petitioners Burns, O'Neal and Williams, this record is barren of even the rudiments of fair play. The Commissioner of Education has never tolerated findings of guilt based upon mere accusation or supposition. For the reasons stated in Section IV of this initial decision, I **FIND** and **CONCLUDE** that the withholdings from petitioners Burns, O'Neal and Williams are both factually and procedurally defective and, therefore, must be set aside. It is so **ORDERED.**

The Board also must be faulted for making one salary payment to each of the petitioners in September 1984 that did not reflect the withholdings effected in the prior month. It may well be that the Board's payroll operation simply had not been made aware soon enough that the withholdings had been effected. Even though this error is egregious, salary payments made in error may be recouped. Bd. of Ed. of Passaic v. Bd. of Ed. of Wayne, 120 N.J. Super. 155 (Law Div. 1972), aff'd o.b. (App. Div. 1973) (unreported), certif. den. 64 N.J. 508 (1974).

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

10 MAY 1985
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

MAY 13 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 15 1985
DATE

Ronald L. Parkerson
OFFICE OF ADMINISTRATIVE LAW

bc

NEWARK TEACHERS' UNION LOCAL 481, AFT, AFL-CIO ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Commissioner observes that no exceptions were filed by the parties pursuant to the provisions of N.J.A.C. 1:1- 6.4a, b and c.

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

The Commissioner, however, wishes to express in the strongest terms his disapproval of both the Newark Board's repeated failure to adhere to the strict requirements of N.J.S.A. 18A:29-14 and its dilatory tactics in waiting until the last possible moment to take those actions required for increment withholdings. The Commissioner notes that, while the Board did narrowly meet the requirements of voting to withhold increments within the confines of the 1984-85 school year in the instant matter, it was faced with having to "scramble" to do so despite its experience in a matter litigated before him in which increments withheld were restored because the Board acted after the onset of the new academic year. See Newark Teachers Union et al., supra. Therein it was stated:

> "***[I]t is the determination of the Commissioner that a board of education must act prior to September 1 of a given school year to withhold the increment of a staff member whose period of service is September to June.***"
> (Slip Opinion, at p. 15)

The Board, for its own purposes, ignores the clear language set forth in N.J.S.A. 18A:29-14 and seemingly willfully disregards the statutory requirements of law as well as the necessity for prompt action. The Board fails to provide any reasons for its nonadherence to the statute. The Commissioner views with extreme

disfavor the dilatory tactics of the Board in dealing with its teachers on the subject of the withholding of increments.

Accordingly, the Commissioner concurs with and adopts as his own the determination rendered by Judge Campbell with the added admonition of the Commissioner.

The Board of Education of Newark shall conform to the determinations above concerning all petitioners.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

JUNE 25, 1985

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 8995-84
AGENCY DKT. NO. 470-11/84

NICHOLAS F. CUCOLO,

Petitioner,

v.

BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOL DISTRICT,

Respondent.

Kenneth L. Nowak, Esq., for petitioner/movant (Zazzali, Zazzali & Kroll, attorneys)

Nathanya G. Simon and **Anthony P. Sciarrillo,** Esqs., for respondent (Schwartz, Pisano & Simon, attorneys)

Record Closed: April 1, 1985 Decided: May 10, 1985

BEFORE **SYBIL R. MOSES,** ALJ:

This matter comes before the Office of Administrative Law (OAL) as the result of a petition filed by Nicholas F. Cucolo with the Commissioner of Education on November 19, 1984, asking that the Commissioner declare his transfer to the position of "in-school suspension" teacher unlawful and asking the Commissioner to order the respondent, Board of Education of the Essex County Vocational School District (Board) to immediately reinstate him in an English position with all retroactive seniority and any other benefits which may be due him. The Board filed an answer, asking the petition be dismissed on December 10, 1984. The Board asserted that its action in transferring Mr. Cucolo was a managerial prerogative and that at all times it acted in good faith, did not take any action which was arbitrary and capricious and carried out its action in accordance with the appropriate New Jersey statutes and regulatory procedures. The matter was forwarded to the OAL for determination as a contested case on December 17, 1984.

A prehearing conference was held on February 5, 1985, and it was determined that the following legal issues had to be decided:

1. Were Nicholas Cucolo's seniority rights violated when the Board abolished an English position and transferred him to the position of "in-school suspension" teacher?

2. Was the position of "in-school suspension" teacher legally established by the Board of Education?

Settlement negotiations were initiated and continued through the month of February 1985 but did not come to fruition. Petitioner filed a motion for summary decision on March 6, 1985. A response was filed on March 20, 1985, and petitioner replied to said answering brief on March 26, 1985. There was no reply from the Board and the record closed on April 1, 1985.

A review of the briefs indicates that the following narrative of facts is basically uncontested, and will be considered the facts in this case.

Nicholas F. Cucolo began his employment with the Board on September 1, 1977, as a teacher of English with a secondary English certification. He continued in that position through June 1984. He has an endorsement in English but no other endorsements in any other subject areas.

In 1983-84, the Board employed 27 teachers of English in all of its secondary schools, several of whom were hired after petitioner was hired (September 1, 1977). At the end of that school year, Central Office Administration reorganized the schedules in its schools. As a result of the reorganization, which was apparently designed to allow for more efficient utilization of staff, there was an "overabundance of teachers in specific

areas, i.e., secondary English." The superintendent recommended that petitioner, an English teacher, be transferred to the position of "special assignment/in-school suspension" teacher, effective 1984-85. The stated purpose of the administration in transferring Mr. Cucolo was an effort to avoid a reduction of force throughout the system, as in 1984-85, the Board employed 21 English teachers, six less than the previous year.

The "in-school suspension" position was new to the district and was only first developed in September 1984. The "in-school suspension" sites are Irvington Center, West Caldwell Center and North 13th Street Center. Three full-time teaching staff members were needed to organize and function in the "in-school suspension" program. Three teaching staff members were assigned to the "in-school suspension" position; Mr. Cucolo was transferred and assigned to the "in-school suspension" position at the Irvington Center; Thomas Donahue, also certified in English, was transferred to the "in-school suspension" position at the North 13th Street Center and Phyllis DeCosta, a beauty culture teacher, was transferred from North 13th Street to the "in-school suspension" position at West Caldwell. The administration sent the principals of all its schools suggestions as to how the "in-school suspension" position should be conducted in a memorandum dated September 13, 1984. There is no job description for the position of "in-school suspension" teacher other than that set forth on this memorandum, and in the affidavits submitted by Mr. Fishbein, Director of Support Services, and Ms. Forster, Director of Planning and Computer Services, for the Board.

It is undisputed that the Board did not submit a job description for the "in-school suspension" position to the county superintendent for approval. It is also undisputed that the county superintendent never designated the appropriate endorsement of certification for the "in-school suspension" position.

At its meeting of August 20, 1984, the Board voted, by roll call, to transfer Mr. Cucolo to the position of "in-school suspension" teacher. On August 21, 1984, the superintendent wrote to Mr. Cucolo informing him of the transfer. Mr. Cucolo did not consent to this transfer. However, since September 1984, he has performed in his assignment as "in-school suspension" teacher. Teachers assigned to "in-school suspension" do not provide instruction in any traditional sense. Students are required to bring work with them for the entire length of the "in-school suspension" period. Regular teachers are advised to give the students more work than they can finish so that they do not tell the "in-school suspension" teacher that they have concluded their work. Petitioner, in performing his duties, is not assigned to a classroom but performs his work in a small side room which has tables. Students who receive the "in-school suspension" discipline must report to his room where they remain all day. He does not assign them any work or homework and does not lecture or instruct the students in his class. He is available for tutorial assistance but generally spends his day sitting silently in front of this group of temporarily suspended students who are performing work assigned by their regular teachers. Mr. Cucolo remains a tenured teaching staff member. The Board says he continues to accrue seniority as a teacher in the category of English.

It is not in dispute that the purpose of the "in-school suspension" policy is to implement a disciplinary system during which students stay in school. The concept is meant to operate as an alternative educational program with two major objectives: to keep the students in school and off the streets for relatively minor infractions (there are 17 specific infractions which will result in the assignment of an "in-school suspension"), as well as to employ some disciplinary action with meaningful educational impact. The primary reason to assign a teaching staff member to cover the "in-school suspension" is to have continuity and consistency of discipline, to have overall familiarity with the procedures and program in the school system, to make available tutorial assistance, and to provide an appropriate teacher image for the program. Teachers assigned to "in-school suspension" retain whatever tenure and seniority they possess, are paid pursuant to the teacher's salary guide and enjoy the same terms, conditions and emoluments of a regular teaching staff member (whether they continue to accrue seniority in their former

categories is in question). Mr. Cucolo's "in-school suspension" assignment is supposed to be part-time in nature, three days a week, and Mr. Cucolo is supposed to perform two days a week as a floating teacher performing instructional teaching duties. I find that he is in the position of "in-school suspension" teacher five days a week.

Counsel's briefs were extremely helpful in deciding this matter. Petitioner's counsel asserts that the involuntary transfer from his tenured position as an English teacher to the newly-created assignment of teacher in the "in-school" suspension program violated his tenure rights since once a teacher acquires tenure in a particular position within his or her certification, he or she cannot be transferred from that position without giving consent, which, according to counsel, is exactly what happened here. Counsel further argues that this assignment is not within petitioner's English endorsement on his teaching certificate. Cucolo's attorney also argues that the Board did not submit a job description for the position to the county superintendent in advance of appointing Cucolo to the "in-school suspension" teaching position so that a determination could be made as to the appropriate certification required for that position. Counsel argues that an involuntary transfer to this position is ultra vires since there is a lesser expectancy here as Mr. Cucolo cannot acquire tenure or accrue seniority in a position which is not certificated. In addition, petitioner claims that his seniority rights were violated when respondent eliminated his tenured English position and transferred him to the "in-school suspension" position without following the requirements set forth in N.J.A.C. 18A:28-10 which requires that all reductions in force be accomplished on the basis of seniority, since it is uncontroverted that several of the 21 remaining English teachers have less seniority than Mr. Cucolo.

Respondent's attorney claims that the "in-school suspension" program is part of a newly-reconstructed program for allowing more efficient utilization of staff, and that Mr. Cucolo was reassigned to the new position because of an overabundance of English teachers, inter alia, throughout the system. Respondent asserts that it was within its managerial prerogatives to properly staff the newly-established "in-school suspension" program by transferring teaching staff members within the scope of their certification and that legitimate educational reasons exist for the transfer of Mr. Cucolo. Counsel

argues that the continued use of the title of teacher for Mr. Cucolo means that the Board is not required to comply with the provisions of N.J.A.C. 6:11-3.5 which requires that a Board submit a job description to the county superintendent. It is the Board's position that Mr. Cucolo is a teacher and continues to be so in a position which requires an individual with an appropriate teaching certification. The Board points out that Mr. Cucolo is continued on his next appropriate step on the salary guide and retains all protections previously held, with no lower expectations in terms of working conditions or salary. The transfer was neither a demotion nor a dismissal but a reassignment within the scope of certification, and a teacher cannot claim a particular position within his/her certification. Counsel argues that in the absence of a reduction in force throughout the system the Board need not make personnel assignments based on seniority. Counsel also argues that there are factual issues in dispute and, therefore, this case is not ripe for summary judgment.

After a review of the briefs and of the affidavits filed in this matter and of the applicable law, I conclude that the motion for summary decision in this case should be granted. Since the relevant facts are not disputed, it is necessary to review the applicable law concerning each legal issue in controversy. The first question is whether the position of "in-school suspension" teacher was legally established by the Board of Education. Before creating the position of "in-school suspension" teacher, the Board did not submit the job description for the position to the county superintendent in advance of making any appointments, so that a determination could be made as to the appropriate certification for that position.

N.J.A.C. 6:11-3.6 provides:

> Assignment of titles
>
> (a) School districts shall assign position titles to teaching staff members which are recognized in these regulations.

> (b) If a local board of education determines that the use of an unrecognized position title is desirable, or if a previously-established unrecognized title exists, such board shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his/her discretion regarding approval of such request, and make a determination of the appropriate certificate and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year.

The Board did not comply with the regulatory requirements, but it should have, since it is uncontroverted that this was a newly-created position with an unrecognized position title not set forth in any regulation or statute. Cf., Bigart v. Bd. of Ed. of Paramus, 1979 S.L.D. 123, where the board actually did formally adopt a job description for the "departmental teacher—high school" position to which it assigned that petitioner and obtained the county superintendent's approval of the job description and position before it assigned Bigart to that position. Bigart at 126. Continued usage of the generic term "teacher" in describing the "in-school suspension" position does not release the Board from complying with the clear requirements of the aforementioned regulation. Given the foregoing analysis, it is clear that the Board did not legally establish the position of "in-school suspension" teacher.

The next question is whether Mr. Cucolo's seniority rights were violated when the Board abolished an English position and transferred him to the "in-school suspension" post.

Seniority is a concept which only applies to certain rights of tenured personnel and only has meaning when a reduction in the employment force is necessary. Howley v. Ewing Bd. of Ed., 6 N.J.A.R. 509, 521 (1982). The source of the concept is in the tenure laws, specifically, N.J.S.A. 18A:28-9, 10 and 13. Standards applying to seniority have been promulgated in N.J.A.C. 6:3-1.10 et seq. There are specific categories in which seniority may be accrued, which differ from areas of certification.

It has been well-established that certification is necessary to assume all responsibility for instructing a class. Every teaching staff member, tenured or otherwise, must hold a valid certificate to teach. There are only three kinds of regular certificates, that is, a certificate with lifetime validity issued to candidates who meet New Jersey standards for regular certification; instructional, administrative and supervisory, and educational services. All other certificates referred to in case law are actually "endorsements" on one of the foregoing three certificates. Endorsements may be issued on a New Jersey instructional certificate in the categories listed in N.J.A.C. 6:11-6.3. Howley v. Ewing Bd. of Ed., 6 N.J.A.R. at 513-514. After receiving a certificate and an endorsement and after continuing employment in a recognized and certified position for the statutory period set forth in N.J.S.A. 18A:28-5, a teaching staff member acquires tenure in that position, which is a legislative status and protects the teacher, but it is not a contract (emphasis added). See, Howley at 516-517 and Williams v. Plainfield Bd. of Ed., 176 N.J. Super. 154, 162 (App. Div. 1980).

Tenure affects the power of a local board of education to transfer an employee. In general, a local board has the authority to transfer or reassign teaching staff members within the scope of their endorsements on their instructional certificates. See generally, Howley, 6 N.J.A.R. at 513-520, since tenure is not acquired in a specific assignment. However, under the tenure statutes, it is clear that a person tenured in a "position" may not be transferred from that position without his or her consent. N.J.S.A. 18A:28-6. Transfer without such consent constitutes a dismissal from the position and cannot be accomplished without compliance with the tenure hearing law. Childs v. Union Tp. Bd. of Ed. (N.J. App. Div., July 19, 1982, A-3603-80T1) (unreported) pp 5-8. However, it is clear that a transfer may be made to a position of the same rank without a reduction in salary if the certification requirements are exactly the same. Under such circumstances, a local board can exercise its right to laterally transfer a teaching staff member. See, Stranzl v. Bd. of Ed., City of Paterson, 2 N.J.A.R. 16, 20 (1980), but a board may not involuntarily transfer a tenured teacher to a position "of lesser expectancy from a position which continues to exist in a school system." Morra v. Bd. of Ed. of Jackson, 179 S.L.D. 81, aff'd State Bd. of Ed., 1979 S.L.D. 89-90.

The facts here indicate that Mr. Cucolo was transferred to another position without his consent, a position that is not within the area of endorsement on his certification; and the facts also indicate that some other teachers with lesser seniority were allowed to remain as English teachers. That transfer violates N.J.S.A. 18A:28-6, 9, 10, and 13; particularly 10, which requires all reductions in force to be accomplished on the basis of seniority alone. When the Board reduces the number of English teachers in a secondary school, the teacher affected has to be the individual with the least seniority, and when a tenured teacher's position is abolished, that teacher has the right to the employment within that same category to which he or she is entitled by seniority. N.J.A.C. 6:3-1.10(i). What the Board did here was to abolish an English position, presumably Cucolo's, and transferred him to a position which had no certification requirements. The fact that he is certified as an instructional teacher is not sufficient to allow the Board to make a lateral transfer without following either the regulation requiring that it submit the job description to the county superintendent, N.J.A.C. 6:11-3.6(b), or following the statutory and regulatory requirement concerning seniority as mandated by N.J.A.C. 6:3-1.10(i). Since the Board has conceded that Mr. Cucolo's transfer occurred as a result of an overabundance of English teachers within the school system, it must adhere to seniority regulations when there is a reduction in the number of teachers in that certification. N.J.S.A. 18A:28-9, 10 and 13, as well as Popovich v. Bd. of Ed. of Wharton, 1975 S.L.D. 737. This is true even though N.J.S.A. 18A:28-6 clearly authorizes respondent to transfer teaching staff members within the endorsement on their certification.

Further, the position to which Mr. Cucolo was transferred is one of lesser expectancy. Although the Board, in Ms. Forster's affidavit, indicates that he continues to acquire tenure and accrue seniority, I note that the list of English teachers on the 1984-85 seniority list does not include petitioner's name. See, Exhibit H, attached to petitioner's primary brief. The Board cannot assert that Mr. Cucolo continues to accrue seniority as a teacher in his category of English when his name is not even on the list of English teachers for the 1984-85 school year. In addition, petitioner cannot accrue seniority as an "in-school suspension" teacher since seniority can only accrue in a properly certificated

position. DiNunzio v. Bd. of Ed. of Township of Pemberton, 1977 S.L.D. 24, 27. Mr. Cucolo does not have an endorsement on his certificate for the position of "in-school suspension" teacher and, therefore, cannot accrue seniority in that category. No. Bergen Federation of Teachers v. Bd. of Ed. of No. Bergen, OAL DKT. NOS. EDU 10166-83, 8873-83 and 806-84 (consolidated) (Jan. 16, 1985), Commissioner's Decision (March 4, 1985) at 16. Yet, he cannot accrue seniority in English because the applicable regulation only permits accrual of seniority in the endorsement in which the teacher is actually serving. N.J.A.C. 6:3-1.10(1)15.

The issue of whether the position is instructional or noninstructional (see petitioner's assertion that it is unlawful for the Board to transfer him into a noninstructional position without his consent) does not have to be decided in order to determine that the Board created a new position without submitting a job description to the county superintendent in order to determine the requisite certification requirements and then, despite the lack of certification requirement, assigned petitioner, without his consent, to that position.

For all the foregoing reasons, I have determined that, as a matter of law, the Board violated Mr. Cucolo's tenure and seniority rights when it transferred him involuntarily to the position of "in-school suspension" teacher, which position was not established legally by the Board, since it did not follow the prescribed regulations as set forth in N.J.A.C. 6:11-3.6.

Accordingly, it is hereby **ORDERED** that the motion for summary decision be and is hereby **GRANTED**; and

It is further **ORDERED** that petitioner be reinstated to the English position to which he is entitled given his seniority;

And it is further **ORDERED** that petitioner receive retroactive seniority in English from September 1984.

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

May 10, 1985
DATE

SYBIL R. MOSES, ALJ

MAY 14 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAY 15 1985
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

md/e

NICHOLAS F. CUCOLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

The Board believes that the initial decision is in error in several respects. It argues, inter alia, that students must be supervised by teaching staff members and to do otherwise would violate state law. N.J.S.A. 18A:26-2; N.J.A.C. 6:11-3.4 The Board reiterates its contention that petitioner and others similarly situated retain whatever tenure and seniority they possess in the category of certification and are otherwise treated the same as all regular teaching staff members. Further, it wishes to clarify the record that the exhibit referred to in the initial decision, ante, is not what the judge interpreted it to be. Rather, it is merely a list of 1984-85 English teachers and their seniority. According to the Board, petitioner is on a master list of all persons certified in English, therefore, the judge's reliance on the above-cited exhibit is misplaced.

In addition to the above, the Board excepts to the determination that it violated N.J.A.C. 6:11-3.6(b), claiming that imposition of this requirement to the instant matter would be overly technical and burdensome to a district attempting to implement a reasonable alternative educational program. It points out that assignment of a teaching staff member to study hall does not require a job description, county superintendent approval and special certification. The Board also excepts to the determination that petitioner was transferred to a position of "lesser expectancy."

Upon a review of the record, the Board's exceptions and petitioner's response to these exceptions, the Commissioner concurs with the Office of Administrative Law's recommendation ordering that petitioner be reinstated to the English position to which he is entitled by virtue of his seniority for the following reasons.

The judge is correct in determining that a reduction in force occurred given the factual circumstances in the matter and that petitioner's transfer to the "in-school suspension" position

while retaining English teachers with lesser seniority violated his seniority rights. In 1983-84 there were 27 English teachers while in 1984-85 there were only 21 English teachers, hence a reduction in force for English teachers did in fact occur. The Board has acknowledged that petitioner's transfer was due to an overabundance of English teachers. Thus, the judge is correct in ascertaining that N.J.S.A. 18A:28-10 is controlling even though dismissal from the Board's employ did not occur. N.J.A.C. 6:3-1.10(i) specifically states that "Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority.***".

Consequently, if any transfer of English staff was undertaken by the Board as a result of its overabundance of English teachers, such reassignment/transfer of staff would be determined on the basis of seniority.

As regards the issue of the "in-school suspension" position, the judge is accurate in determining that the Board failed to act in accordance with the requirements of N.J.A.C. 6:11-3.6(b) when it did not (1) develop a job description for the newly created unrecognized title and (2) submit the job description to the county superintendent for prior approval and determination of appropriate certificate. The fact that the Board believes this requirement is overly technical and burdensome carries no weight whatsoever. Had the Board adhered to the requirement for creating this position with an unrecognized title, some of the allegations in this matter would not have arisen. Namely, had the county superintendent given prior approval to the position and title and designated that the position was one requiring instructional certification such that English certification was appropriate, there would not have been a need for the case to be argued on any issue but seniority.

Notwithstanding the fact that the judge correctly determined that a violation of N.J.A.C. 6:11-3.6(b) occurred, there are several findings with which the Commissioner does not agree and therefore corrects them as follows. Firstly, he does not agree with the finding that the position to which petitioner was transferred is one of lesser expectancy. The Board is correct in arguing that only a certificated staff member could fill the "in-school suspension" position; thus, any teaching staff member filling such position would have all the rights, benefits and emoluments enjoyed by regular staff members.

Secondly, the Commissioner corrects for the finding that petitioner does not have an endorsement on his English certificate for the position of "in-school suspension" teacher. Since the position is one with an unrecognized title, it remains the responsibility of the county superintendent to determine the certification appropriate for the position. It may well be that a teaching staff member with an instructional certificate with English endorsement could appropriately fill the position.

Thirdly, while the judge is correct in finding that petitioner cannot accrue seniority in the category "in-school suspension", the reason is not because he does not have an endorsement on his English certificate for "in-school suspension" but because seniority would accrue within the secondary category to the certificate/endorsement deemed appropriate for such a position. Although the county superintendent has responsibility for determining the appropriate certificate/endorsement, the Board's failure to comply with the requirements of N.J.A.C. 6:11-3.6(b) does not serve to deny petitioner's accrual of one year's seniority in English for 1984-85. See Michael Furst v. Rockaway Township Bd. of Ed., decided by the Commissioner May 18, 1984, aff'd State Board October 4, 1984. As such, whether or not the Board acted in accordance with the above-cited requirement, it cannot be said "[petitioner] cannot accrue seniority in English because the applicable regulation only permits accrual of seniority in the endorsement in which the teacher is actually serving. N.J.A.C. 6:3-1.10(1)15." (Emphasis in text.)(Initial decision, at p. 10) Even assuming arguendo that an English endorsement were not appropriate for the "in-school suspension" position, N.J.A.C. 6:3-1.10(1)15 itself would entitle petitioner to seniority accrual in English as a "tack-on" to his actual service in English. This regulation states

> "***Whenever a person shall be reassigned from one subject area endorsement to another, all periods of employment in his or her new assignment shall be credited toward his or her seniority in all subject area endorsements in which he or she previously held employment.***"

Accordingly, the Commissioner concurs with and adopts as his own not only the order reinstating petitioner to an English position, but also the judge's order that petitioner be credited with seniority in English retroactive to September 1984. He also orders that the Board immediately comply with the mandates of N.J.A.C. 6:11-3.6(b) in regard to the "in-school suspension" position and that the future filling of any such position be done in a manner consistent with the determinations in the instant matter, particularly if a reduction in force has bearing on the reassignment of staff to an "in-school suspension" position.

COMMISSIONER OF EDUCATION

JUNE 27, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5114-84
AGENCY DKT. NO. 211-6/84

CITY OF BURLINGTON EDUCATION ASSOCIATION,
Petitioner,
v.
BURLINGTON CITY BOARD OF EDUCATION,
Respondent.

Joel Selikoff, Esq., for petitioner (Selikoff & Cohen, attorneys)

John E. Queenan, Jr., Esq., for respondent

Record Closed: April 1, 1985 Decided: May 16, 1985

BEFORE **DANIEL B. MC KEOWN**, ALJ:

The City of Burlington Education Association (Association) alleges that the Burlington City Board of Education (Board) adopted a policy entitled Review/Improvement Policy to Address Occasional Staff Absenteeism in an arbitrary, capricious, unreasonable and otherwise unlawful manner. Specifically, the Association contends the Policy is not reasonably and substantially related to a legitimate educational objective; that it is an arbitrary discipline policy in that it unreasonably infringes upon the legitimate use of statutory and contractual leave rights of Board employees; and, that it is an arbitrary and irrational application of the Department of Education's monitoring guidelines in regard to the level of acceptable individual absenteeism. The Association seeks an Order by which the Board would be permanently enjoined from enforcing the controverted policy. The

Board contends that the controverted Policy is neither arbitrary nor unreasonable and that its adoption is a proper and lawful exercise of its discretionary authority. After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted during which it was agreed the matter may be properly adjudicated by way of cross motions for summary decision on the record, which includes the pleadings, stipulation of fact and documents, a supplemental stipulation of fact and documents, and legal briefs of the parties.

INTRODUCTION

The subject matter of this dispute addresses a policy adopted by the Board in regard to occasional absences of its employees and the relationship of that policy to Chapter 30, Article 1, of Education Law, N.J.S.A. 18A:30-1 et seq., together with certain terms and conditions of employment agreed to between the Association and the Board resulting from the process of negotiations. Furthermore, the case addresses the issue of whether the policy was adopted by the Board to meet some identifiable, legitimate educational objective.

STIPULATED FACTS

The parties, through an executed stipulation of fact and certain documents, agree that the following are the facts of the matter:

1. The Association is the statutory majority representative of two negotiating units of employees employed by respondent. Unit one includes all non-supervisory certificated personnel, excluding principals, vice-principals, the director of curriculum and the director of athletics. Unit two includes all full-time secretarial and clerical personnel under contract or on an approved leave. A separate written negotiated agreement covers each of these units. Both agreements are effective July 1, 1983 to June 30, 1985.

2. On March 12, 1984 the Board adopted a policy entitled Burlington City Review/Improvement Policy to Address Occasional Staff Absenteeism. It is stipulated that the Board's policy provides in full as follows:

> It shall be the policy of the Burlington City Board of Education to encourage staff members to be to work on time, as well as on a regular basis.
>
> This regular presence of professional and support staff personnel is vital to the success of the district's educational program. Therefore, the superintendent of schools is authorized to formulate procedures which will ensure that sick leave, as well as other occasional absences, is used for their intended purposes as stated in N.J.S.A. 18[A]:30-1:
>
> > Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household.
>
> The State defines "'occasional staff absenteeism'" as all staff absences exclusive of approved professional days, and extended illnesses in excess of five (5) consecutive work days.
>
> When a school district's occasional absenteeism rate exceeds 3.5%, the Board of Education must have a written policy procedure/plan to address this matter.

It is also stipulated that the Board adopted the following procedure to implement the policy:

1. The superintendent of schools shall speak to the entire staff during yearly orientation sessions.
2. Periodic follow-up to be made by principals at faculty meetings.
3. Department chairpersons, and area coordinators shall review attendance expectations with their respective groups at monthly meetings.
4. Each day staff absences shall be recorded and fed into the computer.

5. Bi-monthly, the principals and the superintendent of schools shall be provided with a print-out of the attendance record. Individuals who exceed 3.5% of occasional absence, shall receive a letter indicating their cumulative absentee record for the year, to date. This letter will remind them that occasional absences are against Board of Education policy and asking their cooperation in improving their record.

6. With the publishing of the second, third, fourth, and fifth bi-monthly attendance reports, staff members who have reached 3.5% of occasional absence, by those respective dates, shall receive the same letter of warning.

7. With each bi-monthly report, persons who have previously received a letter of warning, and whose record of attendance has not improve, shall be required to have a conference with their building principal. Mitigating, or aggravating, circumstances may be taken into account at this meeting. However, a complete review of the employees total absentee record shall be reviewed to see if any decernable (sic) patterns are evident. A written summary of the conference will be recorded; said record may be used in the annual evaluation, and attendance improvement may be part of the Professional Growth Plan.

8. If occasional absentee records of individuals have not improved after a conference with their building principal, a second conference shall be held with the superintendent of schools. A written summary of the conference will be recorded, said record may be used by the superintendent to recommend, to the Board of Education, that the annual salary increment be withheld.

9. The administration shall institute positive re-inforcement, for staff members with outstanding attendance records, by issuing news releases in "Our Schools" publication as well as a letter of praise from the superintendent of schools.

3. No collective negotiations between the Association and the Board took place with respect to the contents of this policy.

4. This policy was adopted by respondent in response to the issuance of the Manual for the Evaluation of Local School Districts Pursuant to the Public School Education Act of 1975 by the Chapter 212 Monitoring Committee, pages 15 and 16 of Manual sections 6.2 and 6.3.[1] The Board's policy was adopted also in response to the issuance of the Guidebook for the Manual for the Evaluation of Local School Districts Pursuant to the Public School Education Act of 1975 of the New Jersey State Department of Education, specifically Element 6, indicator 6.2 and indicator 6.3,[2] page 8, including the definition of "occasional staff absenteeism", page 39.[3]

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[1] Section 6.2 of the Manual provides for purposes of Department of Education monitoring approval under the thorough and efficient standards at N.J.S.A. 18A:7A-1 et seq., that "The annual rate of staff (teaching and administrative) occasional absenteeism does not exceed 5 percent." The absenteeism rate is to be documented by the Board through data supplied in its district report submitted to the Department of Education. Section 6.3 of the Manual provides "There is a review/improvement process to address staff absenteeism if the annual rate of occasional staff absenteeism exceeds 3.5 percent. The Board is to document its absenteeism rate through data in its district report submitted to the Department of Education, together with a description of the review process and improvement plan. See also N.J.A.C. 6:8-6.2(b)(b)(ii)(iii).

[2] Indicator 6.2 provides in full as follows:

> This indicator of how local districts measure up to thorough and efficient standards applies to absences of five consecutive days or less * * *. By definition, occasional absences include all reasons except extended illness and approved professional days. The absence rate is that of the previous school year. The current rate for the year during which monitoring is being conducted will also be determined to ascertain significant increases or decreases. The percentage of occasional absence is computed by dividing total possible days of attendance for all certificated staff into the total days of occasional absence for all certificated staff, the result multiplied by 100, and that result subtracted from 100.
>
> $$100 - \left(\frac{\text{Total days of occasional absence}}{\text{Total possible days of attendance for all staff}}\right) .100$$

Indicator 6.3 provides in full as follows:

> An improvement plan for staff attendance is required if the rate of occasional absence is 3.6% to 5.0%. Districts are to develop plans which will meet their specific needs.

[3] Occasional staff absenteeism is defined as "all staff absences exclusive of approved professional days and extended illnesses in excess of five consecutive work days.

5. Under its policy, the rate of occasional absences is computed under the Board's policy in accordance with the formula in section 6.2 of the "Guidebook" referred to in paragraph four above.

6. Subsequent to the issuance of the "Guidebook" above, the State Department of Education issued in May, 1984 a "Position Statement on Staff Absenteeism and the Monitoring Process". The Department's position statement provides in full as follows:

> Through the new statewide monitoring system, the Department of Education is encouraging local school districts to examine their staff absenteeism data and adopt a positive approach to the development of staff attendance programs where necessary.
>
> Under the monitoring guidelines that took effect in January of 1984, districts are being monitored for compliance in 10 major areas or "elements." Element 6 — Professional Staff — deals specifically with what the state considers acceptable districtwide absenteeism rates.
>
> The criteria established for measuring district compliance states that, to receive state certification in this element, districts must document that "the annual rate of staff (teaching/administrative) occasional absenteeism does not exceed 5 percent" (indicator 6.2). It also provides that if the annual rate of staff occasional absenteeism exceeds 3.5 percent, a review and improvement program to address the problem must be developed (indicator 6.3). District absenteeism rates are based upon the end of the year district data reports.
>
> The absenteeism guidelines were established because:
>
> * quality and continuity of instruction are essential to the provision of a thorough and efficient education.
> * such instruction can be seriously and negatively affected by prolonged and frequent absences on the part of professional staff members.
>
> INAPPROPRIATE USE OF STATE GUIDELINES
>
> Unfortunately, some school districts have used these statewide standards inappropriately by applying them to individual cases.

* The state's absenteeism guidelines SHOULD NOT be used as the criteria upon which to base evaluations of individual professionals.

* Individual absenteeim policies are a matter of local determination and should provide for a case-by-case review. Individual staff members should not be penalized for absences due to illness or other justifiable reasons.

* Local attendance program should also facilitate identification of individuals who are abusing sick leave provisions and other local attendance policies of the board of education.

* Local staff attendance policies should encourage staff members to recognize the importance of good attendance records.

The state guidelines were intended to represent general indicators of overall district attendance and to highlight possible district, not individual, absenteeism problems.

7. The negotiated agreements between petitioner and the Board contain certain provisions which allow employees represented by petitioner to obtain leaves of absence both paid and unpaid. Those provisions are as follows:

a. For certificated personnal — Article XI "Absence on Account of Personal Business", Article XII "Absence On Account of Personal Illness", and Article XIII "Temporary And Extended Leaves of Absence". For secretarial and clerical employees they are: Article VI — "Sick Leave," Article XI — "Personal Business", Article XII — "Family Illness", Article XIII — "Temporary and Extended Leaves of Absence", and Article XIV — "Paid Holidays".

8. By letter of March 7, 1984 the Association requested that the Board delay adoption of the above policy. The Board did not delay adoption of this policy pursuant to said request and by letter of July 3, 1984, the

Association informed the Board of certain specific objections to respondent's policy.[4] The policy was not altered.

9. The above policy was implemented by the Board during the 1983-84 school year, after March 12. The superintendent interpreted said policy to require that an absence taken under Article XI of the negotiated agreement for certificated personnel for a religious holiday be treated as an occasional staff absence for the purpose of computing the rate of such absenteeism for the individual and for the district. By letter of March 19, 1984 to the superintendent, teacher Jay H. Trackman requested that the policy not be so interpreted. The superintendent refused that request by handwritten notation on said letter.

10. On or about April 3, 1984 the Board issued to certificated personnel the first set of form warning letters[5] referred to under its policy. Said letter was issued to each certificated professional represented by the Association whose individual rate of occasional absenteeim exceeded 3.5% for the 1983-84 school year up to April 1, 1984.

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[4] The Association takes the position that the Board's policy contradicts the State guidelines in the following ways:

1. District absenteeism rates must be based upon the end-of-the-year district data report, not bi-monthly reports.
2. Statewide standards may not be applied to individual cases.
3. Absenteeism guidelines should not be used as the criteria upon which to base evaluations of individual professionals.
4. Individual staff members should not be penalized due to illness or other justifiable reasons.
5. It was never the state's intention to include support staff in this policy.

[5] The form warning letter is as follows:

> As of this date, your attendance record, for this school year, indicates a need for improvement.
>
> In accordance with Board of Education policy - File: GBRIG-R, please consider this warning notice as the first administrative step to encourage you to improve your daily attendance. Your regular attendance is needed in order to teach the children the objectives outlined in the curriculum guides.
>
> Your cooperation, in improving your attendance record, is both anticipated and appreciated.

11. On or about March 29, 1984 the Board issued and circulated to each secretarial and clerical employee a memorandum including a list of the names of each such employee and the rate of occasional absences of each employee for the 1983-84 school year up to the date of the memorandum.[6]

12. As a result of several grievances filed by the Association concerning the letters referred to in paragraph 10 above and the memorandum referred to in paragraph 11 above, the Board agreed that said letters should be disregarded for the 1983-84 school year; that each employee receiving such a letter should be notified and would be notified that the timing of the application of the Board's policy was incorrect; that the attendance records of staff members prior to March 12, 1984 would not be utilized in the application and implementation of its policy; and that the superintendent would not place handwritten remarks upon individual staff member's written "Request for a Sanctioned Absenteeism".[7] The Board however refused to agree that absence request forms on which the superintendent had already placed remarks in response to requests for approval of an absence would be removed from the effected teachers' personnel files to which they were sent. The above agreements have been partially implemented by the Board by the distribution of a form

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[6] Nineteen secretarial/clerical employees received the memorandum which shows the accumulated absences for each employee and the percentage average of the possible days of attendance to that point. The superintendent apparently added the following handwritten note on the memorandum received by each such employee:

> Improvement has been noted since the last print-out. As a group the occasional (not total) absences are down to 4%. We need only to reduce this to 3.5% before June 30th to be within State guidelines. Your continued efforts to improve are appreciated. Please note that no Sec't in District Office exceeds the 3.5% of occasional absence. Place a check mark to the left of your name when you have read this print-out and pass on to the next person on the list.

[7] A Ms. Horwitz, presumably a teacher, filed a request to have two days of personal illness considered approved and with pay. The superintendent wrote on the face of that request "Ms. Horwitz, as of today your attendance record shows a 9.6% absentee rate. Please work to improve - thank you."

letter.[8] Finally, the Board as a result of the filing and settlement of one of a series of grievances submitted by petitioner, agreed to cease circulation and distribution among secretarial and clerical employees of the memorandum referred to in paragraph 11 above concerning the individual rate of occasional absences of each secretarial and clerical employee, and agreed to inform those employees that the State Guidelines as to occasional absences do not pertain to them. The Board however informed the Association that its March 12, 1984 policy does and will apply to all employees including secretarial and clerical employees.

13. The Board has again commenced implementation of the policy as of September 1, 1984. The content of the policy is as adopted March 12, 1984.

In addition to the foregoing stipulated facts and documents, the following facts and documents are stipulated through a supplemental stipulation executed by the parties:

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[8] The form letter provides in full as follows:

> The Board of Education has determined that the warning letter issued to you on April 3, 1984 is to be disregarded. While the contents of the letter were correct in accordance with Policy GBRIG, it has been declared by the Board of Education to have been procedurally incorrect.
>
> Sub-sections one, two and three of the policy had not taken place prior to issuing of the warning letter.
>
> Please be advised that the office copy of said letter has been destroyed on this date. The correct procedure shall be followed in 1984-85.

1. As part of its implementation of its occasional absence policy, the Board issued form warning letters to those of its certified professional teaching staff whose rights of occasional absenteeism exceeded 3.5% for the bi-monthly periods of September October, 1984 and November - December, 1984.[9]

2. In January 1985, the Board conducted conferences pursuant to [Step 7 of the procedure to implement the policy, date]. Written summaries of these conferences were distributed to conferees. Copies of these summaries were sent by the Board to the superintendent of schools and to the personnel files of the individual teachers.[10] These conference reports were appended

3. The respondent, subsequent to January 1985 is continuing to implement its policy referred to above.

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[9] This form warning letter, though not in evidence is stipulated by the Association to be identical in substance to the form letter in footnote 5, infra, except that this letter is now computer generated and prepared.

[10] Thirty-three summaries are part of this record: 26 summaries are of teacher conferences; five are of secretarial/clerical conferences; and two are of administrator conferences. Sixteen summaries are critical of the person's 1984-85 absentee record as being above the 3.5% limit (summaries numbered 5, 6, 7, 10, 11, 12, 13, 15, 18, 19, 20, 21, 23, 24, 25, 28); one summary is critical of the person's prior attendance record alone, excluding the 1984-85 year, as being against the Board's current 1984-85 policy (summary number 3); 11 summaries are critical of the person's present and past absentee record (summaries number 1, 2, 4, 8, 9, 22, 26, 27, 30, 31, 32); two summaries, number 14 and 33, contain no criticism at all, while three summaries contain general criticism of the person's absentee record (summaries number 17, 19, 29). Significantly, five of the 16 persons criticized for absenteeism during the current year as being beyond the 3.5% rate are acknowledged to have suffered a husband's long-term illness and subsequent death (5), an "unfortunate illness" (11), an "unfortunate automobile accident" (15), "mitigating circumstances [due to an] automobile accident and stomach problems" (18) and pneumonia (23). One person was criticized for past absences though a notation was made that he took three personal days this year notwithstanding that the Agreement provides for the use of such days and notwithstanding that two of those three days were for religious purposes. Finally, an administrator was advised "* * * your absentee record relative both serious illness and occasional absence, needs immediate improvement" (16), while another employee was advised that a majority of her absences were occasional absences notwithstanding the fact that "* * * some absences where several consecutive days were missed [are] considered occasional because they [the absences] were less than six consecutive days" (29). Note that the Policy excludes from the definition of occasional absence those absences in excess of five days.

The Association explains the application of the Board's Policy, without contradiction by the Board, in the following manner. The Board's official 1984-85 school calendar is used to determine the number of days of required school attendance days in each bi-monthly period. The chart which follows includes a breakdown of the number of days on the school calendar for each of the five bi-monthly periods between the first day of attendance for the teachers, September 4, 1984, and the last day of the school year, June 14, 1985. The numbers were arrived at by counting the number of days in each month less weekends and less days which the calendar indicates schools are closed. The chart shows the number of attendance days in each month, the number of attendance days in each bi-monthly period, and the cumulative number of attendance days for the year to date at the end of each bi-monthly period.

The chart also shows the maximum number of days of occasional absence, less than which the policy's 3.5% rate for each of the bi-monthly periods would not be invoked, as well as the cumulative maximum absences for the year at the end of each period, less than which the policy would not be invoked. These absences are rounded off to indicate the number of whole days of absences that would cause a teacher to be in violation of the Board's policy and this figure appears in parentheses after the unrounded figure. For example, in the first bi-monthly period, September - October, the 3.5% rate converts into 1.4 days of absences, over which, as an example, 2 days, would place a teacher in violation of the Board's policy and would result in the issuance of a warning letter pursuant to Step 5 of the policy.

1. FIRST PERIOD (SEPTEMBER - OCTOBER):

Attendance days for September	= 19
Attendance days for October	= 22
Attendance days for first period	= 41
Attendance days for year to date	= 41
Allowable absences for period	= 1.4 days (2 days is in violation of policy)
Allowable[11] absences for year to date	= 1.4 days (2 days is in violation of policy)

[11] The term "allowable" is used to signify that 1.4 days absence must be reached before the Policy is triggered. "Allowable" is not intended to suggest an enforceable right to 1.4 absences unless otherwise authorized by statute, rule, or agreement.

2. SECOND PERIOD (NOVEMBER - DECEMBER):

Attendance days for November	= 17
Attendance days for December	= 15
Attendance days for year to date	= 73
Allowable absences for period	= 1.1 days (2 days is in violation of policy)
Allowable absences for year to date	= 2.55 days (3 days is in violation of policy)

3. THIRD PERIOD (JANUARY - FEBRUARY:

Attendance days for January	= 21
Attendance days for February	= 19
Attendance days for third period	= 40
Attendance days for year to date	= 113
Allowable absences for period	= 1.4 days (2 days is in violation of policy)
Allowable absences for year to date	= 3.9 days (4 days is in violation of policy)

4. FOURTH PERIOD (MARCH - APRIL):

Attendance days for March	= 21
Attendance days for April	= 16
Attendance days for fourth period	= 37
Attendance days for year to date	= 150
Allowable absences for period	= 1.3 days (2 days is in violation of policy)
Allowable absences for year to date	= 5.2 days (6 days is in violation of policy)

5. FIFTH PERIOD (MAY - JUNE):

Attendance days for May	= 22
Attendance days for June	= 11
Attendance days for fifth period	= 33
Attendance days for year to date	= 183
Allowable absences for period	= 1.17 days (2 days is in violation of policy)
Allowable absences for year to date	= 6.4 days (7 days is in violation of policy)

This concludes a recitation of the stipulated material facts of the matter.

LAW

In addition to the provisions of N.J.S.A. 18A:30-1 already recited, other provisions of Education Law must be considered.

N.J.S.A. 18A:30-2 provides:

> All persons holding any office, position, or employment in all local school districts, regional school districts or county vocational schools of the state who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law, except persons in the classified service of the civil service under Title 11, Civil Service, of the Revised Statutes, shall be allowed sick leave with full pay for a minimum of 10 school days in any school year.

N.J.S.A. 18A:30-3 provides:

> If any such person requires in any school year less than the specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall be accumulative to be used for additional sick leave as needed in subsequent years.

Finally, N.J.S.A. 18A:30-4 provides:

> In case of sick leave claimed, a board of education may require a physician's certificate to be filed with the secretary of the board of education in order to obtain sick leave.

Pursuant to the Public School Education Act of 1975, L. 1975, c. 212, effective July 1, 1975, codified at N.J.S.A. 18A:7A-1 et seq., the State Board of Education has been charged with the duty to establish goals and standards which shall be applicable to all public schools in the state in regard to a thorough and efficient program of education for all pupils N.J.S.A. 18A:7A-6. Implicit throughout the approach towards insuring a thorough and efficient program of education is the base requirement that certificated, professional staff personnel be available for the instruction of pupils. In this regard, the State Board of Education promulgated regulations at N.J.A.C. 6:8-6.1 et seq., Procedures for Evaluation of the Performance of Each Public School District and School, which, at N.J.A.C. 6:8-6.2(b)(6)(ii)(iii), provides as follows:

> ii. The annual rate of occasional absenteeism for district staff (including teachers and administrators) shall not exceed five percent. Documentation shall be calculated from district staff attendance data for the immediate prior school year by dividing total days of staff occasional absences by total possible days of attendance for all staff and multiplying by 100.

And,

> iii. The district board of education shall adopt a review and improvement process to address staff absenteeism, if the annual rate of occasional staff absenteeism exceeds 3.5 percent. The documentation shall be a written description of the review process and improvement plan based on district staff attendance records.

In Montville Tp. Education Association and Montville Secretaries' Association v. Board of Education of the Township of Montville, 1984 S.L.D. ____ (St. Bd. Nov. 8, 1984), the State Board of Education, relying upon standards it adopted in Marilyn Kuehn v. Bd. of Ed. of Tp. of Teaneck, 1983 S.L.D. ____ (St. Bd. Feb. 3, 1983), held that a board of education may not take disciplinary action against an employee based solely on the number of absences incurred by that employee. The State Board reasoned that if such disciplinary action were allowed based solely on the number of absences incurred, such a practice would contravene the statutory guarantees to board employees at N.J.S.A.

18A:30-1 and -3. In Kuehn, Marilyn Kuehn was denied a salary and adjustment increment by the Board because she was absent more than 90 school days during one year. The board relied upon an unwritten policy which provided that any staff member who was absent more than 90 school days in a school year automatically is ineligible for a salary and adjustment increment for the following school year. The State Board held

> * * * [B]oard personnel policies should be carefully considered, prepared in written form, and publicly proposed and adopted by board of education. Such was not the case with this practice, which had not existed in written form, nor had it been adopted by the Teaneck Board of Education. The Teaneck Board's practice applied without regard to the reasons for or the cause of the absence * * * except for workmen's compensation cases and nonpaid leaves of absence. Petitioner, who was seriously ill, was statutorily entitled to use her annual and accumulated sick leave under N.J.S.A. 18A:30-1 and 18A:30-3. Having exercised her statutory right, the Board's policy then obviated the statutory entitlement by withholding petitioner's employment increment and adjustment increment for the following school year.
>
> Under N.J.S.A. 18A:29-14, a board of education shall provide reasons for the wit holding. To simply state that a teacher by sheer number exceeds the 90-day maximum allowance for absence and forfeits an increment, without considering the particular circumstances for absence is not good cause for the withholding of increment as required by N.J.S.A. 18A:29-14. For the Teaneck Board to determine that petitioner's absence exceeding 90 days, in and of itself, is sufficient reason for the withholding of increment, without consideration of the particular circumstances for the absence, is arbitrary and without any demonstrated rational basis.

In Montville Township Education Association, supra, the Montville board adopted teacher attendance guidelines for the purpose of improving overall teacher attendance. Those guidelines correlated the number of days absence with ratings of satisfactory, needs improvement, and unsatisfactory. The guidelines, it is noted, also required the inclusion of narrative explanation to be placed in the comment section of the teacher's yearly summary evaluation. The State Board, in affirming the propriety of the guidelines, held as follows:

> It is well established that a teacher's attendance record may be considered when evaluating his overall performance and that high absenteeism may be sufficient grounds for disciplinary action even where legitimate medical excuse exists. [citation omitted] However, under the standards established by Keuhn, disciplinary action may not be based solely on the number of absences because to permit such a practice would contravene the statutory

> guarantees of N.J.S.A. 18A:30-1 and -3, which grant an entitlement to annual and accumulated sick leave. Keuhn, supra. While the Guidelines here do assign a rating based on the number of days of absence, they also require a narrative explanation in the Summary Evaluation and the record indicates that evaluators are in fact required to clarify any absences that were the result of major medical problems. * * *

While the State Board reversed the Commissioner's decision that set aside the Montville board's teacher attendance guidelines, it did make the following observation:

> The State Board agrees with the Commissioner that:
>
> > * * * the teacher evaluation report is not just an ordinary document. A reprimand placed in a teacher's personnel file, without restriction as it its use, may have an adverse impact upon that person's employment possibilities, assignment or earnings. (Emphasis added)

A fair reading of the State Board of Education's holdings in Keuhn and Montville Township Education Association matters discloses that the State Board recognizes the obligation of local boards of education to adopt personnel policies which encourage their employees, including professional and nonprofessional staff, to be on the job. However, the State Board also recognizes the existence of statutory benefits conferred upon board employees at N.J.S.A. 18A:30-1 and -3. That is, the State Board has adopted the view that sheer numbers of absences by an employee, without consideration of the underlying cause for such absences, is an insufficient basis upon which the board may place a reprimand in the affected person's personnel file and that sheer number of absenees is an insufficient basis upon which to deny an employee an otherwise legitimately authorized benefit.

Turning to the facts of this case, the remarkable feature of the Board's Policy is that so-called warning letters are sent to persons who exceed 3.5% of the prior year's absence rate and subsequent conferences are conducted with neither the letter nor the conference addressing the underlying reason for the absence. The warning letters and conferences with the principal or the superintendent can only be seen as the initial steps in a disciplinary process which has the potential result of a deprivation of a salary or adjustment increment otherwise earned by the teacher or the ultimate result of the certification of tenure charges against tenured employees. The facts here demonstrate

that the Board through negotiations with the Association agreed, ostensibly in good faith, to certain employee absences for reasons then deemed legitimate including personal illness, family illness, death in the immediate family, court subpoena, and three paid personal days per year regardless of the reasons for the absence. Nonetheless, the Board is effectively modifying the terms and conditions of the negotiated agreement which it entered through the application of this Policy by its warning letters and conferences without regard to reasons. Recall the employee whose husband died, or the several who were in automobile accidents, or the one who suffered pneumonia. Those persons were absent for justifiable reasons; yet, no consideration was given in regard to the declaration that those persons were in violation of the Board's Policy.

Notwithstanding the fact that the Board contends no teacher has yet been disciplined by virtue of this Policy, it is clear that the warning letter, together with the conference, are the initiation of a disciplinary process in order to conform the effected employee's conduct to the established standard. Moreover, the Policy is, on its face and as applied, contrary to the legislative benefit conferred upon all employees at N.J.S.A. 18A:30-2 in regard to "allowed sick leave with full pay for a minimum of 10 school days in any school year." The Policy admits of no legitimate absence but for professional days. While the statute does not confer upon employees the right to use such sick leave in an unfettered manner, so long as the condition precedent of personal disability due to illness or injury or exclusion from school by medical authorities or by quarantine is met, the Board cannot interfere with such legislative benefits. The Policy requires initial disciplinary steps to be taken in the form of warning letters and conferences against employees who justifiably exercise their legislatively granted benefits.

While the ostensible purpose of the Policy is to ensure the attendance of all employees at their assigned duties on a regular and consistent basis the Policy, according to the evidence of record, is applied in a mechanical fashion without regard to the underlying cause for absence. An employee who may in fact abuse sick leave provisions of the statute or of the negotiated Agreement are treated in an identical fashion to employees who are legitimately ill, injured, or who have absented themselves from duty because of religious holidays. Moreover, the Board is applying its present Policy in an ex post facto manner by allowing past attendance records to be held to the standard of its present policy. While the ostensible purpose for the Policy is salutary, the application of the Policy is not reasonably related to achieve that desirable goal. More

likely than not, employees' past attendance records were in accord with then existing policy and the past record should not now be judged on the basis of a present and different policy.

FINDINGS AND CONCLUSIONS

In sum, I **FIND** the Policy to be an arbitrary and unreasonable exercise of the Board's discretion to monitor employees' attendance in that the Policy is applied without regard to the underlying reason for such absences. I **FIND** that because the Policy does not distinguish between those who may in fact abuse sick leave benefits or other leave benefits from those who are legitimately ill, injured, or otherwise legitimately absent, and, as such, the Policy cannot rationally achieve the salutary goal of consistent and regular employee attendance to their duties. I **FIND** that the implementation of the Policy, without regard to the underlying reasons for absence, limits employees from the proper exercise of legislatively granted allowable sick leave at N.J.S.A. 18A:30-2 and limits the employees' exercise of their legitimately negotiated benefits as are set forth in the Agreement. I **FIND** the Policy is intended by the Board to be an integral part of an employee's overall performance evaluation without regard to the underlying reasons for such absence. I do not find, as the Association contends, the Policy to be vague because the Policy admits to no legitimate absences, but for professional days. The Policy cannot be any clearer than that. However, I do **FIND** the Policy to be overbroad in that it disciplines persons for legitimate absences in the same manner as the Policy disciplines persons for abuse. I **FIND** the Policy to be contrary to the Department of Education's declaration of inappropriate use of its guidelines in that this Board intends to use criticism of employees' attendance generated by the Policy as part of the employees' performance evaluations; and, no provision is made in the Policy to facilitate the identification of those who abuse sick leave.

For all the foregoing reasons, I **CONCLUDE** that the Board's Policy entitled Review/Improvement Policy to Address Occasional Staff Absenteeism is an arbitrary and unreasonable exercise of the Board's discretion and that the Policy seeks to unlawfully discipline employees for the lawful exercise of the legislatively granted benefits at N.J.S.A. 18A:30-2 and their negotiated benefits as set forth in the Agreement. Accordingly, the Burlington City Board of Education is hereby permanently **RESTRAINED** from implementing the controverted Policy without regard to the underlying reasons for

employee absence. A final note. The Association's argument that a bi-monthly base may not be used by the Board to monitor absence is without a basis in law. So long as the Board abides by the standards articulated by the State Board of Education in Kuehn, supra and Montville Education Association, supra, the Board is free to adopt a policy to achieve the legitimate goal of consistent job attendance. Furthermore, I **FIND** no merit in the Association's argument that the Board somehow acted improperly by combining secretarial/clerical employee absences with teacher absences to establish the absentee rate as applied during 1984-85. Finally, because the Board is permanently restrained from implementing its Policy as controverted herein, the Board is also **ORDERED** to remove warning letters and conference summaries generated by the Policy during 1984-85.

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

May 16, 1985
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

MAY 16 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 20 1985
DATE

Ronald L. Parker for
OFFICE OF ADMINISTRATIVE LAW

ij

CITY OF BURLINGTON EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions filed by the Board were not submitted within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

Upon review of the record and initial decision in this matter, the Commissioner agrees with the Office of Administrative Law's recommendation permanently restraining the Board from implementing its "Review/Improvement Policy to Address Occasional Staff Absenteeism." The Commissioner concurs with the judge's finding that this policy is an arbitrary and unreasonable exercise of the Board's discretion for the reasons stated in the initial decision.

While the Commissioner supports and commends the Board's desire to develop and implement a policy/strategy to improve staff attendance, particularly occasional absences, its reliance on the criterion/standard adopted by the Department of Education as justification for its action is clearly contrary to the department's position statement on the matter. (May 1984 Position Statement on Staff Absenteeism and the Monitoring Process) The Board's Answer to the Petition of Appeal in several instances gives as a defense that the criterion used in its policy is one set by the State of New Jersey Department of Education and that "Respondent's action was taken to comply with the State Department of Education's directive***." (at p. 2)

The department's 3.5 percent standard is an annual districtwide absenteeism rate. It is not in any way intended for use in evaluating individual absenteeism rates. Further, the department does not hold that each individual staff person must meet a 3.5 percent occasional absence rate. Rather, the standard is used to assess an aggregate districtwide absentee rate over an entire year so as to identify possible district problems in absenteeism.

In May 1984 the Department of Education made it quite clear to district boards of education that the use of the State Guidelines for evaluating individual attendance was inappropriate. Its position bears repeating herein.

"INAPPROPRIATE USE OF STATE GUIDELINES

"Unfortunately, some school districts have used these statewide standards inappropriately by applying them to individual cases.

* The state's absenteeism guidelines SHOULD NOT be used as the criteria upon which to base evaluations of individual professionals.

* Individual absenteeism policies are a matter of local determination and should provide for a case-by-case review. Individual staff members should not be penalized for absences due to illness or other justifiable reasons.

* Local attendance programs should also facilitate identification of individuals who are abusing sick leave provisions and other local attendance policies of the board of education.

* Local staff attendance policies should encourage staff members to recognize the importance of good attendance records.

"The state guidelines were intended to represent general indicators of overall district attendance and to highlight possible district, not individual, absenteeism problems."

As found by the judge, the policy disputed in this matter does not distinguish between those who are legitimately ill, injured, or otherwise justifiably absent from those who may, in fact, abuse leave benefits. If any person's occasional absence rate exceeds 3.5 percent, he or she is subject to the same sanctions even if the underlying reason for the absences be for religious observance, illness, or death in the family as attested to by the record. The Commissioner cannot support as reasonable or within a board's discretionary authority a policy which incorporates a plan of progressive discipline as herein which does not distinguish between abusive and legitimate use of leave benefits. This determination is consistent with the State Board of Education's decision in Montville, supra, which cautioned the board therein as follows:

"***[W]e caution the Board that before taking disciplinary action based on its Guidelines, it is required to consider the circumstances of the absences in each case, as well as the number. Kuehn, supra.***" (Slip Opinion, at p. 5).

Although the Board maintains that the policy makes "no direction for the imposition of discipline whatsoever" (Board's Answer, at p. 2) and it "has taken no disciplinary action against anyone" (at p. 3), the Commissioner concurs with the judge's analysis that:

> "***The warning letters and conferences with the principal or the superintendent can only be seen as the initial steps in a disciplinary process which has the potential result of a deprivation of a salary or adjustment increment otherwise earned by the teacher or the ultimate result of the certification of tenure charges against tenured employees.***"
>
> (Initial Decision, ante)

Notwithstanding the fact that some conference summaries indicate death in family, automobile accident, pneumonia and the like, the judge is correct in stating that no consideration was given for individuals absent for justifiable reasons in regard to the declaration that those persons were in violation of Board policy. Further, the Commissioner notes that no mitigating circumstance is indicated for Mr. Trackman's religious observance during the September-October bimonthly period which contributed to his receipt of a warning and subsequent conference with his principal. (Supplemental Stipulation of Facts, Conference Report Number 25)

Mr. Trackman's circumstances are illustrative of several critical concerns regarding the Board's policy. Firstly, it exemplifies the chilling effect the Board's policy may have on the exercise of an individual's constitutional right to engage in religious observances. In the instant matter, if staff members were absent during the bimonthly period September-October for two days of religious observance, such as occurred with Mr. Trackman, they would be in violation of the policy. This would trigger a letter to them to "remind them that occasional absences are against Board of Education policy and asking their cooperation in improving their record" (Number 5 of Policy). Unless such individuals refrained from engaging in religious observance during this bimonthly interval, they would each year receive a warning of being in violation of the policy. In the Commissioner's judgment, a policy that results in such sanction cannot be deemed appropriate.

Secondly, the above illustrates the unfairness of a policy that imposes sanctions for bimonthly intervals even if an individual's total attendance pattern may be acceptable overall. If one takes the policy as it currently reads, a teacher could have as many as 6.4 absences annually without violating the policy and yet receive a sanction for violation of the policy during a lesser frame of time than an annual period. That is, Mr. Trackman could very well not be in violation of the 3.5 percent policy over an annual basis, yet receive one or more sanctions at given intervals prior to

the end of the school year. For example, Mr. Trackman's conference report (Number 25) states, "For the past several years I have noted in your folder that you have rarely exceeded the Board approved 3.5%." The Commissioner believes that to impose sanctions without reviewing attendance over a sufficient period of time to ascertain a pattern of abuse is clearly unfair.

Consequently, the Commissioner affirms the initial decision rendered by the Office of Administrative Law for the reasons expressed herein. Accordingly, the Board is directed to comply with the judge's orders in this matter to desist from applying the policy and to remove from any records any warning letters/notification of violation of the disputed policy and conference reports generated by the policy.

COMMISSIONER OF EDUCATION

JULY 1, 1985

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 1, 1985

For the Petitioner-Respondent, Selikoff and Cohen
(Joel S. Selikoff, Esq., of Counsel)

For the Respondent-Appellant, John E. Queenan, Esq.

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

November 8, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 4725-84 &
EDU 4726-84
(CONSOLIDATED)
AGENCY DKT. NOS. 144-5/84 &
139-4/84

ELLEN K. DAILY
AND JAMES DAILY,
Petitioners,
v.
BOARDS OF EDUCATION OF THE
TOWNSHIP OF OLDMANS, THE TOWNSHIP
OF QUINTON, SALEM COUNTY
VOCATIONAL-TECHNICAL SCHOOLS,
SALEM REGIONAL DAY SCHOOL,
THE TOWNSHIP OF PENNSVILLE,
THE TOWNSHIP OF MANNINGTON,
PENNS GROVE-CARNEYS POINT
REGIONAL SCHOOL DISTRICT,
WOODSTOWN-PILESGROVE
REGIONAL SCHOOL DISTRICT,
LOWER ALLOWAYS CREEK TOWNSHIP,
THE TOWNSHIP OF ELSINBORO,
SALEM CITY SCHOOL DISTRICT,
THE BOROUGH OF ELMER,
THE TOWNSHIP OF PITTSGROVE,
THE TOWNSHIP OF UPPER PITTSGROVE
AND THE TOWNSHIP OF ALLOWAY,
Respondents.

Douglas B. Lang, Esq., for petitioner Ellen K. Daily (Katzenbach, Gildea & Rudner, attorneys)

Richard A. Friedman, Esq., for petitioner James Daily (Ruhlman, Butrym & Friedman, attorneys)

John P. Morris, Esq., for respondent Oldmans Township Board of Education (Horuvitz, Perlow, Morris & Baker, attorneys)

Janet S. Lawrence, Esq., for respondent Quinton Township Board of Education

George G. Rosenberger, Jr., Esq., for respondents Elsinboro Township Board of Education, Salem County Vocational-Technical School and Salem Regional Day School Boards (Butler, Butler and Rosenberger)

John D. Jordan, Esq., for respondents Pennsville Township Board of Education, Mannington Township Board of Education, Penns Grove-Carneys Point Board of Education, Woodstown-Pilesgrove Regional Board of Education and Lower Alloways Creek Township Board of Education (Jordan & Jordan, attorneys)

Ellen S. Bass, Esq., for respondent Salem City School District (Rand & Algeier)

Bruce E. Barrett, Esq., for respondent Elmer Board of Education and Pittsgrove Township Board of Education (Slimm, Dash and Goldberg)

Gail R. Henningsen, Esq., for respondent Upper Pittsgrove Board of Education and Alloway Township Board of Education (Lenox, Giordano, Devlin, Delehey & Socey)

Record Closed: April 11, 1985 Decided: May 16, 1985

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

Petitioners, Ellen K. Daily and James Daily, wife and husband, perfected separate Petitions of Appeal before the Commissioner of Education, pursuant to N.J.S.A. 18A:6-9 and N.J.A.C. 6:24-1.1 et seq., claiming, among other things, tenure and seniority rights with the Board of Education of the Township of Oldmans (Oldmans) and all other herein named Boards of Education by virtue of their continuous employment as teachers of the handicapped from September 1, 1974 through April 19, 1984, at which time they were each removed from their employment upon the dissolution of the Auburn Cooperative Education Program (ACEP). Petitioners' entitlement claim is grounded upon their allegation that Oldmans Board was the Local Education Agency (LEA) for ACEP and that each of the herein respondent Boards of Education constituted a jointure commission (N.J.S.A. 18A:46-25) or, alternatively, that ACEP was a cooperative program between the

respondent Boards within the meaning of N.J.S.A. 18A:46-24 and, alternatively, that a sending-receiving relationship existed between all named respondents, the unilateral termination of which was without good and sufficient reasons and failed to obtain the approval of the Commissioner. Each of the respondent Boards admits to participation with ACEP; however, each, individually, denies that petitioners have acquired a tenure status with it and seeks to have the petitions dismissed.

PROCEDURAL RECITATION

James Daily filed his petition of appeal before the Commissioner on April 30, 1984, while Ellen K. Daily's petition was received by the Commissioner on May 4, 1984. Thereafter, on June 28, 1984, after issues had been joined, the two separate matters were transmitted to the Office of Administrative Law for determination as contested cases, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The Office of Administrative Law, having determined that the parties and issues were identical in both matters, consolidated the cases for the convenience of the parties and for judicial economy and efficiency.

A prehearing conference was held on August 9, 1984, at which, among other things, the issues for determination were set forth, the discovery calendar was established, and petitioners' oral motion to amend their petitions of appeal to join certain other Boards of Education as party respondents was granted. As a consequence of the grant of leave to join other omitted Boards of Education as respondents to the herein matter, a second prehearing conference was scheduled for October 4, 1984, at the Trenton Office of Administrative Law.

At the second prehearing conference conducted on October 4, 1984, leave was again granted to petitioners to amend their petition of appeal and join all other omitted Boards of Education in Salem County as respondents. The Oldmans Board was granted leave to join the Salem County Superintendent of Schools as a party respondent. It was agreed that counsel for petitioners would draft proposed stipulations of fact to be transmitted to each respondent Board for its review and approval and that the final approved stipulations would be submitted to the undersigned on or before January 11, 1985.

The parties were unable to formulate any stipulations. The undersigned, accordingly, set down peremptory hearing dates for the week of April 8, 1985. The hearing was held on April 8 through April 11, 1985, at the Oldmans Township Municipal Court, Pedricktown, New Jersey. No post-hearing briefs or memoranda were requested nor required. Therefore, the matter was closed, effective April 11, 1985.

The undersigned advised all parties to the herein matter that notices of motion with respect to any and all issues were to be propounded and filed at least ten days prior to hearing. As a consequence, certain respondent Boards either filed notices of motion or requested leave to move orally before this administrative tribunal at hearing for the dismissal of the petition against them. Oral argument was heard on April 8, 1985, on the motions for summary judgment in favor of the respondent Boards for petitioners' failure to state a claim upon which relief may be granted and that no tenure attached to those Boards so moving for their dismissal. The undersigned determined that certain facts, which remained in dispute, precluded summary dismissal of the movants (Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954)) and, therefore, held decision on the motions in abeyance until petitioners had advanced their proofs. Leave was granted to the movant respondents to renew their motions at the conclusion of petitioners' proofs. On the third day of hearing and at the conclusion of petitioners' case-in-chief, respondents renewed their individual motions to be dismissed from the herein proceedings. Petitioners found no objection to the motions of certain respondents and, therefore, consented to dismiss the following Boards of Education as party respondents: Alloway Township, Elsinboro Township, Elmer Borough, Lower Alloways Creek Township, Mannington Township, Pittsgrove Township, Penns Grove-Carneys Point Regional, Pennsville Township, Salem City, Upper Pittsgrove Township and Woodstown-Pilesgrove Regional. Having heard no objection by petitioners and having determined that petitioners had no claim against the above-identified respondents, they were each, individually, summarily dismissed from the herein action.

Accordingly, the respondents that remain in the proceedings include the following: Oldmans Township, Quinton Township, Salem County Vocational-Technical Schools and the Salem Regional Day School.

STATEMENT OF FACTS

Having reviewed the entire record in this matter and having given fair weight thereto, the following facts are neither in dispute nor were they successfully rebutted and, therefore, are hereby adopted as **FINDINGS OF FACT.**

The ACEP appears to have been the creation of the Salem County Superintendent of Schools and the Salem County Child Study Team (CST) supervisor where, in or about June 1974, an application to the New Jersey Department of Education (DOE) was initiated by the Salem County Superintendent and its CST supervisor to provide county-wide instructional services to pupils identified and classified as emotionally disturbed (ED), pursuant to N.J.S.A. 18A:46-6 et seq. and N.J.A.C. 6:28-3.5(e)4. The application, which was approved by the DOE, provided, among other things, an initial grant of $25,000, pursuant to the Federal Assistance for the Education of Handicapped Children under P.L. 89-313, Amendment to Title I, ESEA, and Part B, EHA, P.L. 91-230. The Oldmans Board agreed to function as the LEA, and its chief school administrator, Maurice J. Madden, was named as the administrator for the project.

ACEP was housed in the facility known as the Auburn School under the direction and control of the Oldmans Board, which functioned as the LEA. The program provided for instruction services to ED pupils ranging in age from seven to fourteen years, who were separated into two classrooms identified as Primary ED and Intermediate ED. The pupils selected for ACEP were identified and classified by the local boards of education CSTs, without any involvement by the Oldmans Board's CST, and by application from the local board of education to the ACEP Director (James Daily) for admission to the program. The Director approved or disapproved of the pupil admission application on a space-available basis and upon the advice and consent of a consulting psychologist. The Director would personally visit each pupil applicant at the pupil's school or home in order to explain the ACEP program. Upon the acceptance of a pupil in ACEP, the Director would advise Mr. Madden and, thereafter, a contract would be executed by the Oldmans Board Secretary between the Oldmans Board and the sending board for the pupil's tuition to ACEP. The local sending board would also provide transportation to and from ACEP.

The annual budget for ACEP was developed by Mr. Madden, in cooperation with the ACEP Director and was approved and adopted by the Oldmans Board. The budget was determined by calculating the total projected annual cost, divided by the number of

pupils in the program, in order to arrive at a tuition rate per pupil. This tuition amount was then reduced to a contract which was forwarded to the sending school district. The ACEP budget was designed to defray all costs of the program and was operated to immunize the Oldmans Board from any expenses except for those pupils Oldmans might have enrolled in ACEP in any given year. The ACEP budget and appropriations passed through the Oldmans Board's books and accounts, with separate accounts specifically designated for the program. The original grant of $25,000 approved by the DOE for the 1974-75 school year was decreased to $15,000 for the 1975-76 school year. It was further decreased to $10,000 for the 1976-77 school year and, thereafter, it was decreased to zero dollars for the remainder of the existence of the program. As a consequence of the decrease in federal aid, the tuition charges per pupil increased proportionally.

During the existence of the ACEP at the Auburn School, every herein identified Board, at one or more times, sent a pupil or pupils to the program under contract with the Oldmans Board except the Salem Vocational-Technical Schools and the Salem Regional Day School. In the school year 1982-83, during the existence of ACEP, the Quinton Board established and operated its own ED program and, consequently, it no longer contracted with the Oldmans Board for such educational services.

During the period of its existence, Mr. Madden communicated information about the operation of ACEP with other chief school administrators and the Salem County Superintendent of Schools through the monthly meeting of the Salem County Roundtable and by way of general correspondence.

The ACEP functioned with a voluntary Advisory Committee (AC) generally composed of members of the sending school districts and the Salem County CST supervisor, with Madden and/or the ACEP Director acting as chair or co-chairperson. The AC had no binding authority over ACEP, nor did it promulgate or adopt any rules or regulations concerning the operation of ACEP. Similarly, subsequent to Oldmans Board's assuming the responsibility as the ACEP LEA, the Salem County Superintendent of Schools or the Salem County CST supervisors had no role or authority in the day-to-day operation of ACEP. Nor did the Salem County office have any direct control over the ACEP budget, which authority rested squarely with the Oldmans Board. Except for the initial contact with petitioners, the Salem County office had no role or authority concerning the selection and employment of personnel for ACEP. The authority for the

employment (and discharge) of employees for ACEP belongs exclusively to the Oldmans Board. The AC was disbanded in 1981 because of a lack of attendance and interest on the part of the sending Boards.

Petitioner James Daily became aware of ACEP through the Salem County CST supervisor, Richard Scott. On or about July 21, 1974, James Daily completed an Oldmans Board's employment application and, thereafter, he was interviewed by Mr. Scott, Mr. Madden and Ms. Gladys Binotti, an employee of the Penns Grove-Carneys Point Board. Subsequently, James Daily was advised by Mr. Scott of his employment as the Teacher-Director of ACEP and, after executing an employment contract with the Oldmans Board, Mr. Daily commenced employment on or about August 1, 1974. Mr. Scott had made the original selection of pupils to attend ACEP for the 1974-75 school year, and 18 pupils from various school districts in Salem County were enrolled in the beginning classes. From his initial employment, which began on August 1, 1974, James Daily was continuously employed under contract with the Oldmans Board on an annual basis, together with 22 working days during the summer months. Petitioner James Daily was employed from August 1, 1974 until April 19, 1984, when the Oldmans Board discontinued ACEP.

Petitioner Ellen K. Daily also commenced her employment in ACEP under contract with the Oldmans Board on August 1, 1974. Thereafter, Ellen Daily was employed as a teacher of the handicapped on an annual basis without summer employment until April 19, 1984, the date Oldmans Board discontinued ACEP. The Oldmans Board denied that either petitioner had acquired a tenure status in its employ and consequently discontinued their employment.

During the course of their employment with the Oldmans Board, both petitioners James Daily and Ellen Daily were supervised and evaluated by Mr. Madden, Oldmans chief school administrator. Petitioners' annual salary increases, increments and other emoluments were set by the Oldmans Board as a consequence of negotiations between it and the Oldmans teachers' recognized negotiating unit. Petitioners were credited with their annual sick leave through the Oldmans Board, pursuant to N.J.S.A. 18A:30-1 et seq. Neither petitioner entered into any contractual arrangement with any local board of education other than the Oldmans Board from August 1, 1974 through April 19, 1984. Petitioners had no contractual arrangement with the Salem County Superintendent of Schools, nor did they have any contractual arrangement with any office within his control.

Subsequent to the Oldmans Board's discontinuance of ACEP, the Quinton Board and the Vocational-Technical Board accepted some pupils in their programs who were dislocated by the termination of ACEP. The Quinton Board and Vocational-Technical Board accepted the discontinued ACEP pupils in preexisting ED programs upon application from the local boards of education rather than through ACEP or the Oldmans Board.

The reasons for the Oldmans Board's discontinuance of ACEP, either expressed or implied, were: (1) The decrease in pupil enrollment with a concomitant increase in per pupil tuition charges; (2) The Oldmans Board no longer had any pupils attending the program; and, (3) The illness of key personnel employed in the program caused the Oldmans Board to curtail temporarily the operation of ACEP. On or about February 9, 1984, the Oldmans Board voted to discontinue ACEP in April 1984. Thereafter, Mr. Madden advised all of the Salem County local boards of education, through their local superintendent of schools, that ACEP would be discontinued and closed as of April 19, 1984.

DISCUSSION AND CONCLUSIONS

The parties to the herein matter advanced a variety of theories as to which board or boards of education petitioners' tenure attached and, whether petitioner had acquired tenure with more than one board. Those theories advanced included the alternative propositions that petitioners' tenure rights were secured: (1) By contact and continuous employment with the Oldmans Board acting as LEA for ACEP under N.J.S.A. 18A:28-5; Spiewak v. Bd. of Ed. of Rutherford, 90 N.J. 63 (1982); (2) By virtue of a jointure commission under N.J.S.A. 18A:46-24 et seq., whether de jure or de facto, Faulcon Bisson v. Bds. of Ed. of Boro of Alpha, Tps. of Greenwich, Lopatcong and Pohatcong, 1978 S.L.D. 187; Anna Marie Chinnis v. Bds. of Ed. of Lower Cape May Reg. S.D., et als., 1981 S.L.D. ____; (3) Upon the discontinuance of a school, pursuant to N.J.S.A. 18A:28-6.1; In the Matter of the Closing of Jamesburg H.S., 83 N.J. 540 (1980); or (4) as a consequnce of the effects of change of government, under N.J.S.A. 18A:28-16, et seq.; Shelko v. Bd. of Ed. of the Mercer Cty. Spec. Services School District, 97 N.J. 414 (1984).

The facts herein demonstrate, and it is not disputed, that petitioners James Daily and Ellen K. Daily have served more than the requisite period of time to acquire a tenure statute, pursuant to N.J.S.A. 18A:28-5, which provides, in pertinent part, as follows:

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant superintendents, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, in capacity, 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 the employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years; . . .

The uncontroverted facts clearly show that both petitioners were continuously employed from August 1, 1974 through to April 19, 1984. Such a period of continuous uninterrupted service with ACEP exceeded the statutory minima for the acquisition and entitlement to tenure and, as a concomitant, secured for petitioners certain rights and entitlements to seniority in their respective positions.

The facts clearly demonstrate that petitioners acquired a tenure status with the Oldmans Board. The initial employment application was made through the Oldmans Board. The initial employment contracts and all subsequent contracts and/or salary notices to petitioners were issued by the Oldmans Board. Petitioners' annual salary increments and increases were dependent upon the salary agreement negotiated between the Oldmans Board and the local teacher association authorized to represent the Oldmans teaching staff members. Petitioners were subject to the supervision and evaluation by the

Oldmans Board's chief school administrator. The annual budget for the ACEP was under the exclusive control and direction of the Oldmans Board. All personnel employed for ACEP were under the direct control of the Oldmans Board as was the procurement of materials, supplies, equipment and other amenities incident to the successful operation of the program. These indicia, among others, unquestionably show that petitioners James Daily and Ellen K. Daily acquired a tenure status with the Oldmans Board of Education and I so **CONCLUDE.**

Petitioners advanced their claims to tenure, among other claims, under the theory that a jointure commission existed between the participating Boards. At the close of hearing, petitioners abandoned this claim. The Oldmans Board, however, pursued the argument that a de facto jointure commission was extant during the course of the operation of ACEP by virtue of the Commissioner of Education granting approval of the federal funds used to initiate the program, through the County Superintendent's involvement, together with the participation of other Boards of Education in Salem County. The pertinent statutes, with respect to jointure commissions, is found at N.J.S.A. 18A:46-24 et seq.

N.J.S.A. 18A:46-24 provides that:

> 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 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 that:

> 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.

Where the Commissioner has approved and placed his imprimatur upon an agreement between two or more boards of education to carry out the duties for the education of handicapped pupils, a de jure jointure commission exists. A condition, among others, for such a jointure commission to come into existence requires that the commission must be affirmatively approved by the participating boards of education and composed of duly appointed representatives of the respective boards of education participating in the jointure commission in order for it to exercise its powers (N.J.S.A. 18A:46-26) and to carry out its duties (N.J.S.A. 18A:46-27). Where, moreover, local boards of education have agreed to provide facilities, transportation, examination, educational instruction and other services to handicapped pupils without the Commissioner's prior approval, the Commissioner has found that a de facto jointure commission exists where all other indicia of the requirements of the statutes are present, notwithstanding a violation of the formalities of the statutes. Bisson; Chinnis, decided, Comm'r of Ed. (May 29, 1981).

In the instant matter, the record clearly demonstrates that the Commissioner of Education approved and awarded a grant of EHA funds for the initiation of ACEP. However, no proofs were proffered that any of the local boards of education, other than the Oldmans Board, affirmatively agreed, by a duly adopted resolution, to participate in the ACEP. The evidence demonstrates, moreover, that subsequent to the Oldmans Board's agreement to serve as the ACEP LEA, the local boards of education entered into sending-receiving contracts with Oldmans to provide educational services to ED pupils from the local boards, selected by ACEP on a cost-per-pupil basis. The agreements between the local sending boards of education and the receiving Oldmans Board were merely contractual in nature, based upon the number of pupils sent and received. There were no formal resolutions adopted by the other local boards of education to enter into an agreement to form a jointure commission for the purpose of providing services for the ED pupils enrolled in and attending the ACEP. Without an agreement or the consent of the other local boards of education, each local board of education separately and independently entered into sending-receiving contracts with the Oldmans Board to provide educational services to their local ED pupils. Thus, any agreements reached were strictly between the receiving Oldmans Board and the sending local board.

In Bisson the representatives to the de facto jointure commission consisted of the chief school administrator of each of the four participating boards operating as a

board of directors over a Special Service Team providing services for handicapped pupils. The Bisson hearing examiner found as facts the following with respect to the participating boards' representatives:

> 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. [187 S.L.D. at 191]

Thus, in Bisson, the de facto commission met the requirements of N.J.S.A. 18A:46-25 with respect to representation of the participating boards of education, and the representatives exercised the authority, power and duties of a jointure commission pursuant to statute. In addition, the costs of the operation of the de facto jointure commission in Bisson were shared equally by all of the participating boards of education.

In the instant matter, there were no representatives of the respective participating boards, other than the informal, voluntary and changing membership on the ACEP AC. Unlike the board of directors in Bisson, the AC exercised no authority or power over the ACEP, nor did it perform any duties with regard to the supervision, evaluation or management of the program. The exclusive control over the ACEP resided in the Oldmans Board, with none of the participating boards of education involved directly or indirectly in the management and operation of the program. There existed no indicia of even a de facto jointure commission by virtue of the Oldmans Board's exclusive control over the ACEP, subsumed under its general powers and authority pursuant to N.J.S.A. 18A:11-1.

Notwithstanding the DOE approval of the initial grant of federal funds and the Oldmans Board agreement to serve as the ACEP LEA, I **CONCLUDE** that no jointure commission was in place, either de jure or de facto, with respect to the ACEP and that its operation and management were under the exclusive control of the Oldmans Board. Consequently, I **CONCLUDE** that neither Ellen K. Daily nor James Daily has any tenure claims against any of the participatory boards of education under N.J.S.A. 18A:46-24 et seq.

Accordingly, I **CONCLUDE** that petitioners' original claims and the Oldmans Board's defenses with respect to the existence of a de facto jointure commission pursuant to Bisson is without merit, and such claims are hereby **DISMISSED WITH PREJUDICE.**

Alternatively, petitioners and respondent Oldmans Board argue the application of N.J.S.A. 18A:28-17 and urge this administrative tribunal to find that the respondents, Quinton Board and the board of education of the Salem County Vocational-Technical School and its Salem Regional Day School, assumed the operation of ACEP subsequent to the Oldmans Board's dissolution of the ED program. The statute relied upon, N.J.S.A. 18A:28-17, reads as follows:

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

The parties advancing the argument rely, in part, upon our Supreme Court's holding in Shelko. The facts in Shelko and the instant matter can be distinguished where in Shelko a different fact pattern was presented than the one before this administrative tribunal. In Shelko, the local district assumed operation of exactly the same program previously administered by the jointure commission. The building, books, students, teaching staff and curriculum remained unchanged. For all intents and purposes, the program continued uninterrupted and in exactly the same form as that administered under the jointure commission. In the case before this tribunal, there is no argument that ACEP terminated on April 19, 1984, that the teachers were discharged, that the program materials were eliminated and that the physical facilities were used for some other purposes. The ACEP pupils were returned to their respective home districts where they

then were assigned to various other programs provided, among others, by the Quinton Board, the Salem County Vocational-Technical School Board and the Salem Regional Day School, all of which were in existence before the April 19, 1984 dissolution of ACEP. The Quinton and Vocational-Technical ED programs were neither changed nor modified in any manner as a consequence of the termination of ACEP.

There has been no showing that the Oldmans Board made any arrangements or entered into any agreements with other boards of education to assume the operation of its ACEP subsequent to its discontinuance. The facts herein demonstrate that on or about February 1984, the Oldmans Board determined, by resolution, to terminate ACEP in April or June 1984, and that its Chief School Administrator was to advise all other boards of education in Salem County of its decision. No proofs were advanced at hearing to demonstrate that the Oldmans Board or its agents took any affirmative action to insure that the ED pupils in its ACEP were placed in alternative educational programs similar to ACEP. Rather, the Oldmans Board unilaterally terminated the ACEP, upon notice, and the pupils assigned in ACEP were summarily discharged to return to the local sending board's jurisdiction. It was, therefore, the duty of the local sending board to locate suitable placements for its classified pupils upon the termination of ACEP. As a consequence, the Quinton Board and the Salem County Vocational Technical Board accepted a limited number of pupils upon appropriate application by the former sending boards to ACEP. Under these facts and circumstances, it cannot be said that either the Quinton or Salem County Vocational Technical Board assumed the operation of the Oldmans Board's ACEP.

Similarly, the findings set forth above equally demonstrate that N.J.S.A. 18A:28-6.1 is inapplicable here. Absent affirmative agreements between the Oldmans Board and any other local board of education to continue ACEP upon its discontinuance by Oldmans, petitioners' employment rights and entitlements cannot be recognized by or transferred to the other boards.

Accordingly, I **FIND** and **CONCLUDE** that the facts in Shelko are distinguishable from the facts in the instant matter and that N.J.S.A. 18A:28-17 and N.J.S.A. 18A:28-6.1 are inoperable under the circumstances of this case.

I **CONCLUDE,** therefore, that petitioners have not acquired a tenure status with the Quinton Board or the board of the Vocational-Technical School or with any Salem County board of education other than the Oldmans Board.

In summary, the proofs adduced at hearing clearly demonstrate that petitioners acquired a tenure status exclusively with the Oldmans Board and with no other board of education. Consequently, it is hereby **ORDERED** that the Oldmans Board determine the seniority rights of petitioners herein, accounting for all of their time under its employ. As a consequence of the Oldmans Board's calculation of petitioners' seniority rights, in the event it is found that James Daily and Ellen K. Daily have seniority rights superior to that of an incumbent employee, it is hereby **ORDERED** that James Daily and Ellen K. Daily immediately be placed in position to which he/she is entitled, together with all back pay denied during the period of removal, less mitigation and all benefits and emoluments withheld.

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

OAL DKT. NOS. EDU 4725-84 & 4726-84

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

16 May 1985
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

MAY 17 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 20 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

ij/ee

ELLEN K. DAILY AND JAMES DAILY, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARDS OF EDUCATION OF THE TOWNSHIP OF OLDSMAN ET AL., SALEM COUNTY, RESPONDENTS.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were received from each of the petitioners and the Boards of Education of Oldmans Township, Salem County Vocational-Technical School and Salem Regional Day School within the time prescribed by N.J.A.C. 1:1-16.4 a, b, and c.

Petitioners contend that the judge erred in determining they did not acquire tenure with the Salem County Vocational-Technical School. Specifically, they allege that he wrongfully determined that the Salem County Vocational-Technical Board did not assume operation of the Auburn Cooperative Education Program (ACEP) within the meaning of N.J.S.A. 18A:28-17. They argue, inter alia, that (1) the judge misinterpreted this statute; (2) this statute does not require an agreement between the two districts (Shelko, supra); (3) the criteria for tenure protection afforded by this statute have been satisfied; and (4) they are entitled to tenure with the Salem County Board.

The Salem County Voc-Tech Board believed the judge's determinations in this matter to be correct and it contends that petitioners' legal arguments to the contrary are without merit and constitute an unjustifiable attempt to expand the plain meaning of Shelko and to go beyond any meaning of N.J.S.A. 18A:28-17.

The Oldmans Board submitted two exceptions of clarification which are incorporated by reference herein. Subsequent to this, it submitted a letter informing the Commissioner that on June 5, 1985 the Board met, reconsidered petitioners' tenure status and, independent of the initial decision, it recognized the tenure rights of Ellen and James Daily and determined the seniority rights of tenured staff with respect to the position of Resource Room Teacher.

Upon review of the record in this matter, the initial decision and exceptions filed by the parties, the Commissioner affirms the findings and determinations reached by the Office of Administrative Law. The judge's analysis of the pertinent statutes and decisional law is well reasoned and appropriate. The record

clearly demonstrates that no jointure existed and that the factual circumstances herein are distinguishable from those in Bisson, supra, wherein it was determined that a de facto jointure existed.

Notwithstanding the above, the Commissioner believes it necessary to address further the issue of jointures, particularly in light of Bisson since this case was relied on by the Oldmans Board in its legal arguments. It must be emphasized that a jointure exists only when the mandates of N.J.S.A. 18A:46-24 and 25 have been followed. Although Bisson does employ the language " de facto jointure, it must be understood that the decision does not give recognition to "de facto" jointures but rather the decision serves to establish that when two or more boards act as though a jointure were formed and operated as such, failure to comply with the statutory requirements does not act to deprive an individual of his or her tenure and seniority rights granted by law. As the judge correctly points out in the instant matter, circumstances similar to Bisson do not exist herein, therefore that case is inapplicable.

As regards petitioners' arguments regarding the judge's misinterpretation of N.J.S.A. 18A:28-17 and Salem County Voc-Tech Board's assuming the operation of ACEP subsequent to the Oldmans Board's dissolution of the program, the Commissioner finds nothing presented which supports that the judge erred or was in any manner incorrect in his analysis, findings, or conclusions both in respect to the statute and Shelko, supra.

Consequently, the Commissioner accepts the ALJ's determination that petitioners have not acquired a tenure status with any Board named in the Petition of Appeal but the Oldmans Board of Education.

Accordingly, the Commissioner affirms the initial decision rendered by the Office of Administrative Law and adopts it as the final decision in this matter for the reasons expressed herein and in the initial decision.

COMMISSIONER OF EDUCATION

JULY 1, 1985

ELLEN K. DAILY AND JAMES DAILY,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLDMANS, ET AL., SALEM COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, July 1, 1985

For the Petitioner-Appellant Ellen K. Daily, Katzenbach, Gildea and Rudner (Douglas B. Lang, Esq., of Counsel)

For the Petitioner-Appellant James Daily, Ruhlman, Butrym and Friedman (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Respondent Oldmans Township Board of Education, Horuwitz, Perlow, Morris and Baker (John P. Morris, Esq., of Counsel)

For the Respondent-Respondent Quinton Board of Education, Janet S. Lawrence, Esq.

For the Respondents-Respondents Elsinboro Township Board of Education, Salem County Vocational-Technical School and Salem County Vocational-Technical School and Salem Regional Day School Boards, Butler, Butler and Rosenberger (George G. Rosenberger, Esq., of Counsel)

For the Respondents-Respondents Pennsville Board of Education, Mannington Township Board of Education, Penns Grove-Carneys Point Board of Education, Woodstown-Pilesgrove Regional Board of Education and Lower Alloways Creek Township Board of Education, Jordan and Jordan (John D. Jordan, Esq., of Counsel)

For the Respondent-Respondent Salem City School District, Rand and Algeier (Ellen S. Bass, Esq., of Counsel)

For the Respondents-Respondents Elmer Board of Education and Pittsgrove Township Board of Education, Slimm, Dash and Goldberg (Bruce E. Barrett, Esq., of Counsel)

For the Respondents-Respondents Upper Pittsgrove Board of Education and Alloway Township Board of Education, Lenox, Giordano, Devlin, Delehey and Socey (Gail R. Henningsen, Esq., of Counsel)

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

November 6, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 731-85
AGENCY DKT. NO. 10-1/85

THE TOWN OF WEST ORANGE
BOARD OF EDUCATION,
Petitioner,
v.
MARTIN LIEB,
Respondent.

Samuel Christiano, Esq., for petitioner

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

Record Closed: April 25, 1985 Decided: May 15, 1985

BEFORE **DANIEL B. MC KEOWN,** ALJ:

The West Orange Board of Education (Board) certified charges of unbecoming conduct on January 8, 1985 to the Commissioner of Education for adjudication against Martin Lieb (respondent), a teacher with a tenure status in its employ, based upon his arrest and subsequent conviction for a violation of N.J.S.A. 2C:14-4, Lewdness. The Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A hearing was conducted April 24, 1985 at the Office of Administrative Law, Newark. The record was closed and readied for disposition on April 25, 1985.

BACKGROUND FACTS

The background facts of the matter are not in dispute and are as follows. Respondent is 41 years of age and he and his wife have one child, a six year old son. Respondent has been employed by the Board as a teacher of the sixth grade and assigned to the same school building for 20 years. A review of respondent's performance evaluations since 1971, when the Board began formal performance evaluations to the present time, show respondent received not one negative comment from his evaluator in regard to his teaching, his conduct, or his attitude. To the contrary, the building principal who prepared each evaluation during the 14 years, noted that respondent is by all measures considered an excellent and effective teacher. The principal noted that respondent is well liked by colleagues and students. Parents of respondent's students speak highly of him. The principal notes that respondent works with student teachers from Seton Hall University, he is cooperative, he teaches effective study skills and work habits, he is fair and reasonable, punctual, and he willingly accepts extracurricular assignments, such as chaperoning talent shows and concerts each year. Furthermore, respondent has been in charge of the school's audio/visual aids office, he participates on the school's language arts council, he is on the building commmittee, and he participates in the school's outdoor education program.

In addition to his school activities, respondent is active in his temple where he is a trustee, he is president elect of the temple's mens' club and, he is on the temple's finance committe. Respondent is described by his neighbor who testified before me as a devoted husband, father, and as a "super neighbor". A teaching colleague describes respondent as very professional with solid emotional stability, dependable and responsible, that he is more responsible than most teachers, and that he is a person who has a positive relation with other staff, supervisors, parents and students. In fact, this colleague testified that former students of respondent's with whom she presently talks praise him. Respondent has no prior arrests and no disciplinary measures were ever taken against him by the Board or any school authority for any reason.

THE CHARGE OF UNBECOMING CONDUCT

On July 6, 1984 a criminal complaint was signed against respondent by the Essex County police department for an alleged violation of N.J.S.A. 2C:14-3(b), criminal

sexual contact. At the time of his arraignment on the charge before the Maplewood Municipal Court, he was advised that the Essex County Prosecutor's Office downgraded the indictable charge to allege a nonindictable disorderly person's violation of N.J.S.A. 2C:14-4, Lewdness. The distinction between the charges is that a violation of N.J.S.A. 2C:14-3(b) is a "crime" of the fourth degree under the New Jersey Code of Criminal Justice, N.J.S.A. 2C:1-1 et seq., while the latter charge, a disorderly person's offense, is not a "crime" under the Code nor under the New Jersey Constitution. N.J.S.A. 2C:1-4. When the charge was downgraded to a disorderly person's offense, respondent entered a plea of guilty without benefit of legal counsel. Respondent was sentenced to a suspended 10 days in jail, a $250 fine, $15 costs, a $25 penalty payable to the Violent Crimes Compensation Board, and 30 days of community service. (J-3, at p. 1).

When school authorities learned of the foregoing events, the superintendent filed with the Board on September 4, 1984 the following charge of unbecoming conduct against respondent:

> 1. On Friday, July 6, 1984 Martin Lieb [respondent] was arrested by Essex County police for Criminal Sexual Contact, N.J.S.A. 2C:14-3(b). This is a 4th degree crime. Mr. Lieb pleaded guilty in the Maplewood Municipal Court and was fined $250, $10.00 Court costs, $25.00 to the Violent Crimes Compensation Board and 30 days community service.
>
> * * * *

The administrative tenure charge is inaccurate on its face because respondent did not plead guilty to the criminal violation of N.J.S.A. 2C:14-3(b). Rather, respondent entered a plea of guilty in Maplewood Municipal Court to the disorderly person's offense of lewdness at N.J.S.A. 2C:14-4. The superintendent amended the charge on October 5, 1984 to show respondent pled guilty to a violation of N.J.S.A. 2C:14-4. In the meantime respondent, realizing now the consequence of pleading guilty to such a charge in municipal court in regard to his employment as a teacher, retained counsel and successfully sought to reopen the matter before the Maplewood Municipal Court to retract his plea of guilty and to proceed to trial. A trial was conducted by the Maplewood Municipal Court on December 16, 1984. The Honorable Abe W. Wasserman, Maplewood Municipal Court Judge, entered a finding of guilty on the charge of lewdness. (J-1).

The Board, with the agreement of respondent, had withheld further action on the administrative tenure charge pending the outcome of his trial at the municipal court

level. When Judge Wasserman found respondent guilty, the Board resumed its processing of the tenure charge and, following respondent's appearance before it on or about January 8, 1985, the Board certified the charge of unbecoming conduct against respondent to the Commissioner for adjudication. It is noted that the superintendent amended the original charge on October 4, 1984, but the charge was not thereafter amended to show respondent withdrew his guilty plea. The superintendent did, however, file a statement on January 11, 1985 that respondent had withdrawn his guilty plea, was tried on the charge of violation of N.J.S.A. 2C:14-4, and was found guilty by the Maplewood Municipal Court and sentenced.

SPECIFICATION OF THE CHARGE OF UNBECOMING CONDUCT

The specification surrounding the charge against respondent, as filed by the Essex County Police Department and as certified by the Board, is as follows:

> On the above date and time [July 6, 1984] the undersigned officer while working in an undercover capacity had occasion to come in contact with the above suspect, later known as Martin Lieb. Suspect walked up to the undersigned and without conversation reached down and made contact with the undersigned officer's genital area. Suspect was then placed under arrest for Criminal Sexual Contact and transported to Essex County Police Headquarters to be slated.

ISSUES

The issues to be adjudicated are:

1. Was the Board's certification of charges procedurally correct;

2. Does a municipal court conviction for lewdness, pursuant to N.J.S.A. 2C:14-4, constitute either "conduct unbecoming a teaching staff member" or other "just cause" sufficient to warrant punishment of a teacher under tenure, per se;

3. Is teacher discipline properly to be imposed upon proof of conduct unbecoming a teaching staff member which occurred not in the course of a teacher's employment;

4. If a municipal court conviction for lewdness does not constitute good cause for punishment of a teacher under tenure, per se, then did the conduct of respondent in the particular, constitute such good cause;

5. If discipline is warranted, what is appropriate in these circumstances.

DISCUSSION

I

Prior to hearing, respondent moved to dismiss the charges on the grounds the statement of the charges the Board certified on January 8, 1985 contained the erroneous assertion that he had pled guilty to a violation of N.J.S.A. 2C:14-4, as opposed to being tried on the charge and found guilty. Respondent argued that such misinformation before the Board, in writing, is contrary to N.J.S.A. 18A:6-11 which, respondent says, requires the Board to consider the charge, and only the statement of evidence presented to it. Respondent pointed to the fact that the Board did not have a writing to demonstrate he withdrew his guilty plea and was found guilty, after trial, until January 11, 1985, three days after it determined to certify the charges against him.

At the opening of the record on April 25, 1985, respondent's motion to dismiss was denied upon the findings that respondent knew each and every step along the certification process the nature of the present administrative charge against him. In fact, the Board withheld further processing of the tenure charges so that respondent could seek leave of the Maplewood Municipal Court to withdraw his guilty plea in order to be tried on the allegation. Respondent appeared before the Board on January 8, 1985 to dissuade it from certifying the charges and, while the Board had no such information in writing, it clearly had information that respondent had retracted his guilty plea and after trial was found guilty. Consequently, respondent's motion to dismiss for violation of N.J.S.A. 18A:6-11 was and is denied.

II

In regard to whether a municipal court conviction for violation of N.J.S.A. 2C:14-4 constitutes unbecoming conduct or other just cause per se to warrant discipline, N.J.S.A. 2C:51-2, Forfeiture of public office, must be considered. This latter statute provides as follows:

> a. A person holding any public office, position or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or crime which, if committed in this State, would be such an offense or crime;
>
> (2) He is convicted of an offense involving or touching such office, position or employment; or
>
> (3) The Constitution or a statute other than the code so provides.

While the forfeiture of public office provisions are not limited to "crimes" under the New Jersey Code of Criminal Justice, N.J.S.A. 2C:1-1 et seq., or the New Jersey Constitution but includes "offenses" in certain circumstances, it is well to note that N.J.S.A. 2C:1-4 provides that conviction of a disorderly person's offense "* * * shall not give rise to any disability or legal disadvantage based on convictions of a crime." It is recognized that in Newark Board of Education v. Mary Jane Cito, 1983 S.L.D. ____ (Sept. 1, 1983), the Commissioner appears to have held that N.J.S.A. 2C:51-2 may, in certain circumstances, be automatically applied to offenses not constituting a crime when he said:

> Language in N.J.S.A. 2C:1-4(b) to the effect that convictions for lesser offenses "'shall not give rise to any disability or legal disadvantage based on conviction of a crime'" apparently refers to the loss of the right to vote and the privilege of serving on a jury suffered by persons "'convicted of a crime'" as contemplated by N.J.S.A. 2C:51-3. Such language does not have any impact on disqualification from holding public office suffered by persons "'convicted of an offense'" under N.J.S.A. 2C:51-2(a)(2).
>
> Initial decision, at p. 5.

However, this holding is at odds with the holding in State v. Maier, 13 N.J. 235 (1953) which distinguishes conduct then constituting high misdemeanors from disorderly conduct as follows:

> New Jersey has met the same basic problem by treating as disorderly conduct the acts which heretofore would have constituted the crime of assault or assault and battery, leaving for indictment and trial by jury the special kinds of assault and battery comprehended within the three kinds of high misdemeanors just referred to, thus sparing the defendant in the cases treated as disorderly conduct from the personal disgrace of a criminal record and all of the social and business disadvantages which flow from a criminal conviction, including the loss of his right to continue to hold any public office he then occupied, N.J.S.A. 2A:135-9 [the predecessor] statute to N.J.S.A. 2C:51-2 or to qualify for a civil service position, R.S. 11:9-6, R.S. 11:23-2, or the right to serve as a juror, N.J.S.A. 2A:69-1 * * * (emphasis added)
>
> 13 N.J. 250, 251.

See also In re: Ruth M. Buehrer, et al., 50 N.J. 501, 517 (1967) which states that "in our State "'crimes'" are called "'misdemeanors'" or "'high misdemeanors'" * * * Below the grade of crime are lesser offenses, none of which carries the stigma or the disabilities which follow upon a conviction of crime * * *." Judicial expressions that forfeiture of public office provisions at N.J.S.A. 2C:51-2 are not self-effectuating for a disorderly person's offense conviction are controlling. Thus, I **CONCLUDE** respondent's municipal court conviction for violation of N.J.S.A. 2C:14-4, Lewdness, does not per se constitute unbecoming conduct or just cause to impose discipline upon respondent. The disorderly person's offense upon which respondent was found guilty did not involve "dishonesty" or "a crime of the third degree or above."

The plain language of N.J.S.A. 2C:51-2(a)(2) would apply if the offense of which respondent was convicted involved or touched his employment as a teacher. Significantly, the conduct underlying respondent's conviction occurred during the summertime when school was not in session; his conduct did not involve pupils; nor was respondent's employment as a public school teacher in any way involved with his conduct. Consequently, respondent's conviction of lewdness may not be seen to be an offense involving or touching his employment as a public school teacher.

III

In regard to the third stated issue, discipline may be properly imposed upon a tenured teacher for unbecoming conduct engaged in even if such conduct did not occur in the course of a teacher's employment. In In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville, 1973 S.L.D. 157 the Sayreville Board certified charges of unbecoming conduct against Beam on the strength of a parental complaint which alleged that Beam assaulted the parents' 13 year old daughter during the evening at about 9:15 p.m. on a public street in front of a pizzeria away from the school building. Beam claimed that because the incident occurred in the evening away from school premises the Commissioner lacked jurisdiction to impose discipline upon him. The Commissioner, in rejecting Beam's argument held as follows:

> * * * [T]he Commisioner finds respondent's argument that, because the occurrence happened in the evening away from school premises, both the Board and the Commissioner have no authority to act, is without merit. The teaching profession is chosen by individuals who must comport themselves as models for young minds to emulate. This heavy responsibility does not begin at 8:00 a.m. and conclude at 4:00 p.m., Monday through Friday, only when school is in session. Being a teacher requires, inter alia, a consistently intense dedication to civility and respect for people as human beings. The Commissioner has, on past occasions, determined tenure charges arising from incidents which happened in the evening both on and off school property. See In the Matter of the Tenure Hearing of Thomas Appleby, School District of Vineland, Cumberland County, 1965 S.L.D. 159, aff'd State Board of Education 1970 S.L.D. 448; In the Matter of the Tenure Hearing of John H. Stokes, School District of the City of Rahway, Union County, 1971 S.L.D. 623.
>
> 1973 S.L.D. at 163.

I **CONCLUDE** that notwithstanding that the conduct complained of here occurred during the summer months while school was not in session and that such conduct occurred away from school facilities, the Commissioner has jurisdiction to impose appropriate discipline if the conduct rises to the level of conduct unbecoming a teacher.

IV

Whether respondent's conduct constitutes unbecoming conduct under N.J.S.A. 18A:6-10 requires an examination into the underlying circumstances of such conduct.

At the municipal court hearing, the Essex County police officer testified that on July 6, 1984 he was on plainclothes duty in the South Mountain Reservation in the Maplewood area. At about 1:45 p.m., the officer testified that he was taking a walk down one of the footpaths located off the roadway in the reservation. Respondent, according to the officer, was walking towards him in the same footpath. As they passed in close proximity to each other, respondent "* * * walked right up to me and without any kind of conversation reached down and made contact with my genital area * * * my penis." (J-3, at p. 2.5). The officer testified he immediately displayed his identification and arrested respondent.

Respondent testified that as he was walking in the footpath in the South Mountain Reservation he observed a man, later learned to be the police officer, standing by a tree off the footpath fondling himself and gesturing to him. Respondent began to leave the footpath area and as he passed the man they made contact "front to front". Respondent testified he was immediately placed under arrest. (J-3, at p. 2.11). The judge, in his written decision, found as follows:

> While the testimony of the witnesses contained contradictions as to facts of the incident charged in the complaint, I am satisfied beyond a reasonable doubt, and with full awareness of the serious consequences to the defendant on my decision, that the credible testimony is that of the police officer, and that the complaint has been sustained by the credible evidence.
>
> (J-1)

Respondent does not dispute the fact of his conviction for violation of N.J.S.A. 2C:14-4, nor does he attempt to relitigate the very same facts found to have been proven true beyond a reasonable doubt by the Maplewood Municipal Court Judge. However, respondent did testify that he was under severe stress during the time the incident occurred. Respondent, who is of the Jewish religion, testified that his father had died suddenly at age 49 soon after respondent's bar mitzvah. His mother remarried sometime thereafter. His mother died during February 1984. Three to four months thereafter, his stepfather remarried which caused respondent distress. Obviously, respondent perceived his stepfather's marriage as some kind of desecration to his mother's memory. Furthermore, his stepfather remarried prior to the completion of the Jewish custom of unveiling. The custom of unveiling, as it is understood by this forum, is the erection of a stone at the grave of the deceased. In this case, because respondent's mother was the deceased, the custom is to have the unveiling 11 months after the time of death. Clearly,

respondent expected that the custom of the unveiling would be honored for his mother. Respondent's stepfather, as the husband of the deceased, prevailed and the unveiling was scheduled much earlier than the 11 month customary period.

Respondent explained that on July 6, 1984, he was distraught over the death of his mother, the marriage of his stepfather, and the unveiling scheduled to occur sooner than the customary 11 month period. It should be noted that respondent is a ten month employee and, as such, he secured alternate employment for the summer months. He was engaged to do some curriculum work for the Board in the morning and he held a part time job at a local department store in the afternoon. On July 6, while he was between jobs, respondent testified he drove to the South Mountain Reservation to think, meditate, and to clear his head. He explained that what happened thereafter happened and, as already noted, he does not seek to relitigate the conduct he was found to have engaged in by the Maplewood Municipal Court. Respondent emphasizes that he was extremely distraught at the time, but he insists he is not homosexual, nor is he under any physical or emotional impairment to continue teaching, nor does he present the likelihood of danger to any of his pupils. In fact, respondent testified that July 6, 1984 was the first time he ever visited the South Mountain Reservation and that he has never had similar physical contact with anyone at any time in his entire life.

When the events of July 1984 came to the attention of the Board, it caused its psychiatrist, Dr. Albert M. Bromberg, to evaluate respondent's mental condition. Significantly, Dr. Bromberg submitted to the Board an evaluation (R-1) of respondent's mental condition and he concluded as follows:

> On evaluation Mr. Lieb presented as a mild mannered man who was very anxious and concerned about the results of this evaluation. This is the first time in 19 years that he has not been teaching and he is very concerned about the effects that this will have on his career.
>
> There is no indication of psychotic thinking, paranoid ideation, hallucinations or delusions. Affect is appropriate, no signs of clinical depression or suicidal thinking are noted.
>
> There are no suggestions of effeminate speech or motor activity.
>
> * * * Judgment and insight are good.
>
> In summary, Mr. Lieb seems to be a man who was in the wrong place at the wrong time. Whatever action the police were taking

> in the Reservation at that time, Mr. Lieb was caught up in a situation in which he pleaded guilty because he felt guilty about not being able to defend his dead mother. * * *
>
> Unless there are other circumstances not known to me at this time, I see no reason to prevent Mr. Lieb from continuing his occupation as a classroom teacher.
>
> (R-1)

V

The conduct in which respondent was found to have engaged in July 6 by the Maplewood Municipal Court is clearly conduct not expected of a teacher. Such conduct is unbecoming conduct under N.J.S.A. 18A:6-10.

The salutary purpose of a board of education to certify charges against a tenured employee is to afford protection to the public and to the pupils by causing a determination to be made on the fitness of the teacher to continue in the teaching profession. In this case, respondent's conduct of July 6, 1984 is not condoned. However, that one fleeting instance of bad judgment cannot be the basis upon which to conclude respondent poses a threat, or likelihood of a threat in the future, to his pupils. It is clear respondent was undergoing emotional distress because of the death of his mother, the near immediate remarriage of his stepfather which in respondent's mind manifested disrespect for his mother, and the sudden expedition of the unveiling custom. Given such stressful circumstances, together with the report, findings and conclusions of Dr. Bromberg, the Board's own psychiatrist, it is clear that respondent's conduct on this one occasion is an aberration of his character and moral fiber. Respondent has had a long and successful career as a public school teacher in the Board's employ and his contributions to his pupils have been consistently recognized over the years. He is a devoted family man who is an active participant in his temple in addition to his significant contributions to the West Orange public school system.

In view of all of the circumstances of this case, the discipline of termination of employment would be extremely harsh and not justified. Respondent has suffered the shame, humiliation, and loss of income since January 1985 when he was suspended by the Board without pay. Surely respondent's life has been turned upside down and while his own conduct caused the turmoil in his life he has undergone substantial discipline already. A fair discipline in this case, considering all of the circumstances, is to continue

respondent's suspension without pay through the close of the 1984-85 academic year and provide for reinstatement as of the beginning of the 1985-86 academic year.

Accordingly, the Board of Education of West Orange is hereby **DIRECTED** to continue respondent's suspension without pay through the conclusion of the 1984-85 academic year. The West Orange Board of Education is further **DIRECTED** that Martin Lieb be reinstated to his position as a tenured teacher at the commencement of the 1985-86 academic year at the salary level he was earning for 1984-85. Respondent has not been performing as a teacher for the Board since January 1985. Consequently, it cannot make a reasoned determination whether respondent "earned" a salary increment as the result of his performance during 1984-85.

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

May 15, 1985
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

MAY 16 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 20 1985
DATE

Ronald L. Parker /phv
OFFICE OF ADMINISTRATIVE LAW

bc

IN THE MATTER OF THE TENURE	:	
HEARING OF MARTIN LIEB, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWN OF WEST	:	DECISION
ORANGE, ESSEX COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a thorough and comprehensive review of the record in this matter, the Commissioner agrees with the analysis, findings, and determinations of the Office of Administrative Law. Given respondent's outstanding teaching career, the factual circumstances underlying the tenure charges, the fact that the action giving rise to the charges was a single, isolated incident on an otherwise unblemished record and the findings of the Board's psychiatrist, the Commissioner believes that termination is not warranted. He therefore accepts the penalty recommended by the judge as appropriate for the reasons expressed in the initial decision and herein.

Accordingly, respondent's suspension is to continue through the close of the 1984-85 school year without pay and his 1985-86 increment is to be withheld.

IT IS SO DETERMINED.

COMMISSIONER OF EDUCATION

JULY 1, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION TO DISMISS
TENURE CHARGES
OAL DKT. NO. EDU 669-85
AGENCY DKT. NO. 508-12/84

IN THE MATTER OF THE TENURE HEARING OF MICHAEL WALLWORK, SCHOOL DISTRICT OF THE TOWNSHIP OF ORANGE, ESSEX COUNTY

Nancy Iris Oxfeld, Esq., for movant respondent
(Oxfeld, Cohen & Blunda, attorneys)

Melvin Randall, Esq., for respondent/petitioner
(Love & Randall, attorneys)

Record Closed: May 2, 1985 Decided: May 14, 1985

BEFORE **SYBIL R. MOSES**, ALJ:

This matter originally came before the Office of Administrative Law (OAL) as a result a filing of tenure charges by the Board of Education of the Township of Orange (Board) against Michael Wallwork. Mr. Wallwork was notified on November 16, 1984, that certain charges and supporting statements of evidence had been filed with the Board,

pursuant to N.J.S.A. 18A:6-11, which consisted of a two-page memorandum to Patrick Pelosi, Business Administrator/Board Secretary, from Woodrow Zaros, Superintendent of Schools, charging Mr. Wallwork with certain conduct unbecoming a tenured teacher. Mr. Wallwork did not file a response or a Statement of Position in response to the notice of charges. On December 3, 1984, the Board unanimously preferred tenure charges against Mr. Wallwork. He was notified of same on December 7, 1984. The matter was forwarded to the OAL for determination as a contested case on February 5, 1985, pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference took place on February 22, 1985. Discussions were held in regard to possible inactivity of the pending tenure charges, but the case was kept on the active calendar. A motion to dismiss the charges as inappropriately filed was filed by Mr. Wallwork's attorney on March 18, 1985. The Board's attorney responded on April 8, 1985. A second conference of counsel was held on May 2, 1985 in regard to settlement. No settlement was reached. Accordingly, it is necessary to decide respondent's motion to dismiss the tenure charges.

Respondent's motion is based on the grounds that the tenure charges against Mr. Wallwork arise from respondent having been "arrested and charged" with crimes, which is not sufficient to warrant either dismissal or reduction in salary. Counsel argues that the Board is confused over the difference between being charged and/or being arrested for having committed a crime and being convicted of a crime or having committed the underlying acts upon which a conviction for such a crime would rest. The statement of evidence in support of the charges reiterates that respondent was charged with certain crimes and arrested for certain crimes but no factual basis for the charges or arrests has been proffered. Counsel argues that Mr. Wallwork is innocent until presumed guilty and being charged and arrested is not sufficient to support tenure charges.

The Board asserts that its action is proper because it fulfilled all the conditions and procedures articulated in N.J.S.A. 18A:6-10 et seq. and it is up to the Commissioner to determine the fitness of the tenured employee, not the

local board. The Board argues that its charges and the statement in support of the charges must be read in pari materia because it was the intent of the Board that the charges filed with the Commissioner of Education were based upon the circumstances underlying the criminal complaints filed by five students who were allegedly sexually assaulted by Mr. Wallwork. Since the intent of the Board is clear, the charges should not be dismissed.

Having reviewed the applicable law, including the cases cited by both counsel, it is my opinion that the procedures set forth in N.J.S.A. 18A:6-11 for the filing of tenure charges have not been complied with sufficiently in order to give Mr. Wallwork the protections he is due. N.J.S.A. 18A:6-11 sets forth the requirements that a Board must follow in making charges against any tenured employee. The essential elements of that statute are: (1) Board preparation of written charges; (2) submission of the written statement of evidence under oath to support the charges; (3) provision of a copy of charges and written statement of evidence to the employee; (4) determination by the Board of whether there is probable cause to credit the evidence in support of the charges; and (5) a determination by the Board whether the charges are sufficient to warrant a dismissal.

The Commissioner of Education has acknowledged that all the requirements must be met. See, In the Matter of the Tenure Hearing of Marilyn Feitel, School District, City of Newark, 1977 S.L.D. 451. In Feitel, a tenured teacher was dismissed by the local board based on charges of inefficiency, incapacity and unbecoming conduct. The teacher argued that the board failed to adhere to the procedures set forth in N.J.S.A. 18A:6-11 because the board did not provide sufficient evidence to support the tenure charges. After reviewing the facts and the charges leveled against the teacher, the Commissioner concluded that the board failed to properly certify charges of inefficiency against her. The charges were dismissed and she was reinstated with back pay and appropriate emoluments. See also, Manalapan--Englishtown Education Association v. Board of Ed., 187 N.J. Super. 426 (App. Div. 1981). There the Appellate Division determined that the local board of education had failed to make adequate findings with respect to the tenure

charges of unbecoming conduct against the principal. The court held as follows:

> We remand so that the local board now may do what it should have done then: expressly determine whether "there is probable cause to credit the evidence in support of the charge[s] and whether such charge[s], if credited, [are] sufficient to warrant a dismissal or reduction of salary" and then to articulate plainly the reasons for the determination respecting those questions. Following that response, the matter shall take whatever administrative course is then available to the parties. Id. at 432.

Similarly, in the case at bar, the Board of Education did not articulate plainly the reasons why it credited the evidence in support of the charges. It is axiomatic that a charge and an arrest are not evidential and it is further axiomatic that a criminal defendent is innocent until proven guilty. This Board only referred to the fact that Mr. Wallwork was charged with and arrested for aggravated sexual assault, possession of a controlled dangerous substance and making terroristic threats. The evidence underlying the charges was not set forth in any detail. Accordingly, the Board has not complied with the statutory requirements as explicitly required by the Manalapan decision.

I note, however, that a local board may suspend a tenured teacher on tenure charges if those charges are based on the underlying facts of a criminal complaint. See, Ott v. Bd. of Ed. Hamilton Tp., 160 N.J. Super. 333, 336 (App. Div. 1978), certif. den. 78 N.J. 336 (1978) but a statement of supporting evidence is required, pursuant to N.J.S.A. 18A:6-11. The Ott court granted the teacher's application for restraint of the disciplinary proceedings pending resolution of a criminal matter, based on legislative intent and basic equitable principles. The Appellate Division deemed that the charges brought by the board were properly made because they referred to the underlying facts of the criminal charge which Mr. Ott wanted disposed of first, before having to testify in his own defense of tenure charges. The Ott court did determine that petitioner would be barred from continued receipt of his salary while the criminal charges were being determined, but that if he were cleared of the disciplinary charges, he would be entitled to reinstatement of full back salary. Id. at 342. In this case, the supporting evidence submitted by the board

is limited to the fact that Mr. Ott was arrested after being charged with certain crimes without stating the facts underlying the charges.

A failure to adhere to the requirements of N.J.S.A. 18A:6-11 entitles Mr. Wallwork, movant here and respondent in the tenure charges, to have the charges dismissed as inappropriately filed since there is not sufficient supporting evidence which, "if true in fact," would warrant dismissal or reduction in salary. I have reviewed the cases cited by the Board, Robert T. Currie, v. Board of Education of the School District of Keansburg, 1966 S.L.D. 193 and Schinck v. Bd. of Ed. of Westwood Consolidated School District, 60 N.J. Super. 448, (App. Div. 1960), and find they are not controlling. Currie concerned an untenured teacher's dispute with the local board over the issue of whether he was entitled to tenure. In that case the Commissioner held that the tenure statute was considered to speak for itself and that the board had complied with the requirements of the statute. That case is inapposite to the case at bar because while the tenure statutes speak for themselves, this Board has not complied with the statutory requirements. The Schinck case is also inapposite. In Schinck, the local board proposed a new school bond issue in excess of the school district's debt limit. The Appellate Division determined that the Legislature had delegated certain factfinding functions to the Commissioner and the State Local Government Board, and that both bodies had adhered to the statutory requirements concerning sufficient and adequate evidence to support exceeding the debt limit. Schinck v. Bd. of Ed. of Westwood, Consolidated School Dist., 60 N.J. Super. at 470-476.

For the foregoing reasons, I have determined to grant Mr. Wallwork's motion to dismiss the charges. The charges can be refiled with the appropriate supporting evidence. In the meantime, the Board of Education shall either restore Mr. Wallwork to his position or, since 120 days have passed since he was suspended, it must now, pursuant to N.J.S.A. 18A:6-14, pay him his full salary retroactive to the 121st day from the date of suspension.

Accordingly, it is hereby **ORDERED** that the tenure charges filed by the Board of Education of the Township of Orange, Essex County, against Michael Wallwork be, and are, hereby dismissed as inappropriately filed; and

It is further **ORDERED** that Michael Wallwork receive his appropriate salary from the 121st day after his suspension.

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

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

May 14, 1985
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

MAY 16 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 17 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

par/e

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHAEL WALLWORK,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF ORANGE, ESSEX COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. It is observed that the Board's exceptions to the initial decision and respondent's reply have been filed with the Commissioner pursuant to N.J.A.C. 1:1-16.4a, b and c.

Essentially, the thrust of the Board's exceptions is that it did in every instance comply with the statutory provisions of N.J.S.A. 18A:6-10 et seq. as well as those procedural requirements enunciated by the Commissioner in Feitel, supra, in its certification of tenure charges against respondent. The Board argues that in satisfying the specific provisions of N.J.S.A. 18A:6-11, it also complied with the procedural limitations imposed upon all local boards of education by the Court in In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967) wherein it was held in part:

> "***There is nothing in the new act [N.J.S.A. 18A:6-10 et seq.] which suggests the local boards were intended to retain any part of the jurisdiction which they formerly exercised in such controversies other than a preliminary review of the charge and the required certification to the Commissioner. Their participation in such proceedings is specifically confined to that limited function. Thus, the Legislature has transferred, from the local boards to the Commissioner, the duty of conducting the hearing and rendering a decision on the charge in the first instance. His jurisdiction in all such cases is no longer appellate but primary.
>
> "The pivotal words of the statute are that the Commissioner shall 'conduct a hearing' on the charge and 'render a decision.' The requirement of a hearing has been held to mean the hearing of evidence and argument and judgment thereon. See In re Masiello, 25 N.J. 590, 600 (1958).
>
> "The legislative mandate to 'render a decision * * * on the charge' implies a duty on his part to review the evidence and to resolve all issues necessary to a final determination. It means that the Commissioner must settle or determine the controversy by giving judgment.***" (at 412)

The Board argues further that the Manalapan decision relied upon by the judge in this matter is distinguishable insofar as it was found that the board therein violated the procedural provisions of N.J.S.A. 18A:6-11 by determining not to certify tenure charges against one of its employees as otherwise stated in the initial decision. The Board maintains that it did satisfy the two determinative criteria laid down by the court in Manalapan related to compliance with N.J.S.A. 18A:6-11:

> (1) Is there probable cause to credit the evidence in support of the tenure charge?
>
> (2) Is such tenure charge, if credited, sufficient to warrant the dismissal of a tenured teaching staff member or a reduction in salary?

Finally, the Board argues that the distinction made by the judge between Ott and the matter controverted herein is without a difference. In this regard the Board's exceptions read as follows:

> "***The Administrative Law Judge also refers (See decision pages 4 and 5) to the decision in Ott v. Board of Education of Hamilton Township, 160 N.J. Super. 333 (App. Div. 1978) in support of the position that the facts in the instant case are distinguished from the facts presented in Ott. In Ott the Hamilton Township Board of Education filed tenure charges against Ott basing them upon the underlying facts of the criminal charges. This is fundamentally what the Board intended in the instant case. In the instant case, the Board's charges and the statement in support of same must be read in part material. The intent of the Board then becomes obvious that the charges filed with the Commissioner of Education are based upon the facts and circumstances underlying the criminal complaints filed by the five (5) students who were allegedly sexually assaulted by Michael Wallwork. The intention of the Board was clear and it has been determined that the Commissioner looks to the clear intention of the Board rather than to the technical perfection of its language. Since board of education members are laymen, where their intention is clear, they should not be limited by the legal niceties of language. See Robert T. Currie v. Board of Education of School District of Keansburg, 1966 S.L.D. 193. Further, it has been held that a local board of education's exercise of its statutory discretionary authority, absent bad faith is

entitled to a presumption of correctness. See Schinck v. Board of Education of Westwood Consolidated School District, 60 N.J. Super. 448, 476 (App. Div. 1960).***" (at p. 4)

Respondent in rejecting the Board's arguments urges the Commissioner to affirm the findings and conclusions in the initial decision essentially for the reasons stated therein. Respondent makes the following comments in reply to the Board's exceptions:

"***What apparently happened in this matter was that the Board of Education confused being 'charged' with a crime and being 'arrested' for a crime with being convicted of a crime and/or with having committed the underlying acts upon which a conviction for such a crime would rest. For example, Charge No. 1 states that:

> 'On or about October 11, 1984, Michael Wallwork was charged with sexual abuse of a minor student, possession of a controlled dangerous substance and making terroristic threats.' (Exhibit A-2).

"However, nowhere is it alleged that on any given date, time or occasion Michael Wallwork actually sexually abused a minor student, nowhere is it alleged that he actually possessed a controlled dangerous substance and nowhere is it alleged that he actually made a terroristic threat. The statement of evidence is no more enlightening. (Exhibit A-4). This merely reiterates that respondent was 'charged' with the crimes, sets forth the statutes he is 'charged' with having violated and further sets forth that he was additionally 'arrested' for the charges. However, again, there is no factual basis contained within the evidence to show that he did in fact assault a minor, possess a controlled dangerous substance or make terroristic threats.***" (at p. 4)

The Commissioner, upon review of the respective opposing arguments of the parties is not persuaded by the position taken by the Board which is determined to be without merit in the instant matter.

It is clear from a review of the record of these tenure proceedings that the Board's tenure charges and the Superintendent's statement of evidence in support of those charges are essentially the same except for those statements made in paragraphs 2 and 3 of the Superintendent's Statement of Evidence which read as follows:

> "***2. A statement has been filed with the Orange Township Police Department on behalf of each minor supporting the charges made.
>
> "3. The complaints filed on behalf of the minors were reviewed by the Assistant Prosecutor of Essex County and were found to be indictable offenses and were forwarded to the Essex County Grand Jury.***"

The Commissioner cannot agree with the Board's claim that the mere reiteration of the tenure charges in its Statement of Evidence in support of those charges without a more specific statement of those underlying facts constitutes sufficient procedural compliance with the provisions of N.J.S.A. 18A:6-11 regarding the statutory prerequisites for the certification of tenure charges. This statute of reference in pertinent part is recited below:

> "Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination.***"

In order to invoke the provisions of N.J.S.A. 18A:6-11, the Board was procedurally required to present a copy of the tenure

charges and the statement of evidence in support of those charges to respondent and thereby provide him with an opportunity to file his own written statement of position and evidence concerning the tenure charges against him, prior to having the Board determine there was probable cause to credit the evidence in support of the tenure charges as being sufficient to warrant certification to the Commissioner. Once the tenure charges and the Board's evidence in support of the charges were certified to the Commissioner, the Board had the burden of proving that the underlying factual evidence in support of the tenure charges against respondent should be accepted by the Commissioner pursuant to statutory prescription.

It is apparent from a further review of the Statement of Evidence filed by the Superintendent that paragraphs 2 and 3, ante, confirm the fact that at no time during these tenure proceedings was the Board, respondent or the Commissioner provided with the "evidence in support" of the tenure charges pursuant to the provisions of N.J.S.A. 18A:6-11. Rather, the Statement of Evidence made under oath by the Superintendent confirms the fact that the evidence in support of the criminal charges against respondent relied upon by the Board in the certification of tenure charges was filed with the Orange Township Police Department and the Assistant Prosecutor of Essex County.

These charges were apparently found to be indictable offenses by the Assistant Prosecutor and forwarded to the Essex County Grand Jury. However, there is nothing to date in the record to establish that respondent has been indicted by the Grand Jury or that he was tried and convicted of the criminal charges in a court of competent jurisdiction.

Accordingly, for the reasons set forth above the Commissioner hereby affirms that portion of the findings and conclusions in the initial decision which holds that:

1. The tenure charges against respondent be and are hereby dismissed as being procedurally defective pursuant to N.J.S.A. 18A:6-11.

2. The Board is not precluded from recertifying the tenure charges against respondent pursuant to N.J.S.A. 18A:6-11 with appropriate evidence in support of such tenure charges.

The Commissioner, by virtue of his dismissal of these tenure charges without prejudice, hereby modifies the initial decision as follows:

1. The Board is directed to pay respondent his full salary as of the date it certified tenure charges against him and suspended him without pay.

2. In view of those circumstances involving the criminal charges against respondent which are apparently pending action by the Essex County Grand Jury, the Board is directed to use its discretionary authority pursuant to N.J.S.A. 18A:6-8.3 to cause his suspension from active employment.

N.J.S.A. 18A:6-8.3 reads as follows:

> "Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reasons of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement."
> (Emphasis supplied.)

Except as modified and supplemented above by the Commissioner, the initial decision is hereby affirmed and the tenure charges against respondent are dismissed without prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 1, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3311-85
AGENCY DKT. NO. 149-5/85

FRANK C. MAIMONE AND HIS PARENT PATRICIA KENNEDY,[1]
Petitioners,
v.
HADDON TOWNSHIP BOARD OF EDUCATION AND LEONARD E. COPLEIN, SUPERINTENDENT OF SCHOOLS,
Respondent.

John Barbour, Esq., for petitioner (Barbour & Costa, attorneys)

Joseph F. Betley, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: June 17, 1985 Decided: June 17, 1985

BEFORE **DANIEL B. MC KEOWN,** ALJ:

Frank Maimone (Frank), an emancipated 18 year old pupil enrolled in the twelfth grade of the Haddon Township High School, seeks immediate relief from an action by the Haddon Township Board of Education (Board) declaring him ineligible to be graduated from its schools on Tuesday, June 18, 1985 because of his asserted failure to successfully complete 12th grade physical education. Frank maintains school authorities excused him from further participation in physical education on medical grounds in or

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1. Patricia Kennedy, the mother of Frank Maimone, voluntarily withdrew as a party petitioner. Maimone resides with his grandparents; Ms. Kennedy resides elsewhere.

about December 1984. The Board maintains Frank induced school authorities to rely on a note obtained by his mother, but not authorized by the physician, to secure excusal from physical education. After the matter was transferred to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., oral argument on Frank's motion for interim relief was heard June 12, 1985 at the Office of Administrative Law, Mercerville. A ruling was held in abeyance pending the conduct of a plenary hearing on June 14, 1985 at the Haddon Township Municipal Building, Westmont. The ruling which follows is a disposition on the merits of the matter.

FACTS

The facts of the matter are not in dispute except as otherwise noted and are as follows.

N.J.S.A. 18A:35-5 provides in full as follows:

> Each board of education shall conduct as a part of the instruction in the public schools courses in health, safety and physical education, which courses shall be adapted to the ages and capabilities of the pupils in the several grades and departments. To promote the aims of these courses any additional requirements or rules as to medical inspection of school children may be imposed.

N.J.S.A. 18A:35-7 provides in full as follows:

> Every pupil, except kindergarten pupils, attending the public schools, insofar as he is physically fit and capable of doing so, as determined by the medical inspector, shall take such courses, which shall be a part of the curriculum prescribed for the several grades, and the conduct and attainment of the pupils shall be marked as in other courses or subjects, and the standing of the pupil in connection therewith shall form a part of the requirements for promotion or graduation.

The Board requires its pupils to achieve a passing grade in physical education each year of school to meet graduation requirements. Pupils may be excused on a yearly basis from such requirement upon the presentation of a physician's note recommending such excusal. Yearly excusals are subject to renewal upon the presentation of another note from the physician.

Frank's physical education program for the current year required him to successfully complete a health course in the first marking period which ended November 7, 1984. The second marking period, which ended January 25, 1985, emphasized volleyball and archery skills. Though the year's physical education program also requires study in other physical skills for the third and fourth marking periods, no further mention of such requirements need be made because Frank did not participate in any physical education class since sometime in early to middle December 1984.

Frank's scholastic record (R-7) shows he was excused from physical education during his seventh grade year, 1979-80. Frank, who was then 13 years of age, was diagnosed (R-3) by Dr. Nahum Malcolm Balotin,[2] a family physician and formerly in partnership with Dr. Leon Boguslaw by whom Frank's mother, a registered nurse, was earlier employed for several years, as suffering from Osgood-Schlatter disease, an inflamation or partial separation of the tibial tubercle caused by chronic irritation. The condition is usually secondary to overuse of the quadriceps muscle and, according to the testimony of Dr. Deighan,[3] the school medical inspector, it occurs generally in athletic adolescent boys through 14 years of age. While Osgood-Schlatter disease may occur beyond 14 years of age, it generally does not. The condition, Dr. Deighan explains, is an osteochondrosis, which affects the ossification centers of bones in children. Osgood-Schlatters is characterized by swelling and tenderness over the tibial tubercle which increases with exercise or any activity that extends the leg. Pain is experienced in or below the knee. Dr. Deighan says Osgood-Schlatters can only be diagnosed by x-ray; it cannot be clinically diagnosed. Treatment consists primarly of preventing further irritation during the healing process and, if not properly cared for, the knee may require complete immobilization by way of a cast.

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[2] Dr. Balotin had been in partnership with Dr. Leon Boguslaw through about 1979. While the partnership has ceased, both physicians practice in the same building and when the need arises both physicians will treat the same patients and make notations in the patient's records as to the treatment administered.

[3] Dr. Deighan is an osteopathic physician who specializes in family medicine and sports medicine.

Notwithstanding the affliction in 1979-80, Frank tried out unsuccessfully for the school basketball team in eighth grade, played baseball in ninth grade and in tenth grade he earned a junior varsity letter. Simultaneously, Frank participated on the schools' cross-county team as a long distance runner and earned a varsity letter in this sport in ninth grade. When physical examinations were administered him for baseball and cross-county, Frank did not mention Osgood-Schlatters disease to the examining physician(s) because he wanted to play ball and to run.

Finally, it is noted that Frank was involved in an automobile accident sometime in late 1983 which resulted in serious injury to his passenger. Evidence of injuries, if any, to Frank is not part of this record.

After Frank completed the health course at the beginning of the 1984-85 year, he participated in volleyball the first half of the second marking period. Mr. Williams, Frank's physicial education teacher for this segment, testified without contradiction that during the course Frank told him he was going to secure medical excuse from further participation in physical education after the volleyball segment ended. Frank, Mr. Williams testified, explained he wanted to finish volleyball because he liked it. Frank also told Ms. Ginsberg, the chair of the guidance department and Frank's counselor, that he was going to secure a medical excuse from further physical education participation. Frank did not proffer the basis for such excuse to either Mr. Williams nor Ms. Ginsberg; however, neither did either teacher inquire of Frank the basis for such excuse. Frank, in fact, did not specifically complain about his knee to school authorities at any time during 1984-85.

Frank's version of events from December forward is that his left knee began to swell and cause him pain around the end of October, early November 1984. He reported this condition to his mother and asked her arrange an appointment with the family physicians. His mother, Ms. Kennedy, being a registered nurse, felt qualified to diagnose her son's symptoms as the reoccurrence of Osgood-Schlatters disease. She arranged with Dr. Boguslaw's receptionist, Marlene Dolce, a close friend of hers, to have Ms. Dolce prepare the following unauthorized note on the doctor's stationary, sign his name, followed by Ms. Dolce's initials (R-1):

Frank Maimone may not participate in gym class the remainder of the school year due to exacerbation of Osgoodschlatter disease.
Leon Boguslaw
M.D./md

Though the note is dated December 1, 1984, Mr. Kennedy explained Ms. Dolce prepared it on or about December 15, 1984 and backdated it at her request. Ms. Kennedy then gave the note on or about December 15 to her son, Frank, who, rather than taking the note to school, placed it in his dresser drawer and "forgot" it. In the meantime, Frank simply ceased attending physical education class which program was now in the archery skills segment. Ms. Kennedy did testify that at the time she secured the note, she simultaneously made an appointment for Frank with Dr. Boguslaw. However, even if she did make such an appointment and there is no corroboration in the record that such an appointment was made, Frank later cancelled the appointment because it would interfere with his parttime employment.

When Mr. Preziosi, Frank's physical education teacher for archery skills, noticed his absence, he asked Mr. Williams if he knew of the basis for Frank's absence. Mr. Williams told Preziosi of Frank's earlier representation that he was to be medically excused from further physical education. In the meantime, Ms. Ginsberg, having already been told by Frank of his intention to secure a medical excuse but not yet having seen evidence of such excuse and having been questioned by the physical education teachers of his whereabouts, was, as she says, "nagging" him to submit a physician's note. Ms. Ginsberg explains that a student who does not participate in physical education must submit a doctor's note to justify nonparticipation; otherwise, the student is marked absent and the grade result will be a failure. Ms. Ginsberg, Mr. Preziosi, and a Mr. Carr, Frank's assigned physical education teacher during the third marking period, reminded Frank on several occasions of the need to submit a doctor's note or receive a failure for physical education.

While Frank testified he submitted the asserted note (R-1) from Dr. Boguslaw to school authorities in late January or early February 1985, the evidence is convincing that Frank did not submit the note until March 4, 1985. Sally Fitzpatrick, the chief nurse at the Haddon High School, explained that as each student who is to be excused from physical education submits a doctor's note, that fact is logged in a record book, the notice filed, and the receiving nurse completes an excuse from physical education for the affected student to give his/her physical education teacher. In this case, school nurse

Klettke recorded receipt of Frank's purported doctor's note on the March 1985 page (R-10) of the record book and nurse Klettke completed the physical education excuse form (P-4) on March 4, 1985 for Frank to show his teachers. The completed form excuses Frank from physical education participation retroactively from December 1, 1984 to the end of the year. Ms. Ginsberg specifically recalls Frank showing her the note for the first time on March 4, 1985 and she recalls directing him to take the note to the school nurse. Mr. Carr also recalls that Frank tried to show him the note on March 4, 1985 when he, too, directed Frank to the nurse. Doctors' notes in support of students' excuse from physical education participation are routinely delivered to the school nurses who are under orders from Dr. Deighan to accept as true all statements submitted on a doctor's letterhead in regard to, in this case, the need for a student to be excused from physical education.

While Mr. Preziosi testified that the asserted doctor's note (R-1) Frank submitted was challenged as to its validity within days of March 4, the evidence shows school authorities did not inquire of Dr. Boguslaw until March 20 whether the note was valid. Dr. Shapiro, the high school principal, explained that on March 14, 1985 the physical education staff arranged a meeting with him to correct a perceived problem of student abuse of medical excuse from physical education participation. The meeting resulted in agreement that henceforth all submitted medical notes for excuse from physical education would be verified by personal contact with the physician in an effort to cooperatively arrange an alternate physical education program for the affected students.

In the meantime, Frank and school authorities were having differences of opinion whether Frank was a pupil resident in the district's boundaries for school attendance purposes and whether certain of his conduct constituted insubordination to warrant suspension from school[4]. The day after the principal met with the physical education staff regarding student abuse of medical excuse from physical education, he participated in a meeting with Frank and the superintendent on the issue of whether Frank should be suspended. The principal learned for the first time at this meeting that Frank was excused from physical education on medical grounds. The principal implemented the agreement reached with the physical education staff on March 14 by telephoning Dr. Boguslaw on March 20 to verify the note (R-1) Frank submitted. The principal intended to

[4] The issue of Frank's eligibility for enrollment in the Board's school together with the propriety of a suspension for asserted conduct were the subject matters of an earlier petition filed before the Commissioner which resulted in a settlement by and between the parties. See, Maimone v. Haddon Township Board of Education, et al., OAL DKT. NO. EDU 1902-85 (April 26, 1985).

arrange with Dr. Boguslaw an alternate physical education program for Frank. The principal testified he then learned not only did Dr. Boguslaw have no knowledge of the note, he also learned that the doctor did not authorize his receptionist to prepare the note, nor use his letterhead paper, nor sign his name. In fact, Dr. Boguslaw has not personally seen Frank as a patient since 1976 when he treated him for gastrointestinal virus. The principal went to Dr. Boguslaw's office and secured the following note personally prepared by the doctor.

> Frank Maimone was seen in 1979 for OsgoodSchlatters disease by Dr. Balotin. He was not examined for this by me although a note was given by my receptionist - Marlene Dolce who worked for both of us at that time. (R-3)

Dr. Boguslaw testified at hearing that as a matter of course his receptionist prepares all medical excuses his patients may need for work or for school so long as he reviews such excuses before being given to the patient. The doctor explained that when he learned of this note and questioned the receptionist, he was told that the note was prepared and signed because he was on vacation that day and not available. Despite this explanation, despite the fact that Dr. Boguslaw has not personally seen Frank as a patient since 1976, and despite the assertion imputed to be Dr. Boguslaw's by his receptionist that Frank should be excused from physical education " * * * due to exacerbation of Osgood-Schlatters disease * * *" without an examination of Frank by him, Dr. Boguslaw did not ask the receptionist why she prepared such a note. Dr. Boguslaw did offer the opinion that his receptionist prepared the note without his knowledge as a personal favor to her friend, Frank's mother. Notwithstanding the foregoing, Dr. Boguslaw testified he did not admonish his receptionist to any great extent because, as he says, she knows now not to prepare notes on his letterhead over his signature without his knowledge.

When the principal learned on March 20 that Frank was excused from physical education on the basis of an unauthorized medical note he had advised Ms. Ginsberg. Ms. Ginsberg, who coincidentially had a meeting with Frank and his mother on March 28 to discuss Frank's academic subjects, advised Frank at that meeting only that a question existed as to the validity of the note and that if the note is found to be invalid Frank would receive an "F" for physical education for nonattendance. Frank was not then told of what the principal learned through his conversation with Dr. Boguslaw nor is there evidence to show that Ms. Ginsberg had such knowledge to impart to Frank. Frank expressed the view that the medical note was accurate. The fact is, however, that between March 20 when the principal learned that the note was unauthorized through

May 1, 1985 no affirmative effort was made to specifically advise Frank of Dr. Boguslaw's disavowal of the note upon which Frank had been excused from physical education as of December 1, 1984. Nor did school authorities at any time refer Frank to the school medical inspector, Dr. Deighan.

On May 1, 1985, the superintendent sent a letter (P-2) to Frank and, on the same date, the principal sent a letter (P-3) to Frank's mother, Ms. Kennedy, a copy of which was also sent to Frank by the superintendent. The superintendent advised Frank that his physical education grade as of the end of the third marking period was an "F" and that, if he chose, he could meet with school authorities and the Board to convince them a mistake was made or, alternatively, to take measures to receive a passing grade. Frank and his mother met with the principal on May 6 when, for the first time, they learned from the principal his conversation with Dr. Boguslaw on March 20, 1985. Ms. Kennedy, while admitting having knowledge that her son received the grade of "F" in physical education for the first and second marking period, expressed her belief that the note had been accepted as justification for her son's excuse from physical education participation. Furthermore, Ms. Kennedy queried why, in view of the fact the principal was then telling her the medical note was considered invalid based on the March 20 telephone call to Dr. Boguslaw, neither she nor her son were informed prior to May 6. The principal responded he was following school rules in reporting only to the superintendent on matters in litigation[5]. Frank and his mother thereafter unsuccessfully appealed the matter to the Board.

Ms. Kennedy testified, in essence, that in her view school authorities are exaggerating the seriousness of what occurred with the note. Notwithstanding the fact she left the employ of Dr. Boguslaw in 1976, she testified that it is the present practice of his office to have the receptionist, or any physician's receptionist, prepare all such notes over the doctor's signature for patient use. Ms. Kennedy's present employment is as an administrative assistant in the medical psychiatric unit at Misrecordia Hospital so her testimony in regard to present practices of private practitioners is highly suspect. Ms. Kennedy did testify that she had no intention to deceive school authorities when she, or the receptionist, neither of whom are licensed to practice medicine, having diagnosed her son's symptoms in December 1984 as a reoccurrence of Osgood-Schlatters disease, asked her friend to prepare a note over Dr. Boguslaw's signature for her son to be excused from physical education. The obvious question is if Ms. Kennedy did not intend to deceive

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[5] The record is unclear as to the nature of the litigation to which reference is made. The present petition of appeal was not filed until May 30, 1985.

school authorities in causing her son to submit a note on Dr. Boguslaw's letterhead by which Dr. Boguslaw purportedly recommended he be excused from physical education, why she did not simply contact the school nurse or school medical inspector and explain or her or him what she perceived to be the problem with her son.

On May 13, 1985, one week after the meeting with the principal, Frank for the first time since 1979 was personally seen Dr. Balotin. Frank complained of pain in his knee and by Dr. Balotin diagnosed Frank's condition then as patellar tendinitis, tendinitis of the central portion of the common tendon of the quadriceps femoris. Dr. Balotin, as does Dr. Deighan, distinguishes tendinitis from Osgood-Schlatters disease in that tendinitis is an inflamed tendon which generally results from strain. Dr. Balotin personally prepared the following note (P-1) which Frank submitted to school authorities on or about the same day he was examined.

> Frank Maimone should not participate in gym for the rest of the semester. He is being treated for tendinitis.
> (P-1)

Dr. Balotin testified that in his opinion and based on Frank's statements to him on May 13 at the time of the examination, Frank's excuse from physical education for patellar tendinitis can be validly retroactive for a two week period from May 13 but not beyond. Dr. Balotin bases this opinion on the fact Frank complained of the pain on May 13 as having begun two months earlier. The Board does not challenge the validity of Dr. Balotin's medical excuse of Frank from physical education between May 1 to the end of the year. The Board does take the position, however, that because the medical note (R-1) submitted by Frank upon which he was originally excused from physical education was not authorized by Dr. Boguslaw, Frank has been absent from physical education without excuse between December 1 through May 1. The Board says Frank did not successfully complete twelfth grade physical education nor was he validly excused from the course. The Board reasons Frank has not met its graduation requirements and is, accordingly, not entitled to participate in graduation ceremonies on June 18, 1985 because he is not eligible for graduation.

Frank says that he submitted the controverted note (R-1) in good faith because his mother secured the note from the doctor's office. Frank points out that no representation was made that Dr. Boguslaw was treating him for Osgood-Schlatters disease nor that the recommendation for his excusal was based on an examination of him.

Furthermore, Frank contends that it is the Board's obligation under N.J.S.A. 18A:35-7 to have had him examined by the school medical inspector in order to properly challenge his statements that he was not physically fit for physical education participation. Frank contends that regardless of Dr. Boguslaw's disavowal of the original note, Dr. Balotin's present note (R-1) should be given retroactive effect to December 1, 1984 in the same manner that another student who submitted a note in March 1985 was excused from physical education retroactive to September 5, 1984 (R-10). Finally, Frank suggests that the Board and school authorities are unlawfully denying him the opportunity to be graduated as a reprisal for his earlier complaint against the Board regarding his residency and suspension.

DISCUSSION

It is recognized that the statutory obligation of the Board to require its pupils to successfully complete a course in health, safety and physical education each school year may not be waived nor may the obligation of a pupil to successfully complete such course be waived by the Board. The only exception to such statutory obligation is if the pupil is not physically fit nor capable of performing the assigned activities as determined by the school medical inspector.

In this case, Frank says his knee began bothering him in late October, early November 1984. While he advised Mr. Williams and Ms. Ginsberg that he was securing medical excuse from further participation in physical education, he did not specify the basis for such excuse. Nonetheless, he was allowed to unilaterally absent himself from physical education since early or middle December 1984 forward.

Obviously, had Frank's mother not taken it upon herself to secure an asserted "doctor's note" from her friend which both she, as one who is granted a license by the state to engage in nursing, and her friend knew was not medically authorized, more likely than not this precise confrontation would not have occurred. Ms. Kennedy's conduct in this matter is outrageous particularly in light of her status as a registered nurse.

Nonetheless, Frank and his mother have declared he is an emancipated child. That being so, he is an adult and, as such, he is responsible for his own actions. Frank's actions in the matter include his declaration to school authorities that he was to secure medical excuse from physical education; his unilateral abstention from physical education

class with at least the tacit approval of school authorities as shown by the absence of affirmative action prior to March 4, 1985 to constructively consider him, as an adult, as having refused to be actively enrolled in a program leading to graduation; and, his submission of the now controverted note (R-1) on March 4, 1985 which was accepted by school authorities at face value and upon which he was advised he was officially excused from physical education retroactive to December 1, 1984. But, between March 20, 1985 when the principal learned the note was unauthorized to May 6, 1985 when Frank and his mother met with the principal, no school authority told Frank that because the note was not authorized he was considered to be absent from physical education without cause and that, as such, he was earning a grade of "F". Ms. Ginsberg's advice to Frank on March 28, that there was some question on the note is not equivalent to a declaration that because the note was determined to be unauthorized, school authorities revoked his earlier granted official excuse from physical education. The evidence is clear that school authorities did in fact cause the revocation of nurse Klettke's initial grant of Frank's excuse from physical education because of the unauthorized note.

The statutory basis of physical unfitness or incapacity for physical education exemption must be borne in mind. When the principal learned on March 20 that the note was not authorized, the question of whether Frank was physically fit or capable was not considered on its merits. Rather, the principal concluded that because Frank submitted a medically unauthorized note he must be physically fit and capable. I cannot endorse such a conclusion in light of Frank's earlier assertions to Mr. Williams and Ms. Ginsberg that he was to secure a medical excuse from physical education and his unquestioned abstention from physical education class except for reminders to submit the note. It would have been an easy matter for the principal on or about March 20, 1985 to cause Frank to be examined by the school medical inspector for a medical evaluation of whether Frank was then, or had been to a reasonable degree of medical certainty, fit for physical education participation since December 1, 1984. That the principal elected not to refer Frank to the school medical inspector at that time creates a void of medical evidence as to Frank's fitness and capacity for physical education participation between December 1, 1984 through May 1, 1985. That being so, I must accept Frank's testimony that his knee was bothering him in December 1984 to the extent that he could not participate in physical education.

Even if Frank were determined by the school medical inspector on or about March 20 to be physically unfit or incapable to participate in physical education, the

principal had at his disposal the opportunity to develop with the medical inspector an alternative physical education program for Frank. (R-6). There is no evidence in this record that at the time Frank was initially excused from physical education participation that the principal considered the alternative physical education program approach for Frank. However, it must be quickly recognized that the alternative physical education program policy may not have been implemented until after the principal met with the physical education staff on March 14 regarding student abuse of medical excuse.

FINDINGS AND CONCLUSIONS

There is nothing in the statutory exemptions for participation in physical education which requires the submission of a physician's note to establish unfitness or incapacity. A pupil's complaint, or parental complaint, that a particular pupil should be excused from physical education participation on the grounds of physical unfitness or incapacity must be accompanied by school authorities arranging an examination by the school medical inspector. In this case, school authorities did not arrange for its medical inspector to examine Frank.

I **FIND** based on a preponderance of credible evidence in the record, through Frank's testimony, that Frank was not physically fit nor capable of participating in the Board's 1984-85 physical education program since December 1, 1984 forward. This finding is based upon Frank's testimony and upon the absence of contrary evidence from the school medical inspector who was not given the opportunity to examine Frank Maimone. This finding of physical unfitness and incapacity is, to some extent, strengthened by Dr. Balotin's assessment on or about May 13, 1985 (P-1) that Frank was then suffering from tendinitis and that he should be exused from "gym" through the end of the present school year. Frank's statement to Dr. Balotin that his knee bothered him for only 2 months does not contradict this finding. The evidence is that Frank's knee bothered him in November, 1984.

Having found that the preponderance of evidence tends to support Frank's version of his incapacity to participate in physical education between December 1, 1984 through May 1, 1985 and, in light of Dr. Balotin's assessment on May 13, 1985 that Frank presently suffers from tendinitis and should be excused from "gym" through the end of the year, I **CONCLUDE** that under the provisions of N.J.S.A. 18A:35-7 that Frank Maimone must be excused from participation in physical education and the concommitant

requirement of successfully completing physical education for that period of time. The assigned grade of "F" is invalid. This determination does not, nor is it intended to, modify the obligation of Frank Maimone to achieve satisfactory results in all other courses assigned him during the school year 1984-85 for purposes of high school graduation June 18, 1985. Upon the assumption he successfully completed all other graduation requirements, Frank Maimone is declared eligible to participate in graduation ceremonies on June 18, 1985 and to be graduated from the Haddon Township High School.

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

June 17, 1985
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

JUN 17 1985
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

June 20, 1985
DATE

Ronald J. Parker, Jr.
OFFICE OF ADMINISTRATIVE LAW

bc

FRANK C. MAIMONE AND HIS PARENT, PATRICIA KENNEDY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HADDON AND LEONARD E. COPLEIN, SUPERINTENDENT OF SCHOOLS, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record and the initial decision in this matter which was heard on an expedited basis and has also considered the oral exceptions taken by his representative.

The Board in its exceptions argues that N.J.S.A. 18A:35-7 was misread by the ALJ. The aforesaid statute, it is argued, does not require or trigger an automatic examination by the school medical inspector. Such an interpretation, contends the Board, ignores the standard practice in most districts of relying on the outside physician for providing medical excuses. The role of the medical examiner, argues the Board, is not to transplant the family physician but to supervise the process, ensure compliance, and possibly to examine and to verify. In the instant matter, asserts the Board, the Haddon Township medical inspector instructed the nurse to accept medical excuses which were verified upon the stationery of a physician.

The Board further contends that petitioner herein never complained about a specific physical disability, merely having indicated that he would present a medical excuse to verify his non-attendance in physical education after December 1, 1984.

In the final analysis, contends the Board, the ALJ has inappropriately substituted his judgment for that of the Board and wrongfully placed the burden of proof upon the Board to demonstrate through examination by its medical inspector that petitioner was not physically disabled. The ALJ, it is contended, wrongfully accepted petitioner's testimony concerning his alleged physical discomfort for the period December 1984 through May 1985 solely on the basis that the Board offered no testimony or evidence to the contrary. The burden of proof, alleges the Board, rests with petitioner to demonstrate valid medical excuse. Donna Eckert v. Board of Education of the City of Bayonne and Attendance Committee of Bayonne High School, decided by the Commissioner April 25, 1985

Should the Commissioner accept the ALJ's reasoning in this matter, the Board contends that it will have a far-reaching and detrimental effect. It will require that the school medical inspector personally examine and verify all claimants for medical excuses both for absences and for excusal from physical education.

Petitioner in reply exceptions argues that the ALJ's factual determination is clear and contends that his assertion that he was going to obtain a medical excuse does constitute evidence of a physical complaint. The responsible adults in this case, the Board and its agents, never took the required step of asking, "What is the problem?"

Petitioner argues that the language of N.J.S.A. 18A:35-7 which requires all pupils, except kindergarten pupils, to take physical education "***insofar as he is physically fit and capable of doing so, as determined by the medical inspector***" leaves no room for interpretation. In petitioner's view said language places the sole burden for determining physical capability upon the medical inspector. To find otherwise would place the financial burden of proving physical disability upon the child and his or her parents. If a child claims he or she is hurting, it is the role of the medical inspector to examine and verify. Had such verification taken place, contends petitioner, another note could have been obtained and the excuse for gym verified. Having failed to meet its responsibilities in this regard, the determination by the Board to deny graduation was arbitrary and capricious.

Petitioner further rejects the idea that he failed to meet the burden of proof of demonstrating that he was physically unable to take physical education. Petitioner, it is argued, is an 18-year-old emancipated youth who had no personal knowledge that the note obtained by his mother was tainted and therefore he was under no compulsion to demonstrate his physical incapacity until such time as he was informed that the unacceptability of the December 15th note would result in non-graduation. Upon being so informed in May 1985 petitioner did obtain a note from his physician which excused him for the rest of the semester. Since it is the practice of the district to accept retroactive excuses for physical education, petitioner argues that the May 13, 1985, note does provide him with a valid medical excuse for the entire period of December to the end of the semester as determined by the ALJ.

The Commissioner has considered the initial decision and the arguments raised by the parties in the oral exceptions taken by his representative. In so doing, the Commissioner cannot accept the interpretation placed upon N.J.S.A. 18A:35-7 by both petitioner and the ALJ. The phrase "***as determined by the medical inspector***" cannot be read so as to require the medical inspector to examine every person who requests a medical excuse from physical education. Such an interpretation is clearly inconsistent with prevailing practice, as pointed out by the Board, and is not mandated by the statute. In any practical sense, the phrase "***as determined by

the medical inspector***" must of necessity be interpreted as providing the medical inspector with the responsibility of establishing a process for receiving, reviewing and approving requests for medical exclusion from physical education. A thorough review of the regulation governing school health and safety and defining the specific rules of the school medical inspector, N.J.A.C. 6:29-1.1 et seq., does not support the interpretation suggested by petitioner herein. Those rules in several specific areas authorize the school medical inspector to accept the recommendations of family physicians without specifically requiring that the examination be conducted by the medical inspector in the first instance or that he or she corroborate by virtue of his or her own examination. (See N.J.A.C. 6:29-1.1(e); N.J.A.C. 6:29-4.2; N.J.A.C. 6:29-4.3(c).)

While it is true, as contended by petitioner, that regulations may not supersede statute, the long-standing nature of these regulations and the general nature of the language of N.J.S.A. 18A:35-7, in the Commissioner's view, provide ample basis for permitting local boards to accept physical education excuses written by family physicians pursuant to a procedure approved by the school medical inspector and without requiring the medical inspector to verify such excuse by physical examination as contended by the ALJ herein. The Commissioner does, however, believe that some of the problems raised by the instant matter could have been avoided by an earlier instituted procedure of requiring the school nurse to obtain telephone verification as to the authenticity of the excuses. The Commissioner therefore recommends that local boards review their existing policies and establish procedures for verification which will limit the kinds of problems arising from this matter.

The Commissioner further notes that the failure of the Board and its agents to directly notify petitioner between March 20, 1985, the day that they discovered that his note was not authorized by Dr. Boguslaw and May 1, 1985, the date when he was so notified that he would not graduate, was not fatal to the Board's contention. Firstly, the Commissioner notes that petitioner was noticed that there was a question about the authenticity of his note on March 28, 1985 and yet he made no effort himself to inquire as to the problem, nor did he attempt to seek authentification of his excuse. In the Commissioner's view, the ALJ places the burden in this matter on the district to disprove rather than upon petitioner to prove its authenticity or replace it with an authentic one. Secondly, it remains somewhat obscure to the Commissioner how a physical examination in March by the school medical inspector could verify a condition which was purported to exist in December unless such examination could possibly have revealed a chronic condition evidently present in petitioner for a long period of time. It is to be noted in the instant case, however, that the note subsequently provided by Dr. Balotin based upon his assessment of May 13, 1985 did not so diagnose petitioner's condition but found him to be suffering from tendonitis which he estimated could be considered to have been troubling him for a period of perhaps two weeks prior to the examination, or approximately May 1, 1985. Given such

diagnosis, coupled with the ALJ's findings that Dr. Balotin had indicated that petitioner claimed to have been bothered by the tendonitis of the knee for only the two months previous, it is difficult to understand the ALJ's finding that petitioner had demonstrated by "a preponderance of the credible evidence" that he was suffering from an incapacitating injury or condition which would excuse him from physical education all the way back to December 1, 1984. Even assuming arguendo the retroactivity of his condition from May 13, 1985, the date he was examined by Dr. Balotin, to a time some two months earlier, approximately March 13, 1985, that still leaves the entire period from December 1, 1984 to March 13, 1985 as a period of unexcused absence from physical education.

Missing almost entirely from the ALJ's consideration in this matter is a recognition of the fact that petitioner submitted an unauthorized note as an excuse from participation, relying upon exacerbation of a condition which had been originally diagnosed in the 1979-1980 school year. While the ALJ places the blame on Kennedy for what he calls her outrageous conduct of having the note prepared by her receptionist friend without the approval of the physician, the Commissioner cannot but note that petitioner is emancipated and must bear personal responsibility for the contents of a note whose authenticity he would have had some reason to doubt given the fact that he knew that he had not been examined by Dr. Boguslaw. It would appear that petitioner cannot claim lack of knowledge because his mother took the responsibility for getting his excuse and then turn around and claim that he is not responsible for his mother's actions because he is an emancipated adult.

Consequently, for the reasons contained herein, the Commissioner finds and determines that petitioner has failed to carry the burden of proof that the Board of Education of Haddon Township acted either illegally or in an arbitrary and capricious manner in denying him graduation. The finding of the ALJ in this matter is hereby set aside and the decision of the Board of Education of Haddon Township not to permit Frank Maimone to graduate is upheld.

COMMISSIONER OF EDUCATION

JULY 3, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 20-85
AGENCY DKT. NO. 500-12/84

RICHARD N. FRISSELL,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

Wayne J. Oppito, Esq., for petitioner

Samuel A. Christiano, Esq., for respondent
(Christiano and Christiano, attorneys)

Record Closed: April 10, 1985 Decided: May 21, 1985

BEFORE **SYBIL R. MOSES,** ALJ:

This matter comes before the Office of Administrative Law (OAL) as the result of a petition for declaratory judgment filed on December 7, 1984 with the Commissioner of Education by Richard N. Frissell asking the Commissioner to render a declaratory judgment on the question of whether he is entitled, by tenure and seniority, to be placed on the preferred eligible list for the position of Director of Fine Arts in the West Orange school system. Petitioner asserts that he was the tenured Director of Art in the West Orange school district in February 1984 when the Board of Education of the Township of West Orange (Board) abolished the positions of Director of Art and Director of Music and created a new position, Director of Fine Arts, which position includes the duties of the

abolished positions. Petitioner does not contest the fact that the Director of Music had greater seniority than he had. The Director of Music was appointed to the position of Director of Fine Arts on July 1, 1984. Since that date, petitioner has twice asked the Board to clarify his placement on the preferred eligible list for the position of Director of Fine Arts, pursuant to N.J.S.A. 18A:28-12 and N.J.A.C. 6:3-1.10. The Superintendent of Schools has notified Mr. Frissell that he is not on the preferred eligible list for the position of Director of Fine Arts, but only for the the position of Director of Art.

The Board filed an answer to the petition for declaratory judgment, asserting that the petition had been filed outside the time limit set forth in N.J.A.C. 6:24-1.2 and that Mr. Frissell is not entitled, by tenure or seniority, to be placed on a preferred eligible list for the position of Director of Fine Arts. The matter was forwarded to the OAL for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. and N.J.S.A. 52:14B-1 et seq., on January 2, 1985.

A prehearing conference was held on Thursday, February 14, 1985. Counsel agreed that this case could be decided as a matter of law and that there was no need for any testimony. The sole issue to be determined is whether petitioner, Richard N. Frissell, formerly Director of Art, is entitled to placement on the preferred eligible list for the position of Director of Fine Arts, which position encompasses the duties and responsibilities of two former positions, Director of Art and Director of Music. Respondent waived the affirmative defense that the petition had not been filed within 90 days of the action complained of, pursuant to N.J.A.C. 6:24-1.2. Counsel agreed that the issues set forth by the Department of Education on page two of the forwarding sheet are not in dispute. Briefs were timely filed in this matter, as was a stipulation of facts agreed to by both counsel. Time was permitted for responses, but none were filed. The record closed on April 10, 1985.

The parties agreed to the following facts as the sole facts in this case, and I adopt them for that purpose.

1. Petitioner, Richard N. Frissell, was the tenured Director of Art in the West Orange School District from on or about July 1, 1978 to June 30, 1984.

2. Respondent, Board of Education of the Township of West Orange, Essex County, is organized under the laws of the State of New Jersey and is responsible for the administration and operation of the West Orange School District.

3. In February 1984, respondent determined to close one of the two high schools in the school district.

4. As a result of this school closing, respondent combined the two positions of Director of Music and Director of Art into one position, Director of Fine Arts.

5. The duties and responsibilities of the position of Director of Fine Arts encompass the duties and responsibilities of the two former positions.

6. An employment requirement for the position of Director of Fine Arts is demonstrated supervisory and teaching experience in either art or music or both.

7. Respondent appointed the former Director of Music to the position of Director of Fine Arts.

8. The Director of Music had greater seniority in his position than the petitioner had as Director of Art.

Counsel for petitioner argues that he is entitled to be placed on the preferred eligible list for the position of Director of Fine Arts because of his service in the position of Director of Art. Counsel does not dispute that the Commissioner of Education issued new regulations in 1983 which recommended that the State Board of Education limit seniority entitlement exclusively to the subject areas and levels at which a teacher has

actually taught. Rather, he argues that the facts here are not similar to the situation in Flanagan v. Bd. of Ed., City of Camden, 1980 S.L.D. 1283, aff'd St. Bd. of Ed. (Dec. 2, 1981), aff'd N.J. App. Div., Jan. 24, 1983, A-1826-81-T1 (unreported), certif. granted, June 22, 1983, remanded N.J. App. Div., Aug. 31, 1983, A-1826-81-T1 (unreported), reversed St. Bd. of Ed., Sep. 5, 1984, where school districts were presented with the problem of having supervisors accrue seniority in other supervisory positions without service in those positions and irrespective of their knowledge of the subject areas which they would be required to supervise. In this situation, petitioner asserts he clearly meets the qualifications enumerated in the job description for Director of Fine Arts. He further asserts that the combining of the two former positions into one is not equal to the creation of the new position to which neither of the holders of the former positions have a seniority entitlement. It is his theory that the more senior holder of the two former positions is entitled to the combined position, while the junior person is entitled to be placed on the preferred eligible list, noting that the former Director of Music who had seniority was given the position of Director of Fine Arts.

The Board asserts that the positions of Director of Art and Director of Music were eliminated and a new position, Director of Fine Arts, with different requirements and qualifications, was created. The Board claims that neither the petitioner nor the incumbent Director of Fine Arts could claim seniority to the new position of Director of Fine Arts and that Mr. Frissell has seniority in the position of Director of Art only, not in the position of Director of Fine Arts because he never served in that post.

A review of the applicable law and regulations, particularly the 1983 seniority regulations, leads me to conclude that Mr. Frissell is not entitled to be placed on a preferred eligible list for the newly created position of Director of Fine Arts because that position is substantially different from the abolished position. The source of the concept of seniority is found in the tenure law. N.J.S.A. 18A:28-9 provides:

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

Dismissals resulting from a reduction in force must be made on the basis of seniority, according to standards to be established by the Commissioner with the approval of the State Board. N.J.S.A. 18A:28-10. A board of education is required to determine the seniority of persons affected by a reduction in force according to the seniority standards and then must notify each person of his status. N.J.S.A. 18A:28-11. If any teaching staff member is dismissed as a result of a reduction in force, the person must be placed and remain on 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. N.J.S.A. 18A:28-12. If a vacancy occurs, the board must reemploy such teaching staff member. Ibid.

The standards referred to in the tenure laws are found at N.J.A.C. 6:3-1.10. Seniority will be determined according to the number of academic or calendar years of employment in the school district in specific categories. N.J.A.C. 6:3-1.10(b). N.J.A.C. 6:3-1.10(l) states, in pertinent part:

> The following shall be deemed to be specific categories . . . :
>
> 10. Supervisors (each approved supervisory title shall be a separate category. District board of education shall adopt job descriptions for each supervisory position which shall set forth the qualifications and specific endorsements required for such position.) . . . .

In 1983, the seniority regulations were revised significantly. The overriding theme guiding the revisions was that no teacher should be permitted to claim seniority in an area in which he or she has never taught. A Position Statement of the New Jersey State Department of Education, June 1983 (at 3, Questions and Answers on Seniority

Regulations). The provisions relating to supervisors were included in the 1983 revisions. The prior regulation provided for five separate supervisory categories: (1) general supervisor (N.J.A.C. 6:3-1.10(k)(10)); (2) general secondary supervisor (N.J.A.C. 6:3-1.10(k)(11)); (3) general elementary supervior (N.J.A.C. 6:3-1.10(k)(12)); (4) general vocational supervisor (N.J.A.C. 6:3-1.10(k)(13)); and (5) subject supervisor (N.J.A.C. 6:3-1.10(k)(22)). The purpose for changing the supervisors categories is explained in the Position Statement as:

> Existing regulations provide for four separate categories of supervision although there presently exists only one supervisor's certificate. This disparity has required both the Commissioner and the State Board of Education reluctantly to issue case law decisions which have recognized the right of an individual having overall seniority as a supervisor - but no appropriate subject matter expertise - to "bump" less senior supervisors who have the specific expertise and experience in a particular field. In one instance, for example, this has meant that a person hired as an audiovisual supervisor may replace a less senior subject matter supervisor specifically trained in the area supervised (i.e. math supervisor). This educationally unsound situation has been remedied by the insertion of a clarifying statement into the proposed revisions which states that "each supervisory title shall be a separate category." Questions and Answers on Seniority Regulations at 2.

The new regulation, N.J.A.C. 6:3-1.10(l)(10), clearly states that each supervisory title shall be a separate category. It is also clear that seniority is accrued only in the specific category in which a teaching staff member has served. In the instant case, Frissell served in the supervisory title of Director of Art. He gained seniority in that title only. Director of Fine Arts is a new and substantially different category. The fact that Frissell is properly certified to fill the Director of Fine Arts position is not enough to require that he be placed on a preferred eligibility list for that position.

A recent State Board of Education decision, while not directly on point, explains the proper standard to be applied to determine whether a teaching staff member is entitled to a supervisory position other than the abolished position he/she previously held. Dinardo v. Bd. of Ed. of the City of Jersey City, OAL DKT. EDU 10261-82 (Jan. 1, 1983) aff'd Comm.

of Ed. (Feb. 18, 1983), aff'd State Board of Ed. (June 1, 1983), remanded to State Board of Education (reversing prior decision) (Feb. 6, 1985). Dinardo was tenured in the position of Supervisor of Social Workers/Home Instruction. In 1981 the Board reduced from four to one the number of Supervisor of Social Workers positions. Dinardo's position was eliminated and the remaining position was filled by a teacher with greater seniority. Dinardo claimed he was entitled to appointment to other supervisory positions in the district based on his general supervisory certification and the seniority he earned as a supervisor of social workers. The Board contended that petitioner possessed neither the requisite teaching experience nor the proper subject area supervisory certification to qualify him for any other supervisory position in the district except the abolished position.

The administrative law judge held that Dinardo was entitled to seniority over the supervisors holding positions requiring general supervisor's certification, relying on the original decision in Flanagan v. Bd. of Ed. of the City of Camden, 1980 S.L.D. 1283. The original Flanagan decision stated that one holding certification as a general supervisor attained tenure as a general supervisor and so enjoyed seniority as a general supervisor even though his supervisory experience was in a specific subject area. The Commissioner affirmed the Initial Decision in Dinardo on February 18, 1983, and the State Board affirmed the Commissioner on June 1, 1983. However, the Appellate Division remanded the case to the State Board in light of the New Jersey Supreme Court's decision in Lichtman v. Ridgewood Village Bd. of Ed., 93 N.J. 362 (1983) which held that "... seniority [is] based upon total accumulated service in a specific category.... relevant experience and seniority of all tenured employees within a single category can be readily ascertained and compared." Id. at 368. While this was occurring, the State Board decision in Flanagan was affirmed by the Appellate Division (A-1826-81-T1, App. Div. August 31, 1983), but on certification to the New Jersey Supreme Court was remanded for reconsideration in light of Lichtman.

On remand, the State Board, in both Flanagan and Dinardo, reversed its prior decisions in light of Lichtman. The State Board indicated that, on the basis of the court's decision in Lichtman, "certification alone is not enough to establish preferred eligibility for seniority purposes." Dinardo, State Board decision (Feb. 8, 1985) at 4. The State

Board went on to say that once it is established that certification for both the abolished position and the position sought is the same, it must be determined that "the duties encompassed by the two positions are substantially the same." Ibid. The State Board then examined the respective job descriptions of the abolished position and the position sought and concluded that the duties in the new position were "more extensive and fundamentally different" from those of the abolished position. Dinardo, State Board decision (Feb. 8, 1985) at 6.

The Dinardo decision was concerned with the "general supervisor" category under the old regulations. The new regulation, which applies to the instant matter, has abolished the former categories and replaced them with a single supervisor category. Under the new regulation, since the Director of Art position is an approved supervisory title and the Director of Fine Arts is another approved supervisory title, Frissell has accrued seniority only in the separate category of Director of Art. Furthermore, under the standard set forth in Dinardo, even though Frissell has the proper certification for the position of Director of Fine Arts, that position not only subsumes all the duties of the position of Director of Art, it has additional duties which had previously been performed by the Director of Music. As was stated in Jablonski v. Emerson Bd. of Ed. (N.J. App. Div., March 6, 1984 (A-6100-82T2) (unreported):

> [T]he Board created a position which included all the duties of Director of Guidance but which had greater and additional responsibilities. Having decided the major question in the negative, it follows that Mr. Jablonski's seniority and tenure rights were not violated when he was not employed as the Administrative Assistant to the high school principal. He was not automatically entitled to that position as it was not substantially the same in duties or in title, to the one he had had before. See, N.J.S.A. 18A:28-9 and N.J.A.C. 6:3-1.10(g). at 3.

The case of Assarsson v. Bd. of Ed. of Newark, OAL DKT. NO. EDU 8455-82 (July 11, 1983), aff'd Commissioner of Education, August 29 1983, aff'd with modification of the Initial Decision, State Board of Ed., January 4, 1984 is inapposite. In that case the administrative law judge ruled that petitioners had shown that the job titles were the same and the official job descriptions were the same, including the general qualifications,

and therefore the positions were virtually identical. The State Board affirmed, with the modification that the burden of ultimately proving the case remained with the petitioners. Assarsson is to be distinguished from the reversal in Flanagan and the case at bar. It involved the old regulations and the administrative law judge relied on the original Flanagan case, which has since been reversed.

The better-reasoned approach and the one that is consistent with the purpose behind the newly revised regulations is to grant seniority entitlement to a new position only if the actual duties required for that new position are substantially similar to those of the abolished position, which is not the situation here. I therefore adopt the standard established by the State Board in Dinardo to be used in cases where a tenured teaching staff member claims entitlement to a supervisory position after his or her position is abolished. That is, once it is determined that certification for the two positions is the same (which is unquestionably the situation here), a further inquiry must be made to determine if the duties to be performed in the new position are substantially the same as those in the abolished position. That is not the situation in the case at bar, especially in light of the emphasis on seniority for actual service given, evidenced in the 1983 regulations.

Accordingly, for all the forgoing reasons, it is hereby **ORDERED** that the petition for declaratory judgment asking that Mr. Frissell be placed on the preferred eligible list for the position of Director of Fine Arts because of his tenure and seniority be, and is, hereby **DENIED.**

OAL DKT. NO. EDU 20-85

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

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

May 21, 1985
DATE

SYBIL R. MOSES, ALJ

Receipt Acknowledged:

MAY 23 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 24 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amn/e

RICHARD N. FRISSELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

Petitioner contends that the judge totally missed the issue in this disputed matter and that none of the cases cited by her are on point because they were decided prior to the effective date of the amended seniority regulations. He asserts, inter alia, that the combining of two former positions into one is not the creation of a new position to which neither of the holders of the former positions have a seniority entitlement. Rather, he argues that the more senior of the two has entitlement to the combined position while the junior is entitled to be placed on the preferred eligibility list. Petitioner avows that, if the initial decision is affirmed by the Commissioner, abuses will become inevitable and boards of education will be able to circumvent the seniority regulations by shifting or combining subject disciplines.

Upon review of the record in this matter, the Commissioner is unpersuaded by petitioner's exceptions that the judge erred in determining that he has no entitlement to be placed on a preferred eligibility list for the Director of Fine Arts position for the following reasons.

When petitioner's position was abolished and he became subject to a reduction in force, his seniority accrued in the category of Director of Art pursuant to N.J.A.C. 6:3-1.10(1)(10) which states that each supervisory title shall be a separate category. Similarly, the Director of Music accrued his seniority in the supervisory category of Director of Music, a category separate and distinct from petitioner's.

The Board for bona fide reasons acted to reorganize its supervisory and administrative staff. As part of that reorganization it created a new position, Director of Fine Arts, which combined the duties and responsibilities previously carried out by the Director of Music and the Director of Art. This new position,

pursuant to N.J.A.C. 6:3-1.10(1)(10), is a category separate and distinct from the abolished positions. Consequently, neither individual had an a priori seniority entitlement to the position.

Further, the judge is correct in recognizing that a pivotal issue in the matter was whether or not petitioner's abolished position was substantially the same as the newly created Director of Fine Arts position. As she found in the initial decision, this new position not only subsumes all the duties of petitioner's abolished position but it also has additional duties not previously performed by him. As such, the new position has expanded responsibilities and functions and is not therefore deemed to be substantially the same as the abolished position. Consequently, although petitioner may meet the qualifications for the new position, it cannot be said that he has seniority entitlement to that position.

In addition, the fact that the Board saw fit to hire the former Director of Music does not mean that petitioner therefore has entitlement to be placed on a preferred seniority list for the Director of Fine Arts position. The Board could have employed any other qualified individual it believed best met the needs of the district, if it so chose.

Accordingly, for the reasons expressed herein, the Commissioner agrees with the recommendation of the Office of Administrative Law denying the declaratory judgment sought by petitioner and adopts it as his own.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 8, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7908-84
AGENCY DKT. NO. 410-9/84 and
OAL DKT. NO. EDU 8107-84
AGENCY DKT. NO. 406-9/84
(CONSOLIDATED)

HELENA BIALEK and PATRICK N. MEEHAN,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,
Respondent.

APPEARANCES:

Anthony N. Gallina, Esq., for petitioners
(Aronsohn & Springstead, attorneys)

Monica E. Olszewski, Esq., for respondent
(Greenwood and Sayovitz, attorneys)

Record Closed: April 30, 1985 Decided: May 30, 1985

BEFORE **ARNOLD SAMUELS,** ALJ:

Petitioners, Helena Bialek and Patrick N. Meehan, are tenured teachers employed by the respondent, Board of Education of the Township of Teaneck. By resolution on June 27, 1984, the Board voted to withhold the salary increments of the petitioners for the 1984-85 school year. Notice of the Board's action was given to the

petitioners a day later. On September 27, 1984, Ms. Bialek and Mr. Meehan filed petitions of appeal with the Commissioner of Education in accordance with the provisions of N.J.S.A. 18A:29-14. On October 31, 1984, the Commissioner of Education transmitted the Bialek appeal to the Office of Administrative Law for hearing as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. The Meehan appeal followed on November 9, 1984.

Concurrent prehearing conferences for both appeals were held at the Office of Administrative Law on January 2, 1985, and two Prehearing Orders were entered, defining and limiting the issues to be decided, fixing hearing dates, providing for discovery and regulating other procedural aspects of the forthcoming hearing, which was to be held on a consolidated basis. It was anticipated that all issues would be capable of resolution by means of motions for summary decision that would be filed by one or both of the parties. However, it was recognized that there was a possibility that plenary testimony might be needed on the question of the circumstances surrounding formulation of the disputed Board policy.

The consolidated hearing was held on March 27, 1985 at the Office of Administrative Law in Newark, New Jersey. The hearing consisted primarily of oral argument in support of both parties' cross applications for summary decision. However, plenary testimony was also taken from the assistant superintendent of schools and a Board member, on behalf of the respondent, and from both petitioners. A group of documentary exhibits was marked into evidence. a listing of which is attached hereto. Both parties filed posthearing briefs on April 30, 1985, and the record closed on that date. All of the proceedings at the time of the hearing and thereafter were consolidated, although no separate order of consolidation had previously been entered.

The issues, as defined in the Prehearing Orders, are as follows:

A. Was the action of the Board in withholding petitioner's adjustment increment for 1984-85 arbitrary, capricious, unreasonable and therefore unlawful?

B. Is the Board's policy no. 334. under which it acted, arbitrary, capricious, unreasonable or in violation of N.J.S.A. 18A:29-14?

The exhibits contained joint stipulations of fact on behalf of both petitioners, marked J-1 and J-2. Those stipulations, which are found herein to be **FACT**, are as follows, as to each petitioner:

As to Helen Bialek

1. Petitioner, Helena Bialek (hereinafter referred to as "Bialek"), is a tenured teaching staff member employed by respondent, Board of Education of the Township of Teaneck (hereinafter referred to as "Board").

2. Bialek is a Certified Elementrary School teacher and is on the maximum step of the Board's salary guide for the 1984-85 academic year.

3. During the 1983-84 academic year, Bialek was absent from school commencing on or about Janaury 12, 1984 through June 22, 1984, due to illness.

4. The Board does not challenge Bialek's representation that the aforementioned absences were due to illness.

5. The Board charged petitioner with 38 and one-half accumulated sick days and deducted the remaining 72 and one-half days from petitioner's salary. A copy of a communication, dated June 22, 1984, to Bialek from Lois Rothman, Payroll Supervisor, setting forth the total days absent, sick days charged and days deducted from pay, is annexed hereto and made a part hereof as Exhibit "A."

note (Ms. Bialek was informed that she was absent for a total of 111 days for personal illness in 1983-84. Thirty-eight and one-half days were allowed, resulting in a net deduction of salary for 72 and one-half days. The letter referred to as Exhibit A is attached to J-1 and is incorporated herein by reference.)

6. On or about June 28, 1984, Bialek was notified on behalf of the Board, in writing, that the Board had voted at its June 27, 1984 meeting to withhold her "increment/adjustment" for the 1984-85 academic year. The reason for the withholding was stated as "absent over 50 days." A copy of the aforementioned communication, dated June 28, 1984, is annexed hereto and made a part hereof as Exhibit "B."

note (This letter, referred to as Exhibit B, is attached to J-1 and is incorporated herein by reference.)

7. Bialek returned to work on September 4, 1984.

8. The first reading of Board Policy No. 334 entitled "Withholding Increments/Adjustments" was read at the June 8, 1983 meeting of the Board. A copy of Board Policy No. 334 as read on the aforementioned dated is annexed hereto and made a part hereof as Exhibit "C."

note (The document referred to as Exhibit C is attached to J-1 and is incorporated herein by reference.)

9. On August 3, 1983, Board Policy No. 334 entitled "Withholding Increments/Adjustments" was adopted by the Board. A copy of Board Policy No. 334 as formally adopted is annexed hereto and made a part hereof as Exhibit "D."

note (The document referred to as exhibit D is attached to J-1 and is incorporated herein by reference. In addition, the text of Board Policy No. 334 is hereafter set out at length in this decision.)

10. A copy of the relevant portions of the Board's minutes of August 3, 1983 are annexed hereto and made a part hereof as Exhibit "E."

note (The document referred to as Exhibit E is attached to J-1 and is incorporated herein by reference.

11. Bialek has not been paid her adjustment increment for the 1984-85 school year.

As to Patrick N. Meehan

1. Petitioner. Patrick N. Meehan (hereinafter referred to as "Meehan"), is a tenured teaching staff member employed by respondent, Board of Education of the Township of Teaneck (hereinafter referred to as "Board").

2. Meehan is a certified Secondary School Teacher of English and French and is on the maximum step of the Board's salary guide for the 1984-85 academic year.

3. During the 1983-84 academic year, Meehan was absent from school commencing on or about March 19. 1984 through June 22, 1984. due to illness.

4. The Board does not challenge Meehan's representation that the aforementioned absences were due to illness.

5. The Board charged petitioner with ten accumulated sick days and deducted the remaining 60 and one-half days from petitioner's salary. A copy of a communication, dated June 22, 1984, to Meehan from Rothman, Payroll Supervisor, setting forth the total days absent, sick days charged and days deducted from pay, is annexed hereto and made a part hereof as Exhibit "A."

note (Mr. Meehan was informed that he was absent for a total of 70 and one-half days for personal illness in 1983-84. Ten days were allowed, resulting in a net deduction of salary for 60 and one-half days. The letter referred to as Exhibit A is attached to J-2 and is incorporated herein by reference.)

6. On or about June 28, 1984, Meehan was notified on behalf of the Board, in writing, that the Board had voted at its June 27, 1984 meeting to withhold his "increment/adjustment" for the 1984-85 academic year. The reason for the withholding was stated as "absent over 50 days." A copy of the aforementioned communication, dated June 28, 1984, is annexed hereto and made a part hereof as Exhibit "B."

note (This letter, referred to as Exhibit B, is attached to J-2 and is incorporated herein by reference.)

7. Meehan returned to work on September 4, 1984.

8. The first reading of Board Policy No. 334 entitled "Withholding Increments/Adjustments" was read at the June 8, 1983 meeting of the Board. A copy of the Board Policy No. 334 as read on the aforementioned date is annexed hereto and made a part hereof as Exhibit "C."

note (The document referred to as exhibit C is attached to J-2 and is incorporated herein by reference.)

9. On August 3, 1983, Board Policy No. 334 entitled "Withholding Increments/Adjustments" was adopted by the Board. A copy of Board Policy No. 334 as formally adopted is annexed hereto and made a part hereof as Exhibit "D."

note (The document referred to as Exhibit D is attached to J-2 and is incorporated herein by reference. In addition, the text of Board Policy No. 334 is hereafter set out at length in this decision.)

10. A copy of the relevant portions of the Board's minutes of August 3, 1983 are annexed hereto and made a part hereof as Exhibit "E."

note (The document referred to as Exhibit E is attached to J-1 and is incorporated herein by reference.

11. Meehan has not been paid his adjustment increment for the 1984-85 school year.

The Board Policy, No. 334, being challenged by the petitioners, who claim that it is arbitrary, capricious and unreasonable, and that it exceeds the Board's discretionary managerial authority, is as follows:

WITHHOLDING INCREMENTS/ADJUSTMENTS

1. The Board shall withhold the employment increment and the adjustment increment of all teaching staff members who shall be on an uncompensated leave for fifty or more school days in any school year for 10 month employees and sixty or more days in any school year for 12 month employees. Such uncompensated leave shall include but not be limited to child rearing leave, medical leaves, home duties leave, and education leave.

2. The Board shall withhold the employment increment and the adjustment increment for all teaching staff members who are absent for twenty or more school days in three consecutive years. Such absenteeism may take the form of either compensated leave or uncompensated leave or both. The increment and adjustment shall be withheld in the fourth year following any three consecutive years of absenteeism as stated herein.

Adopted August 3, 1983, effective August 4, 1983.

In support of their positions, petitioners relied almost entirely on the contents of the three joint exhibits, J-1, J-2 and J-3, that had been marked in evidence. Each of them testified individually to the circumstances surrounding the increment withholding. Both petitioners indicated that the administrative staff recommended that their increments be granted, and that no adverse recommendations were contained in their performance evaluations. However, the Superintendent of Schools and the Board did not adopt those recommendations, voting to withhold the increments, based upon an application of Policy No. 334.

Alden Spencer Denham, Assistant Superintendent of Schools, testified for the Board. He explained the background and rationale for the adoption of policy no. 334. Mr. Denhan said that there was a growing problem of staff absenteeism over the years, which had an adverse effect on student progress. Even though substitutes were often available to fill in for absent teachers, the administration felt that substitute teachers could not possibly perform up to the standards of the regular teachers. In order to counteract the unaccceptably high rate of absenteeism, the administration and the Board decided to adopt an increment withholding policy and standard that would be applied to excessive absenteeism by the teachers. Increment withholding was adjudged to be a suitable plan because annual increments are designed to be a reward for meritorious service, and reliable attendance is an important component of meritorious service. The assistant superintendent stated that the policy provides for withholding an increment after a teacher is absent for 50 or more days beyond permitted absences. At that point the service rendered by a teacher is noticeably less than satisfactory, because of the

accumulation of staff and educational problems. He also said that parents and children became aware of those teachers who are habitually absent, and they choose not to select those classes.

Mr. Denham also referred to formal advice that the district received from the State Department of Education, informing the administration and the Board that the teacher absence rate was excessive (exhibit R-3). That advice was the result of interviews and visitations by State Department of Education staff to all schools in the district. Although it was recommended that the Teaneck schools be certified for an additional period of five years, it was specifically noted that the rate of staff absenteeism was unacceptable. The district was asked to formulate an attendance improvement plan. The State survey indicated that the rate of absenteeism was 4.6 percent. The proper rate for certified staff should be no greater than 3.5 percent.

When asked about the details surrounding the selection of 50 days or more of absence as the increment withholding standard in the policy, Mr. Denham stated that the 50 days does not begin to be counted until all accumulated sick time is first exhausted. He also said that 50 days was selected because, after consideration, he thought that such a number was more than generous. Although not specifically mentioned in the text of the policy, another exemption that is not calculated in the 50 days is absence covered by Workers' Compensation. Mr. Denham explained by saying that, although the effect on the students is just as bad, the exception is made because such absences are caused by injuries on the job.

Mr. Denham testified to one additional fact dealing with the application of the policy to both petitioners. The increment withholding action contemplated by the policy applies to both the employment increment (steps up in the salary guide) and the adjustment increment (the negotiated contract increase). In this case both petitioners were at the maximum step on the employment guide. Therefore, only their adjustment increment was affected by the Board's action.

Upon being questioned further, Mr. Denham acknowledged that he had no documentary or empirical evidence to prove that teacher absenteeism had an adverse effect on the students or that the use of substitute teachers is less effective than the steady, uninterrupted attendance of regular classroom teachers.

Judith L. Macnow, a member of the Board and member of the Board's policy committee, testified further about the formulation of policy no. 334, from the point of view of the Board members. She stated that once the Board became aware of the problem of excessive teacher absenteeism, it decided that there was a definite need for remedial action plus reasonable standards to govern the implementation of such action. Ms. Macnow stated that many meetings and conferences were held by the Board over a period of months before deciding on the details of policy no. 334. Two public meetings were held in the summer of 1983 preceding the adoption of the policy, and no comments were received from the public or from the teachers association.

Ms. Macnow said that the Board felt that the 50-day guideline was fair and reasonable, based upon the fact that the school year was 183 days and all paid, current and accumulated sick leave was first excluded. She also testified that the Board sought and received absenteeism policy information from other school districts in the area, some of which had established policies that were approximately the same as no. 334.

FINDINGS OF FACT

All of the uncontroverted facts (in addition to those numerically stipulated above) set forth in the foregoing discussion are found to be **FACTS** herein, including the number of days each of the petitioners was absent during the year in question. The following is also found to be a **FACT**.

The sole reason for the Board's increment withholding action was an application of the standard in policy no. 334, because each petitioner was absent for more than 50

school days in the school year, over and above permitted and accumulated sick leave, as discussed above.

CONCLUSIONS OF FACT AND LAW

Basically, the petitioners are attacking the legality and reasonableness of policy no. 334 and its automatic application by the Board as a standard. The petitioners do not claim that the number and frequency of their absences in 1983-84 were not excessive. They do not deny that the quantity of their absences could reasonably have been considered to be clearly excessive if dealt with by the Board on an individual basis, rather than by application of an overall standard, as contained in policy 334. Such a finding is within the scope of the Board's managerial authority.

N.J.S.A. 18:29-14 provides 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 . . . .

The standard for review of a Board's action pursuant to the statute is set forth in Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960), where the court stated that "the scope of the Commissioner's review is . . . not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions" (Kopera at 296).

In Bernards Township Board of Education v. Bernard's Township Education Association, 79 N.J. 311 (1979), the Supreme Court provided additional guidance concerning the withholding of salary increments. In reviewing N.J.S.A. 18A:29-14, the Supreme Court stated as follows:

> The purpose of the statute is thus to reward only those who have contributed to the educational process thereby encouraging high standards of performance. In determining whether to withhold a salary increment, a local board is therefore making a judgment concerning the quality of the educational system. It is reasonable to assume that an adversely affected teacher will strive to eliminate the causes or bases of "inefficiency." The decision to withhold an increment is therefore a matter of essential managerial prerogative delegated which has been by the Legislature to the Board (citations omitted, at page 321).

Furthermore, it is also well recognized that a petitioner who appeals an action of a board in withholding a salary increment has the burden of proof in proving that it was unreasonable for the board to withhold the increment based upon the supporting facts. Kopera, supra.

The courts have also concluded that it is not unreasonable for a board of education to conclude that absenteeism can diminish a teacher's effectiveness, and therefore excessive absenteeism may certainly be sufficient reason for the withholding of an increment. Trautwein v. Board of Ed. of the Borough of Boundbrook, N.J. App. Div. April 8, 1980 A-2773-78 (unreported) certif. denied 84 N.J. 469 (1980). Furthermore, the Commissioner and the courts have upheld board action in withholding increments where excessive absenteeism was found, even if based upon legitimate medical reasons. Trautwein, supra. Angelucci and Nehemiah v. West Orange Board of Education, 1980 S.L.D. 1066, aff'd Comm'r of Ed. 1980 S.L.D. 1077, aff'd State Board of Education February 4, 1981. Montville Twp. Education Association v. Montville Twp. Board of Education, 1984 S.L.D. _____, State Board of Education November 7, 1984.

In essence, the Board argues that policy no. 334 constitutes a rational approach to the excessive absenteeism problem, and that it represents a considered reasoned judgment arrived at as a standard approach to defining excessive absenteeism for all of the teaching staff members. If the Board's reasoning in fixing and adopting the standard is accepted, then any action taken under that reasonable policy should not be considered unreasonable or arbitrary in its nondiscriminatory application.

On the other hand, the petitioners claim that the increment withholding action by the Board in accordance with policy no. 334 was arbitrary, capricious, unreasonable and unlawful. They base this claim to a great extent upon the holding of the State Board of Education in Marilyn Kuehn v. Board of Education of the Twp. of Teaneck, 1983 S.L.D. _____ State Board of Education, February 1, 1983. There, the Teaneck Board of Education applied an unwritten policy that provided that any absences by a teacher exceeding 90 days a year would result in forfeit of the increment, without consideration of particular circumstances for the absences. Only Workers' Compensation cases and unpaid leaves of absence were excepted from the unwritten policy. The State Board reversed the board's withholding of Kuehn's increment, stating that the board should not have determined that the petitioner's absences exceeding a total of 90 days was sufficient, in and of itself, for withholding the increment, without considering the circumstances. That action was held to be arbitrary and without any demonstrated rational basis. The State Board also held that the board had violated Kuehn's statutory entitlement to use her annual and accumulated sick leave under N.J.S.A. 18A:30-1 and 18A:30-3. The holding in Kuehn was also cited with approval by the State Board in Montville, supra.

The facts in the case at hand are distinguishable from those in Kuehn. Here, the Board of Education went to great lengths to adopt a formal written policy, after giving due consideration to the problems created by overall excessive absenteeism on the part of teaching staff members. Public hearings were held, and practices in other districts were studied. The State Board of Education had provided an impetus for the Board's action in formulating the policy when it criticized the excessive absenteeism in the district and asked for a plan to improve the situation. All of those factors were absent in Kuehn.

> We are constrained to observe that board personnel policies should be carefully considered, prepared in written form, and publicly proposed and adopted by boards of education. Such was not the case with this practice, which had not existed in written form, nor had it been adopted by the Teaneck Board of Education. . . Kuehn at page 3.

Another important difference between the situation here and that in Kuehn involves the exemptions built into policy no. 334. The 50 days of absence affected by the policy do not begin to be counted until after a teacher has exhausted all of his or her statutory, accumulated or other authorized absences or paid leave time. The State Board holding in Kuehn was in large part predicated on the obvious invasion into the teachers' statutory entitlement by the unwritten policy. That entitlement was carefully preserved in policy no. 334.

> Petitioner, who was seriously ill, was statutorily entitled to use her annual and accumulated sick leave under N.J.S.A. 18A:30-1 and 18A:30-3. Having exercised her statutory right. the board's policy then obviated that stautory entitlement by withholding petitioner's employment increment and adjustment increment for the following school year. Kuehn at 3. 4.

Kuehn disapproves of the practice of increment forfeiture without a statement of reasons under N.J.S.A. 18A:24-14, and solely assessed by sheer number of days, without consideration of the particular circumstances for an absence. Such a practice was held to be arbitrary and without any demonstrated rational basis.

That arbitrary or irrational practice did not occur here. In carefully considering the underlying reasons and problems, and by duly adopting the policy in written form, after public proposal and hearings, the Board in the instant case gave due consideration to the circumstances that caused the problem that the policy is designed to improve. The Board made a rational, considered judgment - - albeit not on an individual basis - - that absence of any teacher for at least one-third of the school year cannot but have a deleterious effect on the educational process, regardless of the reason for the absence. The Board follows that judgment by pronouncing that such a very substantial absence - - which necessarily impedes the educational process - - should not be rewarded. because it is not meritorious service. So long as the standard is rational, reasonable and properly arrived at, its application to the individual teachers, without discrimination. is not irrational and arbitrary.

The petitioners also argue that there was no evidence presented at the hearing that their excessive absences caused any disruption in instruction or had a negative impact upon the students. Ordinary common sense indicates that a teachers continued absence must, at some point, have a negative impact on the learning process. Such a conclusion is aptly summarized in In the Matter of the Tenure Hearing of Catherine Reilly, School District of the City of Jersey City, 1977 S.L.D. 403, where the Commissioner stated:

> Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic program. The entire process of education requires a regular continuity of instruction with a teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process (at 414).

The foregoing rationale has been affirmed in other holdings in similar cases. Ronald S. Kulik v. Board of Ed. of the Town of Montclair, 1983 S.L.D. _____, Commissioner of Education Oct. 3, 1983, affirmed State Board of Education, May 2, 1984; Yvonne Meli v. Board of Education of the Burlington County Vocational - Technical School, Burlington County, 1984 S.L.D. _____, Commissioner of Education May 21, 1984; In the Matter of the Tenure Hearing of Theodore Augustine Burnes, School District of the City of Newark, Essex County, 1984 S.L.D. _____, Commissioner of Education March 8, 1984; In the Matter of the Tenure Hearing of Mary Marshall, School District of the City of Newark, Essex County, 1984 S.L.D. _____, Commissioner of Education August 20, 1984.

In the instant case, 50 days of absence by a teacher over a total period of 183 days in the school year is equal to 27 percent of the total classroom time. That does not include the substantial number of authorized absences that are not computed into the 50 days. There is no question that both of the petitioners were absent from their classrooms for more than one-third of the total school year. That means that the students in the petitioners' classes did not have the benefit of their regular teachers for almost two days out of every week. This hearer draws a strong inference that such a degree of absenteeism by a regular teacher severely hampered the instructional process and constituted a disservice to the students who had a right to expect reliability on the part of their teachers. Any opinion to the contrary is naive, illogical and lacking in consideration or regard for the quality of the educational process. It is unreasonable to prohibit a board from adopting a rational standard that can be applied to all teaching staff members, so long as the absences can be deemed excessive and can result in increment withholding regardless of the reason for the absences. Trautwein, supra. Excessive absenteeism is detrimental to the overall educational scheme. The detriment occurs whatever the reason for the absences.

The petitioners also criticize policy no. 334 because it makes no specific distinction between the withholding of an employment increment and the withholding of the adjustment increment, but requires both to be withheld when the policy is applied.

The applicable statute, N.J.S.A. 18A:29-14, gives the Board discretion to withhold both types of increments. In this case, when the Board formulated the policy, it exercised its managerial prerogative and applied the policy to both the employment and adjustment increments, which it has a statutory right to do. Petitioners argue that the withholding of their adjustment increment bears no rational relationship to the goal of the Board in discouraging absenteeism and reducing the adverse effect of excessive absenteeism upon student progress. In this case, both petitioner teachers were at the maximum step on the salary guide. They were not entitled to any additional employment increments in any event. Therefore, the only increment that could be withheld was the adjustment increment. If petitioners' argument is to be accepted, then the policy could

never be applied to teachers on the maximum step. That is an unrealistic point of view because it would favor teachers on the top step as against others with less seniority. It would also deprive the Board of the ability to use increment withholding as a disciplinary device that can be applied to such teachers.

The sum total of the reasoning advanced by the Board in support of the validity of policy no. 334 is more persuasive, in that it more closely considers the primary goal of the educational system that the petitioners are employed to serve. The teachers have a legitimate concern, to some extent, in desiring to obtain individual treatment. However, there is no evidence of lack of regard for the teacher's rights when the Board established the rational, considered and reasonable standards of minimum attendance in the policy, with a view towards preserving the students' instructional care. If teachers cannot comply with such standards, which in this case seem to be exceedingly liberal in their favor, then they do not deserve to be rewarded for meritorious service that they do not render.

An increment is a reward for meritorious service. After due deliberation and consideration, the Board fixed a reasonable minimum standard of necessary attendance, and stated that a point is reached at or below that minimum attendance where the services are no longer meritorious. Policy no. 334 bears a reasonable relationship to necessary educational goals. The policy is a reasonable exercise of the Board's discretionary authority. It was arrived at with due deliberation, and it considered the effect on the students, after a certain number of teacher absences deemed by the professional staff to be contrary to beneficial educational purposes. The standard that the policy establishes is not unreasonable or arbitrary.

It is therefore **CONCLUDED** that the petitioners have not proven, by a preponderance of the credible evidence, that the Board's withholding of petitioners' adjustment increments for the 1984-85 school year was arbitrary, capricious, unreasonable or unlawful. It is **FURTHER CONCLUDED** that policy no. 334. under which the

increments were withheld, is similarly not unreasonable. arbitrary, lacking in any demonstrated rational basis or otherwise unlawful.

It is therefore **ORDERED** that both petitions be **DISMISSED. WITH PREJUDICE.**

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

May 30, 1985
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

JUN - 4 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 05 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

dm/e

HELENA BIALEK & PATRICK N. MEEHAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioners allege that the judge misinterpreted the issues in this matter. Specifically, they contend that the issue before the Commissioner is not whether their absenteeism on an individual basis may be considered excessive; rather, the issue is whether the Board acted arbitrarily, capriciously and unreasonably in applying Board Policy No. 334 without any consideration of the individual circumstances of each case. Petitioners cite the State Board of Education's decision in Montville, supra, in support of their argument wherein it says:

> "***However, even though this is not a case in which action of the Board is alleged to have interfered with the exercise of the right to take sick leave, we caution the Board that before taking disciplinary action based on its Guidelines, it is required to consider the circumstances of the absences in each case, as well as the number. Kuehn, supra.***"
> (Petitioners' Exceptions, at p.10)

Petitioners disagree with the judge's finding that the facts in the instant matter are distinguishable from Kuehn, supra, in that the Board herein had adopted a formal written policy. They believe that this finding fails to acknowledge the rationale underlying the State Board's decision wherein the State Board held:

> "***For the Teaneck Board to determine that petitioner's absence exceeding 90 days, in and of itself, is sufficient reason for the withholding of increment, without consideration of the particular circumstances for the absence, is arbitrary and without any demonstrated rational basis." (Emphasis supplied.)
> (Petitioners' Exceptions, at p.4)

Further, petitioners except to the judge's holding cited below because they contend there is no foundation in the record to support it. The holding reads:

> "This hearer draws a strong inference that such a degree of absenteeism by a regular teacher severely hampered the instructional process and constituted a disservice to the students who had a right to expect reliability on the part of their teachers. Any opinion to the contrary is naive, illogical and lacking in consideration or regard for the quality of the educational process. It is unreasonable to prohibit a Board from adopting a rational standard that can be applied to all teaching staff members, so long as the absences can be deemed excessive and can result in increment withhholding regardless of the reasons for the absences. Trautwein, supra. Excessive absenteeism is detrimental to the overall educational scheme. The detriment occurs whatever the reason for the absences."
>
> (Initial Decision, ante)

In addition to the above, petitioners object to the judge's finding that Board Policy No.334 represents a rational exercise of the Board's managerial authority because he failed to take into consideration that the policy makes no distinction between the withholding of an employment increment and adjustment increment but rather requires that both be withheld.

The Board urges that the Commissioner adopt the initial decision "based upon its cogent, in-depth analysis of the facts and relevant law" (Reply exceptions, at p. 1) and it points out that petitioners' exceptions raise no factual issue or point of law not adequately addressed in the initial decision.

Upon a review of the record in this matter and the parties' exceptions, the Commissioner concurs with the findings and conclusions of the Office of Administrative Law that (1) petitioners have not borne the burden of proof that their increment withholdings were arbitrary, capricious, unreasonable or unlawful and (2) Board policy is similarly not unreasonable, arbitrary, lacking in demonstrated rational basis or otherwise unlawful for the reasons expressed in the judge's well-reasoned analysis.

The Commissioner agrees with the judge's finding that Kuehn, supra, is distinguishable from the factual circumstances in the instant matter. The Teaneck Board in the present case has adopted a formal written policy after careful consideration and public hearings. The policy as it impacted on the petitioners herein did not interfere with the exercise of their statutorily granted sick leave because it was applied only when they had been absent 50 or more days beyond their accumulative sick leave.

Under the disputed policy, even a new staff member, who assuming arguendo has only 10 sick leave days pursuant to N.J.S.A. 18A:30-2, could be absent nearly one third of a school year and not experience increment withholding because the policy would not trigger such action until there were 60 or more days absence in one year. This can hardly be considered an unreasonable or irrational policy. The Commissioner is in full agreement with the judge's finding that the absence of any teacher for at least one third of the school year cannot but have a deleterious effect on the educational process, regardless of the reason for the absence. As correctly noted by the judge the courts have concluded that (1) it is not unreasonable for a board of education to conclude that excessive absenteeism can diminish a teacher's effectiveness, Reilly, supra; (2) it is therefore sufficient reason for withholding an increment, Trautwein, supra; Meli, supra; and Burns, supra; and (3) that such action has been upheld even where excessive absenteeism is based upon legitimate medical reasons, Trautwein, supra; Angelucci and Nehemiah, supra; Kulik, supra.

In the Commissioner's judgment it cannot be overemphasized that salary increments are to reward only those who have contributed to the educational process as stated by the New Jersey Supreme Court in Bernards Township, supra. If a staff member is not present for an excessive number of days in a given school year, it is reasonable to conclude that such an individual has not been present for a sufficient period of time to earn such a reward, particularly in light of the negative impact on instruction and the need for administrative and supervisory staff to evaluate performance. In the present matter, the Board has established a rational and reasonable standard to judge whether or not a teacher has been present a sufficient number of days to warrant the reward salary increments represent. The fact that the standard policy does not take into consideration individual circumstances is not, in the Commissioner's judgment, in violation of Kuehn, supra, because the standard of excessive absenteeism impacting upon the petitioners is (1) reasonable, (2) arrived at and formally adopted after careful deliberation and public hearings and (3) does not impinge upon any statutory leave entitlement.

The reasonable basis of the aforesaid policy is further confirmed when one views the actions triggered by this policy in the context of not awarding an increment due to failure to meet a minimum prescribed period of service as a pre-condition for salary advancement rather than as a necessarily punitive action. There is little doubt that a board policy or negotiated agreement which required a new employee to be employed for a minimum period of time during an academic year in order to be considered for an increment in the subsequent year would be approved. The Board's policy herein establishes such a minimum and thus, in the Commissioner's view, meets the test of reasonableness.

The Commissioner is unpersuaded by petitioners' argument that the judge failed to take into consideration that the disputed policy makes no distinction between the withholding of an employment

increment and adjustment increment. Such distinction is of no moment because N.J.S.A. 18A:29-14 clearly and unambiguously empowers a board of education to withhold either or both types of increments.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision and as supplemented herein. Notwithstanding this determination, the Commissioner emphasizes that he expresses no judgment regarding part two of Policy No. 334 in that no record was established with respect to that component of the policy. Hence, dismissal of the instant petition does not preclude any future challenge as to the appropriateness or reasonableness of that particular part of the policy.

JULY 19, 1985 COMMISSIONER OF EDUCATION

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 19, 1985

For the Petitioners-Appellants, Aronsohn and Springstead
(Anthony N. Gallina, Esq., of Counsel)

For the Respondent-Respondent, Greenwood and Sayovitz
(Monica E. Olszewski, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We note that the validity of part two of Policy No. 334 was not before the Commissioner or the State Board, and we therefore make no judgment concerning that portion of the policy. However, we caution the Board that its attendance policies must conform to the standards set forth in Kuehn v. Board of Education of Teaneck, decided by the State Board, June 2, 1983 and Montville Twp. Ed. Assn. v. Bd. of Ed. of the Twp. of Montville, decided by the State Board, November 7, 1984.

Maud Dahme opposed.

December 4, 1985

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 0017-85
AGENCY DKT. NO. 483-11/84

OAL DKT. NO. EDU 0166-85
AGENCY DKT. NO. 485-11/84

ZALOTTA WALTER, EVELYN BALL, BARBARA BARON, ROBIN BARRETT JOAN M. BIANCHI, GERTRUDE S. BRENNER, PHYLLIS R. DUMONT, BEVERLY FITTERMAN, GERTRUDE S. GARFIELD, SONDRA GREENSTEIN, HEDY SUE GELLER, RINA GOLDMAN, MARIETTA KALIN, JANE LUND, JANICE MARGOLIS, BEATRICE MARKS, ANNETTE M. MARSEGLIA, JOAN L. MEYERS, JOAN T. MULLIGAN, IRIS POLLOCK, DOROTHEA RODDA, MURIAL ROSEMARIN, BARBARA SCHENCK, IRENE SKULNIK, MALLORY S. STONE,

and

HAROLD RUBIN,

Petitioners

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK,

Respondent

Louis P. Bucceri, Esq., for petitioners
(Bucceri and Pincus, attorneys)

Sidney A. Sayovitz, Esq., for respondent
(Greenwood and Sayovitz, attorneys)

Record Closed: April 15, 1985 Decided: May 16, 1985

OAL DKT. NOS. EDU 0017-85 and EDU 0166-85

BEFORE **WARD R. YOUNG**, ALJ:

Petitioners, tenured teaching staff members (classroom teachers) employed by the Teaneck Board of Education (Board), alleged improper salary guide placement for the 1984-85 school year resulting from the Board's determination not to grant salary credit for part-time non-district or in-district experience as supplemental teachers.

The Board denied any impropriety in reliance on its policy of not granting credit for auxiliary experience when a teacher is placed upon the regular teaching guide, which it states has been long standing.

The matter was transmitted to the Office of Administrative Law on January 2, 1985 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on February 14, 1985 at which the parties agreed to submit the matter for summary decision. Briefs were filed and the record closed on April 15, 1985, the date established for final submissions.

The following facts were stipulated by the parties and are adopted herein as **FINDINGS OF FACT:**

1. Petitioners are tenured teaching staff members in respondent's employ.

2. By resolution on or about August 29, 1984, respondent placed said petitioners on its classroom teachers' salary guide for 1984-85.

3. Said action by respondent included credit, in varying degrees, for teaching or other experience outside of the Teaneck school district as well as credit for classroom teaching experience inside the Teaneck district.

4. Said action did not include salary guide credit for petitioners' experience as so-called Teaneck Auxiliary Teachers (i.e. teachers serving in remedial

capacity under such labels as Title I, Basic Skills, Compensatory Education, Supplemental English as a second language, among others).

5. For the 1984-85 school year, the petitioners have been placed on the salary guide as follows:

Name	Step	Salary
Walter	Column 1, Step 5	$18,702
Ball	Column 2, Step 1	17,518
Baron	Column 3, Step 1	26,437
Barrett	Column 1, Step 4	17,941
Bianchi	Column 2, Step 4	19,246
Brenner	Column 1, Step 2	16,488
Dumont	Column 2, Step 3	18,470
Fitterman	Column 3, Step 6	22,411
Garfield	Column 2, Step 1	17,518
Greenstein	Column 1, Step 3	17,219
Geller	Column 3, Step 6	22,411
Goldman	Column 2, Step 2	17,779
Kalin	Column 1, Step 1	8,114 (half-time)
Lund	Column 4, Step 5	22,739
Margolis	Column 1, Step 8	21,448
Marks	Column 1, Step 3	17,219
Marseglia	Column 1, Step 10	23,540
Meyers	Column 2, Step 2	17,779
Mulligan	Column 2, Step 1	17,518
Pollock	Column 3, Step 5	21,501
Rodda	Column 1, Step 8	21,448
Rosemarin	Column 1, Step 3	17,219
Schenck	Column 1, Step 8	21,448
Skulnik	Column 2, Step 12	24,467
Stone	Column 3, Step 2	19,001
Rubin	Column 1, Step 4	17,941

6. When placed on the salary guide by the respondent, credit was given for education and full-time regular classroom teaching experience in other public school settings. No credit was given for part-time experience in other settings, whether as a regular or auxiliary teacher. The Board states that credit is also not given to regular classroom teachers for past part-time experience in other school settings, whether as a regular or auxiliary teacher.

7. Prior to the 1984-85 school year, the petitioners had the following experience in respondent's school district:

(a) **Zalotta Walter**

1960-1961	classroom teacher	full-time
1961-1962	classroom teacher	full-time
1970-1971	auxiliary teacher	part-time
1971-1972	auxiliary teacher	part-time
1972-1973	auxiliary teacher	part-time
1973-1974	auxiliary teacher	part-time
1974-1975	auxiliary teacher	part-time
1975-1976	auxiliary teacher	part-time
10/76-01/77	auxiliary teacher	part-time
01/77-05/77	auxiliary teacher	full-time
1977-1978	auxiliary teacher	part-time
1978-1979	auxiliary teacher	part-time
1979-1980	auxiliary teacher	full-time
1980-1981	auxiliary teacher	full-time
1981-1982	auxiliary teacher	full-time
1982-1983	auxiliary teacher	full-time
1983-1984	classroom teacher	full-time

(b) **Evelyn Ball**

1967-1968	auxiliary teacher	part-time
1968-1969	auxiliary teacher	part-time
1969-1970	auxiliary teacher	part-time
1970-1971	auxiliary teacher	part-time
1971-1972	auxiliary teacher	part-time
1972-1973	auxiliary teacher	part-time
1973-1974	auxiliary teacher	part-time
1974-1975	auxiliary teacher	part-time
1975-1976	auxiliary teacher	part-time
1976-1978	auxiliary teacher	part-time
1978-1979	auxiliary teacher	part-time
1979-1980	auxiliary teacher	part-time
1980-1981	auxiliary teacher	part-time
1981-1982	auxiliary teacher	part-time
1982-1983	auxiliary teacher	part-time
1983-1984	auxiliary teacher	part-time (3 hours/day)

(c) **Barbara Baron**

03/72-05/82	auxiliary teacher	part-time
1972-1973	auxiliary teacher	part-time
1973-1974	auxiliary teacher	part-time
1974-1975	auxiliary teacher	part-time
1975-1976	auxiliary teacher	part-time
1976-1977	auxiliary teacher	part-time
1977-1978	auxiliary teacher	part-time
1978-1979	auxiliary teacher	part-time
1979-1980	auxiliary teacher	part-time
1980-1981	auxiliary teacher	part-time
1981-1982	auxiliary teacher	part-time
09/82-1/31/82	auxiliary teacher	full-time
01/1/83-6/30/83	special ed teacher	full-time
1983-1984	classroom teacher	full-time

(d) **Robin Barrett**

09/76-05/77	auxiliary teacher	part-time
1977-1978	auxiliary teacher	part-time
1979-1980	auxiliary teacher	part-time
1980-1981	auxiliary teacher	full-time
09/17/81-1/20/82	auxiliary teacher	part-time
01/21/82-6/4/82	auxiliary teacher	full-time
1982-1983	auxiliary teacher	part-time
1983-1984	classroom teacher	full-time

(e) **Joan M. Bianchi**

1954-1957	classroom teacher	full-time
1968-1973	substitute teacher	
1973-1974	auxiliary teacher	part-time
1974-1975	auxiliary teacher	part-time
1975-1976	auxiliary teacher	part-time
1976-1977	auxiliary teacher	part-time
1977-1978	auxiliary teacher	full-time
1978-1979	auxiliary teacher	full-time
1979-1980	auxiliary teacher	part-time
9/18/80-9/26/80	auxiliary teacher	part-time
9/29/80-10/13/80	auxiliary teacher	part-time
10/14/80-4/3/81	auxiliary teacher	full-time
4/3/81-6/13/81	auxiliary teacher	part-time
9/81-1/82	auxiliary teacher	full-time
1/82-6/82	auxiliary teacher	part-time
1982-1983	auxiliary teacher	part-time
1983-1984	auxiliary teacher	part-time (5 hours/day)

(f) **Gertrude S. Brenner**

1978 1979	auxiliary teacher	part-time
1979-1980	auxiliary teacher	full-time
1980-1981	auxiliary teacher	full-time
09/81-02/82	auxiliary teacher	part-time
02/82-06/82	auxiliary teacher	full-time
1982-1983	auxiliary teacher	part-time
1983-1984	auxiliary teacher	part-time (5 hours/day)

(g) **Phyllis R. Dumont**

1967-1968	auxiliary teacher	part-time
1968-1969	auxiliary teacher	part-time
1969-1970	auxiliary teacher	part-time
1970-1971	auxiliary teacher	part-time
1971-1972	auxiliary teacher	part-time
1972-1973	auxiliary teacher	part-time
1973-1974	auxiliary teacher	part-time
1974-1975	auxiliary teacher	part-time
1975-1976	auxiliary teacher	part-time
1976-1977	auxiliary teacher	part-time
1977-5/15/78	auxiliary teacher	part-time
5/16/78-6/20/78	auxiliary teacher	part-time
1978-1979	auxiliary teacher	part-time
1979-1980	auxiliary teacher	full-time
1980-11/80	auxiliary teacher	full-time
11/80-6/30/81	auxiliary teacher	full-time
1981-1982	auxiliary teacher	part-time
1982-1/10/83	auxiliary teacher	part-time
1/10/83-6/83	auxiliary teacher	full-time
9/19/83-12-12/83	auxiliary teacher	part-time (5 hours/day)
12/12/83-1984	classroom teacher	.75 time

(h) **Beverly Fitterman**

3/68-6/68	auxiliary teacher	part-time
1968-1969	auxiliary teacher	part-time
1970-1971	auxiliary teacher	part-time
1971-1972	auxiliary teacher	part-time
1972-1973	auxiliary teacher	part-time
3/75-5/75	auxiliary teacher	part-time
9/75-2/25/76	auxiliary teacher	part-time
2/25/76-6/76	auxiliary teacher	full-time
1976-1977	auxiliary teacher	part-time

1977-1978	auxiliary teacher	part-time
1978-1979	auxiliary teacher	full-time
1979-1980	auxiliary teacher	full-time
1980-1981	auxiliary teacher	*
1981-1982	auxiliary teacher	part-time
1982-1983	auxiliary teacher	part-time
1983-1984	auxiliary teacher	full-time (6 hours/day)

(i) **Gertrude S. Garfield**

1968-1969	auxiliary teacher	full-time
1969-1970	auxiliary teacher	full-time
1970-1971	auxiliary teacher	full-time
1971-1972	auxiliary teacher	part-time
1972-1973	auxiliary teacher	part-time
1973-1974	auxiliary teacher	part-time
1974-1975	auxiliary teacher	part-time
1975-1976	auxiliary teacher	part-time
1976-1977	auxiliary teacher	part-time
1977-1978	auxiliary teacher	part-time
1978-1979	auxiliary teacher	part-time
1979-1980	auxiliary teacher	part-time
1980-1981	auxiliary teacher	part-time
1981-1982	auxiliary teacher	part-time
1982-1983	auxiliary teacher	part-time
9/1/83-9/19/83	auxiliary teacher	part-time (3 hours/day)
9/19/83-1984	auxiliary teacher	full-time (6 hours/day)

*The parties have been unable to stipulate these hours of employment. However, the lack of stipulation does not prevent determination of the 1984-1985 salary.

(j) **Sondra Greenstein**

1977-1978	auxiliary teacher	part-time
1977-1979	auxiliary teacher	part-time
1979-1980	auxiliary teacher	part-time
9/80-10/80	auxiliary teacher	part-time
10/80-6/81	auxiliary teacher	part-time
9/81-1/82	auxiliary teacher	part-time
1/11/82-6/82	auxiliary teacher	part-time
1982-1983	auxiliary teacher	part-time
1983-1984	auxiliary teacher	part-time (4 hours/day)

(k) **Hedy Sue Geller**

1974-1975	auxiliary teacher	part-time
1975-1976	auxiliary teacher	part-time
1976-1977	auxiliary teacher	part-time
1977-1978	auxiliary teacher	part-time
1978-1979	auxiliary teacher	part-time
1979-1980	auxiliary teacher	part-time
1980-1981	auxiliary teacher	part-time
1981-1982	auxiliary teacher	part-time
1982-1983	auxiliary teacher	part-time
1983-1984	auxiliary teacher	part-time (3 hours/day)

(l) **Rina Goldman**

1977-1978	auxiliary teacher	part-time
1978-1979	auxiliary teacher	part-time
1979-1980	auxiliary teacher	part-time
1980-1981	auxiliary teacher	part-time
1981-1982	auxiliary teacher	part-time
1982-1983	auxiliary teacher	part-time
1983-1984	classroom teacher	full-time

(m) **Marietta Kalin**

1972-1973	auxiliary teacher	part-time
1973-1974	auxiliary teacher	part-time
1974-1975	auxiliary teacher	part-time
1975-1976	auxiliary teacher	part-time
1976-1977	auxiliary teacher	part-time
1977-1978	auxiliary teacher	part-time
1978-1979	auxiliary teacher	part-time
1979-1980	auxiliary teacher	part-time
9/80-2/81	auxiliary teacher	part-time
3/81-6/81	auxiliary teacher	full-time
1981-1982	auxiliary teacher	full-time
1982-1983	auxiliary teacher	full-time
1983-1984	auxiliary teacher	part-time (3 hours/day)

(n) **Jane M. Lund**

1966-1967	classroom teacher	full-time
1967-3/15/68	classroom teacher	full-time
1969-1970	auxiliary teacher	part-time
1970-1971	auxiliary teacher	part-time
1971-1972	auxiliary teacher	part-time
1972-1973	auxiliary teacher	part-time
1973-1974	auxiliary teacher	part-time
1974-1975	auxiliary teacher	part-time
1975-1976	auxiliary teacher	part-time
1976-1977	auxiliary teacher	part-time
1977-1978	auxiliary teacher	part-time
1978-1979	auxiliary teacher	part-time
1979-1980	auxiliary teacher	part-time
1980-1981	auxiliary teacher	part-time
1981-1982	auxiliary teacher	part-time
1982-1983	auxiliary teacher	part-time

1982-1983	auxiliary teacher	part-time
1983-1984	classroom teacher	full-time

(o) **Janice Margolis**

1965-1966	substitute teacher	
1966-1967	classroom teacher	part-time
1967-1968	classroom teacher	part-time
1968-1969	classroom teacher	part-time
1969-1970	classroom teacher	part-time
1970-1971	classroom teacher	part-time
1971-1972	classroom teacher	part-time
1972-1973	auxiliary teacher	part-time
1973-1974	auxiliary teacher	part-time
1974-1975	auxiliary teacher	part-time
1975-1976	auxiliary teacher	part-time
1976-1977	auxiliary teacher	part-time
1977-1978	auxiliary teacher	part-time
1978-1979	auxiliary teacher	part-time
1979-1980	auxiliary teacher	part-time
1980-1981	auxiliary teacher	part-time
1981-1982	auxiliary teacher	part-time
1982-1983	auxiliary teacher	full-time
1983-1984	classroom teacher	full-time

(p) **Beatrice Marks**

9/1/69-2/28/77	Kindergarten/Primary Aide (noncertified position)
3/7/77-6/24/77	classroom teacher (long-term substitution)
9/1/77-6/30/78	primary aide (noncertified position)

9/15/78-9/21/78	auxiliary teacher	part-time
9/22/78-6/30/79	classroom teacher	half-time
1979-1980	auxiliary teacher	part-time
1980-1981	auxiliary teacher	part-time
9/1/81-5/21/82	auxiliary teacher	part-time
1/11/82-4/21/82	auxiliary teacher	part-time
4/22/82-5/14/82	auxiliary teacher	part-time
5/14/82-5/21/82	auxiliary teacher	full-time
5/22/82-6/10/82	auxiliary teacher	part-time
9/1/82-6/30/83	auxiliary teacher	part-time
1983-1984	classroom teacher	half-time

(q) **Annette M. Marseglia**

2/28/77-6/30/77	auxiliary teacher	part-time
1979-1980	Kindergarten Title I	half-time
11/3/80-6/81	auxiliary teacher	part-time
9/17/81-6/4/82	auxiliary teacher	part-time
1982-1983	auxiliary teacher	part-time
1983-1984	auxiliary teacher	part-time

(r) **Joan L. Meyers**

1973-1974	auxiliary teacher	part-time
1974-1975	auxiliary teacher	part-time
1975-1976	auxiliary teacher	part-time
1976-1977	auxiliary teacher	part-time
1977-1978	auxiliary teacher	part-time
1978-1979	auxiliary teacher	full-time
1979-1980	auxiliary teacher	part-time
1980-1981	auxiliary teacher	part-time
1981-1982	auxiliary teacher	part-time
1982-1983	auxiliary teacher	part-time
1983-3/5/84	auxiliary teacher	part-time (3 hours/day)
3/5/84-6/84	auxiliary teacher E.S.L. teacher and classroom teacher	part-time (5 hours/day) (5 hours per week) (2-4 hours per week)

(s)	**Joan T. Mulligan**		
	9/70-6/74	substitute in special services classes	
	1974-1975	auxiliary teacher	part-time
	1975-1976	auxiliary teacher	part-time
	1976-1977	auxiliary teacher	part-time
	1977-1978	auxiliary teacher	part-time
	1978-1979	auxiliary teacher	part-time
	1980-1981	auxiliary teacher	part-time
	1981-1982	auxiliary teacher	part-time
	1982-1983	auxiliary teacher	part-time
	1983-1984	auxiliary teacher	part-time (3 hours/day)
(t)	**Iris Pollack**		
	3/78-5/78	auxiliary teacher	part-time
	9/78-6/79	auxiliary teacher	part-time
	9/79-6/80	auxiliary teacher	part-time
	9/80-2/81	auxiliary teacher	part-time
	2/81-6/81	auxiliary teacher	full-time
	1981-1982	auxiliary teacher	part-time
	9/82-1/10/83	auxiliary teacher	part-time
	1/10/83-6/83	auxiliary teacher	full-time
	1983-1984	classroom teacher	full-time
(u)	**Dorothea Rodda**		
	1946-1949	classroom teacher	full-time
	2/1/61-6/61	classroom teacher	full-time
	1961-1962	classroom teacher	full-time
	1962-1963	classroom teacher	full-time
	1963-3/31/64	classroom teacher	full-time
	1969-1970	classroom teacher	full-time
	1969-1970	auxiliary teacher	full-time

1970-1971	auxiliary teacher	part-time
1971-2/72	auxiliary teacher	part-time
2/72-6/72	classroom teacher	full-time
1972-1973	auxiliary teacher	part-time
1973-1974	auxiliary teacher	part-time
1974-1975	auxiliary teacher	part-time
1975-1976	auxiliary teacher	part-time
1976-1977	auxiliary teacher	part-time
1977-1978	auxiliary teacher	part-time
1978-1979	auxiliary teacher	part-time
1979-1980	auxiliary teacher	part-time
1980-1981	auxiliary teacher	part-time
1981-1982	auxiliary teacher	part-time
1982-1983	auxiliary teacher	part-time
9/83-2/14/84	auxiliary teacher	part-time (3 hours/day)
2/15/84-6/84	auxiliary teacher	full-time (6 hours/day

(v) **Muriel Rosemarin**

1966-1967	substitute teacher	
1967-1968	substitute teacher	
1968-1969	auxiliary teacher	part-time
1969-1970	auxiliary teacher	part-time
1970-1971	auxiliary teacher	part-time
1971-1972	auxiliary teacher	part-time
1972-1973	auxiliary teacher	part-time
1973-1974	auxiliary teacher	part-time
1974-1975	auxiliary teacher	part-time
1975-1976	auxiliary teacher	part-time
1976-1977	auxiliary teacher	part-time
1977-1978	auxiliary teacher	part-time
1978-1979	auxiliary teacher	part-time
1979-1980	auxiliary teacher	part-time
1980-1981	auxiliary teacher	part-time
1981-1982	auxiliary teacher	part-time

	1982-1983	auxiliary teacher	part-time
	9/83-2/14/84	auxiliary teacher	part-time (3 hours/day)
	2/15/84-6/84	classroom teacher	full-time
(w)	**Barbara Schenck**		
	1968-1969	auxiliary teacher	part-time
	1969-1970	auxiliary teacher	part-time
	1970-1971	auxiliary teacher	part-time
	1971-1972	auxiliary teacher	part-time
	1972-1973	auxiliary teacher	part-time
	1973-1974	auxiliary teacher	part-time
	1974-1975	auxiliary teacher	part-time
	1975-1976	auxiliary teacher	part-time
	1976-1977	auxiliary teacher	part-time
	1977-1978	auxiliary teacher	part-time
	9/78-1/79	auxiliary teacher	part-time
	1/79-6/79	auxiliary teacher	part-time
	9/79-12/79	auxiliary teacher	part-time
	12/79-6/80	auxiliary teacher	part-time
	9/80-2/81	auxiliary teacher	part-time
	2/81-6/81	auxiliary teacher	full-time
	1981-1982	auxiliary teacher	full-time
	9/82-12/31/82	auxiliary teacher	full-time
	1/1/83-6/30/83	special education teacher	full-time
	1983-1984	classroom teacher	full-time
(x)	**Irene Skulnik**		
	9/77-6/78	auxiliary teacher	
	9/78-6/81	auxiliary teacher	
	9/81-6/82	special education teacher classroom teacher	full-time
	9/82-6/83	special education teacher classroom teacher	full-time
	1983-1984	classroom teacher	full-time

(y) **Mallory S. Stone**

1977-1978	auxiliary teacher	part-time
1978-1979	auxiliary teacher	part-time
1979-1980	auxiliary teacher	full-time
1980-1981	auxiliary teacher	full-time
1981-1982	auxiliary teacher	full-time
1982-1983	auxiliary teacher	full-time
1983-1984	classroom teacher	full-time

(z) **Harold Rubin**

1967-1968	auxiliary teacher	part-time
1968-1969	auxiliary teacher	*
1969-1970	auxiliary teacher	*
1970-1971	auxiliary teacher	*
1971-1972	auxiliary teacher	*
1972-1973	auxiliary teacher	*
1973-1974	auxiliary teacher	*
1974-1975	auxiliary teacher	*
1975-1976	auxiliary teacher	*
1976-1977	auxiliary teacher	*
1977-1978	auxiliary teacher	*
1978-1979	auxiliary teacher	*
1979-1980	auxiliary teacher	full-time
1980-1981	classroom teacher	full-time
1981-1982	classrroom teacher	full-time
1982-1983	auxiliary teacher	full-time
1983-1984	auxiliary teacher	full-time (6 hours/day)

*The parties have been unable to stipulate these hours of employment. However, the lack of stipulation does not prevent determination of the 1984-85 salary.

8. In addition to their employment service in the school district, the following petitioners have teaching experience outside the Teaneck school system (unless otherwise noted, all service is in public schools):

Ball	-	None
Baron	-	7 years (1958-59 to 1964-65) in Paramus, New Jersey
Barrett	-	2 years (1965-66 and 1966-67) in New York City
Bianchi	-	None
Brenner	-	1 year in Livingston, New Jersey and 6 years in Bogota, New Jersey
Dumont	-	February - June 1955 in New York City January 1966 - June 1967 as a supplemental teacher in another district
Fitterman	-	September 1951 - June 1953 in Palisades Park, New Jersey; September 1953 - May 1954 and October 1956 - June 1957 in New York City; 5 months in Skoki, Illinois; 4 years 1969-1973 as a part-time supplemental teacher in Lodi, New Jersey
Garfield	-	2 years (1966-67 and 1967-68) as a supplemental teacher in Fair Lawn, New Jersey
Greenstein	-	2 years (1965-1966 and 1966-1967) in New York City
Geller	-	4 1/2 years in New York City
Goldman	-	None
Kalin	-	None
Lund	-	None
Marseglia	-	7 years (1953-1954 to 1959-1960 in South Orange - Maplewood and 2 years in Title I work in Hackensack, New Jersey (1977-1978 and 1978-1979)
Meyers	-	1 year (1955-1956) in Baltimore, Maryland
Mulligan	-	*

Pollock	-	4 years in New York
Rodda	-	1 year (1945-1946) in the Fair Lawn system
Rosemarin	-	1 year (1962-1963) in private school
Schenck	-	5 years (1955-1956 to 1959-1960) in Oradell, New Jersey
Skulnik	-	*
Stone	-	None
Walter	-	January-June 1960 in Albermarle, North Carolina; January-June 1978 (2 1/2 hours/day) in Leonia, New Jersey

9. A copy of the collective bargaining agreement between the Teaneck Board of Education and Teaneck Teachers' Association for the period 1982-1983 through 1984-1985 is attached hereto as Exhibit J-1.

10. A copy of respondent's resolution of August 29, 1984 establishing petitioners' salaries for the 1984-1985 school year is attached hereto as Exhibit J-2.

11. A copy of the salary guide in the district for the 1984-85 school year is attached hereto as Exhibit J-3.

12. Teachers employed by the respondent are given salary guide credit for service in the district in part-time classroom teaching positions.

ARGUMENTS OF COUNSEL

Petitioners assert they are entitled to credit for service as auxiliary teachers for current salary guide placement, each now being employed as regular classroom teachers.

* The parties cannot stipulate as to Mulligan and Skulnik's history. Petitioners will submit their contentions by affidavit.

They argue the Board's denial of said credit is not based on a duly adopted policy and is therefore arbitrary, and cite in support thereof Siebold v. Bd. of Ed. of Oakland, 1980 S.L.D. 520, aff'd State Bd. of Ed., 1980 S.L.D. 527, aff'd Superior Court, Appellate Division, Dkt. No. A-787-80 (June 3, 1981); McAllen v. Bd. of Ed. of North Arlington, 1975 S.L.D. 90, aff'd State Bd. of Ed. 1975 S.L.D. 92; Ford v. Bd. of Ed. of South Hackensack, 1980 S.L.D. 616; and Ross v. Bd. of Ed. of Rahway, 1968 S.L.D. 26, aff'd State Bd. of Ed., 1968 S.L.D. 29. The Commissioner said in Ross:

> The adoption by respondent . . . of a "Salary Guide" . . . under which teachers would be eligible to receive the salary amounts named therein for the various levels of training and experience. Nothing appears in the guide, or the policy statement included therein, which would limit the amount . . . a teacher would be entitled in my one year . . . .
>
> In the instant matter respondent relies upon a traditional past policy, known to petitioner, ... In the Commissioner's judgment, the fact that such a traditional practice was well known to petitioner does not diminish the effect of respondent's failure to include it in its statement of policy. (at 28)

Petitioners also cite Hoboken Bd. of Ed. v. Temple, 1982 S.L.D. _____ (decided December 2, 1982) wherein the Board denied salary guide credit for respondent's service as a remedial teacher when employed as an elementary classroom teacher, and the Commissioner found no basis for a distinction for salary credit. They do point out a contrasting decision in Gratta v. Fairview Bd. of Ed., 1983 S.L.D. ____ (decided Juen 9, 1983), aff'd State Bd. of Ed. 1983 (S.L.D. _____ (decided September 7, 1983), but distinguish between the two as in the latter a specific limitation on the use of certain forms of teaching experience for salary guide placement was incorporated in the collective bargaining agreement.

Petitioners finally argue for the relief claimed by application of the doctrine of res judicata, and cite as the controlling case Evelyn Ball, et al. v. Bd. of Ed. of the Twp. of Teaneck, 1984 S.L.D. _____ (decided August 31, 1984).

The Board argues two separate salary schedules have existed for auxiliary and regular classroom teachers since 1980-1981 and similarly, the Board's policy of not granting credit for auxiliary experience when a teacher is placed upon the regular teaching guide has been long standing. Although the Board recognizes out of district full time experience for placement on either guide, part time experience receives no recognition on either.

The Board also relies on Hyman, et al. v. Teaneck Bd. of Ed., 1983 S.L.D. _____ (decided August 15, 1983), rev'd State Bd. of Ed., 1985 S.L.D. _____ (decided March 6, 1985), and argues the inapplicability of Ball as the determination of the Commissioner therein was based on Hyman which was reversed by the State Board.

The Board finally relies on Bloomingdale Teachers' Association, et al. v. Bd. of Ed. of the Borough of Bloomingdale, 1981 S.L.D.. _____ (decided March 3, 1981) to counter the petitioners' argument that a policy must be written and adopted to be valid.

DISCUSSION

The gravamen of this dispute is whether petitioners, upon appointment as classroom teachers, are entitled to receive salary credit for prior experience in or out of district as part time teachers.

Since the parties stipulated that out of district part time experience was not recognized by the Board, disparate treatment of teachers is not at issue in that regard.

However, since in district part time classroom experience is recognized by the Board, the Board's failure to give that same recognition for part time experience as auxiliary or supplemental teachers (usually characterized as Title I teachers) is indeed at issue.

Since petitioners are now classroom teachers, and not auxiliary teachers, the negotiated agreement (1982-1985) entitled Teachers Agreement is applicable concerning salary regulations. The Auxiliary Instructors Agreement is not applicable.

Schedule D4 - Salary Regulations states:

> A. General
>
> 1. a. Upon entering the system, the step on the guide will be determined by degree of training and length of experience.
>
> . . .
>
> 4. All teachers will be placed on the appropriate step of the guide as noted in regulation number 2 above.

It is noted that "number 2 above" addresses increment withholding. It is also noted that no mention is made of salary credit for prior teaching experience in the 108 pages of the agreement other than that alluded to in 1.a above.

The Board's reliance in Hyman is misplaced as it is simply not on point, as the State Board stated:

> Whether supplemental teachers who are covered by a separate negotiated salary guide are entitled to placement on the guide for "regular" teaching staff members is the issue presented in this appeal.(slip opinion at 1)

The petitioners herein are no longer supplemental teachers, but regular classroom teachers.

Decisional law in Siebold, McAllen, Ford, and Ross would appear to negate the applicability of the Board's unwritten, unadopted policy of no recognition for in-district supplemental experience except for the more recent decision of the Commissioner in Bloomingdale in affirmation of the initial decision, wherein it was stated:

> It is further **CONCLUDED** that, because the long-standing proven policy and standard is fair, reasonable and consistently applied, lack of actual communication of it to all staff members does not, in and of itself, render it void, because no prejudice results therefrom. If the policy had been generally disseminated and disclosed, there could have been no complaint about it when used; and all of the factors in favor of upholding the validity of the stated policy outweigh any imagined disadvantages that resulted from its restricted disclosure. (slip opinion at 6)

Ball was concerned with salary guide placement for its petitioners, some of whom were classroom teachers and others who were auxiliary teachers. All petitioners in the instant matter are classroom teachers and were petitioners in B . Eight other petitioners in Ball presumably remained as supplemental teachers, left the employment of the Board, or chose not to litigate the issue if they did become classroom teachers. The Commissioner said in that matter:

> The Commissioner has determined that experience as a supplemental or auxiliary teacher is to be included in determining proper placement on a salary guide. New Milford, supra; Fair Lawn, supra; Bennett, supra; Hoboken, supra.

and

> It is clear to the Commissioner that for the teacher employed for less than a full year or fewer periods than full time, such time is considered for proper salary guide placement on a pro rata basis. Fair Lawn, supra; Bennett, supra; New Milford, supra. (slip opinion at 20)

CONCLUSIONS OF LAW

The State Board granted the Board's Motion for Stay pending a decision on the merits in Ball on March 6, 1985. However, until such time as the Commissioner is reversed, the law requires that classroom teachers receive salary credit for in-district experience as a supplemental or auxiliary teacher. Ball, New Milford, Fair Lawn, Bennett, and Hoboken.

Stipulation #3 clearly states that salary credit is granted "for classroom teaching experience inside the Teaneck district." Since said credit is denied for supplemental or auxiliary experience inside the Teaneck district, I **FIND** the unwritten, unadopted, long-standing policy to be unfair and unreasonable which negates the applicability of Bloomingdale. I, therefore, **FIND** Siebold, McAllen, Ford and Ross applicable.

Since the Commissioner has already determined that petitioners are to receive salary credit on the teachers salary guide for prior service in the district as supplemental or auxiliary teachers, I **FURTHER FIND** the doctrine of res judicata applicable in the instant matter.

I **CONCLUDE**, therefore, that summary decision is **GRANTED** to petitioners and **DENIED** the Board.

Although 1984-85 salary guide placement and the employment records of petitioners are stipulated in the record, the record is void of specificity to determine proper salary guide placement on a pro rata basis.

The parties are hereby **ORDERED** to confer and amicably determine proper salary guide placement in recognition of and limited to: a) full time out of district classroom experience, b) in-district experience on a pro rata basis; and to grant proper remuneration to petitioners prospectively from September 1, 1984.

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

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

16 May 1985
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

MAY 20 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 21 1985
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

g

ZALOTTA WALTER ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The parties' exceptions to the initial decision as well as petitioners' reply to exceptions have been filed with the Commissioner pursuant to N.J.A.C. 1:1-16.4a, b, and c.

Initially, it is observed that petitioners' exceptions to the initial decision point out certain omissions or typographical errors regarding Irene Skulnik's salary compensation and salary guide placement. (Initial Decision, ante). Petitioners aver that Skulnik's salary is actually $27,467 as determined by Board resolution (J-2, at p. 44) and the appropriate step on its salary guide (J-3).

Additionally, petitioners' exceptions relative to errors contained in the initial decision read as follows:

> "***The following errors relative to petitioner, Barbara Baron, should be corrected:
>
> (a) Page 3 - Baron's step placement is listed as 'Step 1' rather than her actual placement on Step 10.
>
> (b) Page 5 - Baron's employment experience should be corrected as follows:
>
> | | |
> |---|---|
> | 3/72 - 5/72 auxiliary teacher | part-time |
> | 9/82 - 12/31/82 auxiliary teacher | full time |
> | 1983-84 Special Ed. Teacher | full time |
>
> "Petitioner Marseglia has eight years of full time teaching experience outside the Teaneck school system. (Page 17)***"
> (Petitioners' Exceptions, at p. 1)

Petitioners urge the Commissioner to affirm the initial decision, however, they request further clarification with regard to their salary guide placement and compensation for the 1984-85 school year in order to avoid any possible future remand should this matter subsequently be taken to the Courts on appeal. Alternatively, the Board in its exceptions to the initial decision argues that the judge ignored the decision in Hyman rendered by the State Board of Education on March 6, 1985 wherein it reversed the Commissioner insofar as it affirmed the Board's use of separate salary schedules for auxiliary teachers and regular classroom teachers. In this regard the Board claims that, as a result of Hyman, it can only be concluded that, when a professional teacher is transferred from one salary schedule to another, the Board is not required to give step-by-step years of salary credit for prior teaching experience. The Board complains that the judge placed undue reliance upon Ball in the initial decision notwithstanding the fact that this case, involving the same petitioners, has been stayed on appeal by the State Board of Education.

Finally, the Board objects to the inordinate emphasis placed upon its long-standing unwritten policy restricting the use of auxiliary teaching service for the purpose of salary guide placement on its regular classroom teacher schedule. Petitioners, the Board contends, were fully aware of the effect of this policy as it pertained to their present status of employment for salary purposes. The emphasis and weight accorded to its policy by the judge herein is considered by the Board to be contrary to the Commissioner's prior holding in Bloomingdale, supra.

In their reply to the Board's exceptions petitioners claim that the Board continues to ignore the significant distinction between issues raised in the State Board's decision in Hyman and those controverted herein. Hyman, petitioners maintain, dealt with the placement of auxiliary teachers on the same guide as full-time classroom teachers. In the current matter, petitioners point to the fact that they are all regular classroom teachers in the Board's employ and are placed on the appropriate salary guide. However, they have been denied proper credit for placement on the regular teachers' salary guide by virtue of the Board's refusal to recognize their prior service in the Teaneck School District as auxiliary teachers. Petitioners argue that the Board's use of an unwritten policy or interpretation to restrict their proper salary guide placement is strictly prohibited. Siebold, supra; McAllen Board of Education of the Borough of North Arlington, 1975 S.L.D. 90, aff'd State Board of Education 92; Ross, supra; Hoboken, supra.

Finally, petitioners in rebutting the Board's exceptions argue as follows in pertinent part:

> "***Hoboken, supra should be contrasted with Gratta v. Bd. of Ed., Fairview, 1983 S.L.D. ____ (June 9, 1983), aff'd State Board of Education 1983 S.L.D. _____ (September 7, 1983), in which credit for service as remedial teachers was

denied because the collective bargaining agreement contained a specific limitation on the use of certain forms of teaching experience for salary guide placement. There is no such express restriction in the present case.

"Throughout the cited cases, the Commissioner, State Board and Appellate Division hold that any limitation or restriction on salary guide placement must be express, specific and a part of the salary guide. One may not apply an unwritten restriction on guide placement. Yet that is precisely what the Board has done in the present case. It utterly refuses to consider petitioners' years of service as auxiliary teachers for determining salary guide placement. However, there is no specific restriction on the use of such service in the salary guides. No policy has been adopted. Petitioners are entitled to credit in the same manner that other teachers are given salary credit for part-time and full time work in the district. See generally, Grossman et al. v. Bd. of Ed., Collingswood, 1981 S.L.D. _____ (February 11, 1983).

"The basic dispute arises from the Board's attempt to treat teaching experience in the school district in two completely different manners. Service as a classroom teacher is creditable for salary purposes while service as a remedial teacher is ignored. Because all other teachers are entitled to include employment service in the school district, there is no basis whatsoever for excluding petitioners' years of auxiliary service for salary guide placement purposes. Indeed, it appears that the respondent places more of a premium on service outside the school district than it does auxiliary service in the district.

"The Board argues that, while unwritten, its alleged policy restricting use of auxiliary service for guide credit was well-known and long standing. There is nothing in the record supporting this claim. The only possible conclusion regarding prior knowledge of some policy arises from the fact that in Ball v. Bd. of Ed., Teaneck, 1984 S.L.D. _____ (August 31, 1984), some teachers raised a similar claim regarding the 1983-84 school year. Clearly, the litigation of the restriction as applied to different teachers in the prior school year hardly constitutes a long standing policy.***"

(Petitioners' Reply, at pp. 2-3)

The Commissioner observes that almost all of the named party petitioners herein are also litigants in the appeals taken in Hyman and Ball against the Board. It must be reiterated at this juncture that the Commissioner's decision in Ball preceded the State Board's decision in Hyman.

The Commissioner cannot ignore the decision rendered by the State Board in Hyman which reversed in part his earlier determination in that matter. More specifically, the pertinent language in Hyman that is determined to be instructive to the Commissioner with regard to these instant proceedings reads as follows:

> "***In the case before us, the salary guide for auxiliary teachers covers full-time as well as part-time auxiliary teachers. See Agreement, Article XVII. The work day of a full-time auxiliary teacher is shorter than the work day of a 'regular' full-time classroom teacher. Compare Auxiliary Instructors' Agreement, Article XVII with Teachers Agreement, Article XXII. However, although the Board is permitted to define 'full-time', see N.J.S.A. 18A:29-6 and N.J.A.C. 6:3-1.13, the clear wording of the compensation statutes provides that the entitlements contained in those statutes accrue to full-time teaching staff members and those statutes do not differentiate between subcategories of full-time members. See N.J.S.A. 18A:29-4.1, -5 and N.J.S.A. 18A:29-6 et seq. We therefore find that full-time auxiliary teachers are full-time teaching staff members within the meaning of the compensation statutes. Thus, we conclude 'that salary schedules applying to them must conform to the requirements of the compensation statutes and that the placement of such teachers must be in accordance with those statutes.
>
> "Here, the schedule for auxiliary teachers sets forth salaries that are less than the comparable salaries for nonauxiliary teaching staff members with similar qualifications and teaching experience, contains fewer steps and does not provide for teaching experience in other public schools. Nor does it provide for military service credit or business experience and extra salary for advanced educational degrees as provided by a set sum added to the basic guide step, rather than being included in the step. See Agreement.
>
> "As set forth above, the compensation statutes do not require that full-time teaching staff members be paid any specific salary, but merely set

minimum salaries. N.J.S.A. 18A:29-5, -7, -12. The schedule in this case satisfies those minimums. Likewise, the statutes do not set forth a required form for incorporating compensation for advanced degrees, but establish salary minimums that are below those agreed to here. See N.J.S.A. 18A:29-7. Nor do the statutes require that salary credit be given for teaching experience outside the district or for experience in business. However, N.J.S.A. 18A:29-11 mandates that up to four years' credit for military service be given to all full-time teaching staff members. Insofar as the salary schedule covering full-time auxiliary teachers in this case fails to credit those teachers for military service, it is deficient and we hold that placement of full-time auxiliary teachers on the guide must include credit for military service as provided by N.J.S.A. 18A:29-11."

"Finally, we reiterate that where a Board, as here, has elected to adopt a salary policy that includes salary schedules for one group of full-time teaching staff members, it must provide schedules for all groups of full-time teaching staff members. N.J.S.A. 18A:29-4.1. By adopting a guide for all auxiliary teachers, including full-time auxiliary teachers, the Board here has fulfilled that requirement. That the guide covering such teachers is not the same as that for another group of full-time teaching staff members does not constitute a violation of the school laws.

"We hold today that the fact that there is a separate negotiated salary guide applying to supplemental teachers does not in itself violate the school laws. Because we find no right to placement on the 'regular' full-time teacher's salary guide under the school laws, it is unnecessary to consider under what circumstances such right, if it existed, could be properly waived. Although we recognize that this result allows different categories of teaching staff members to be treated differently in terms of salaries, we emphasize that such differences are permissible under the existing statutory framework.***" (Slip Opinion, at pp. 13-15)

Thus, it is clear that the State Board in Hyman determined that the Teaneck Board (Board herein) had adopted two separate salary schedules which allow different categories of teaching staff

members (auxiliary teachers and regular classroom teachers) to be treated differently in a manner that essentially complies with the provisions of N.J.S.A. 18A:29-1 et seq.

For the purpose of this determination the Commissioner's decision in Ball, now pending on appeal before the State Board, will not be considered insofar as it may conflict with the controlling determination expressed by the State Board in Hyman.

In applying the legal conclusions and principles enunciated by the State Board in Hyman, the Commissioner modifies in part and reverses in part, those findings and conclusions in the initial decision of this matter for the reasons hereinafter set forth.

The facts of this matter clearly establish that petitioners herein were previously employed for varying numbers of years by the Board as auxiliary teachers in a part-time (less than 6 hours daily) or full-time (6 hours per day) capacity.

The adoption by the Board of its separate salary schedule for auxiliary teachers is incorporated within the negotiated Agreement between the Teaneck Board of Education and the Teaneck Teachers Association, Auxiliary Instructors' Agreement (1982-85) (hereinafter "Agreement").

The salary schedule and benefits for the auxiliary teachers as compared with the differences in the salary schedule for regular classroom teachers in the Agreement have been factually documented in detail in Hyman, supra, and Ball, supra, and are relied upon by reference by the Commissioner herein.

By virtue of Hyman the validity and legality of two separate and different salary schedules contained within the Agreement have been affirmed by the State Board of Education.

What is at issue herein is petitioners' claim that inasmuch as the Board has employed them as regular classroom teachers for the 1984-85 school year, their step placement on the regular teachers' salary schedule does not take into consideration all of their past years of teaching service of part-time or full-time employment as auxiliary teachers within the Teaneck School District.

It is undisputed that the Board did not recognize petitioners' prior years of service as full-time or part-time auxiliary teachers within the Teaneck School District in determining their placement on the regular teachers' salary schedule for the 1984-85 school year. The Board concedes that for purposes of placement on the regular classroom teachers' salary schedule that employment service credit has been given to persons who were previously employed as part-time regular classroom teachers within the Teaneck School District. However, the Board denies that it has ever interpreted or implemented the provisions of the Agreement

pertaining to the regular teachers' salary schedule to apply toward granting employment service credit within the district to full-time or part-time auxiliary teachers.

The Board maintains that, while the Agreement regarding its salary schedule policy for regular classroom teachers does not contain specific language to this effect, nevertheless it has been this unwritten policy or practice which governed its actions. Furthermore, the Board asserts that all teaching staff members, including petitioners herein, were cognizant of it.

As noted by the Commissioner, the Board argues in its exceptions that the placement of petitioners on its regular teachers' salary schedule for the 1984-85 school year merely constituted a transfer from one salary schedule to another and therefore does not require step-by-step salary credit for years of teaching experience.

In the Commissioner's judgment the Board's argument has merit to the extent that petitioners' initial employment as full time or part-time auxiliary teachers in the Teaneck School District is controlled by the auxiliary teachers' salary schedule and policies pertinent thereto contained within the Agreement which has subsequently been determined to be proper and legally correct by the State Board in Hyman with one exception. (Military service credit must be accorded to auxiliary teachers pursuant to N.J.S.A. 18A:29-11.)

In this regard it is stipulated that the Board did recognize petitioners' prior full-time regular teaching experience for salary credit purposes to the extent that it could be accommodated and permitted within the six-step salary schedule set forth in the Agreement.

Petitioners' challenge to the validity of their placement on the auxiliary teachers' salary schedule and that particular salary schedule is not at issue herein, but rather, it is the subject matter of further litigation in Hyman now pending before the Appellate Division, New Jersey Superior Court. (April 24, 1985, Docket #A-3508-84T7)

Consequently, unless or until a contrary decision in Hyman is rendered by the Court, the Commissioner must conclude that petitioners' original placement on the auxiliary teachers' salary schedule contained in the agreement is in all ways proper and legally correct.

It is further concluded that the Board therefore has complied with the provisions of N.J.S.A. 18A:29-9 pertaining to their initial placement and years of employment on the auxiliary teachers' salary schedule.

In the Commissioner's judgment when petitioners were originally compensated on the auxiliary teachers' salary schedule pursuant to the Agreement, it was necessary for the Board to recognize the step and level on one of the six steps in the salary schedule for the purpose of determining their salary compensation. This was so regardless of whether petitioners were employed on a daily basis full time (6 hours per day) or less than full time (less than 6 hours per day) during any work year. It is observed that the school calendar and work year for auxiliary teachers is supplemented and further delineated in the Agreement on page 119 and reads in part as follows:

> "Nothing shall prevent the Board of Education from contracting with auxiliary instructor personnel, on an individual basis, to work less than a full year of 185 days. In these cases, the calendar and work year between the inclusive dates of the individual contract shall apply."
> (Article VI, p. 119)

It is important to point out, therefore, that in order for the Board to determine the amount of compensation a part-time auxiliary teacher was to receive for working less than six hours daily during a calendar work year, it merely calculated a pro rata amount of the salary indicated at that particular yearly step on the salary schedule. Such calculation was for salary compensation purposes only, inasmuch as both full-time and part-time auxiliary teachers had identical school calendar work years unless the Board determined otherwise pursuant to Article VI, p. 119, of the Agreement.

Consequently, the Commissioner finds and determines that it is unnecessary to pro rate the years of employment experience of petitioners in the event that it is determined herein that it should be credited to them on the regular teachers' salary schedule.

In light of the above the Commissioner shall now address the pivotal issue of whether petitioners have been properly and legally compensated on the Board's regular teachers' salary schedule set forth in the Agreement for the 1984-85 school year when transferred to the position of regular classroom teacher.

In this regard the Commissioner finds and determines to be without merit the arguments advanced by the Board in support of its action not to grant salary guide credit to petitioners on the 1984-85 regular teachers' salary schedule for their prior employment experience as auxiliary teachers. This determination is grounded upon the fact that the Board was required by virtue of its own salary schedule for auxiliary teachers in the Agreement to legally recognize up to six years of employment experience for the purposes of salary schedule placement compensation, although petitioners' individual years employment experience as auxiliary teachers in the

Teaneck School District exceed the years of experience (6) set forth in the auxiliary teachers' salary schedule. The Board's action in denying petitioners the minimal number of years of experience (6 yrs.) credit on its regular teachers' salary schedule for the 1984-85 school year is arbitrary, capricious, discriminatory, ultra vires and otherwise contrary to the fundamental principles enunciated by the State Board in Hyman because they have already recognized those years of experience on the auxiliary teachers' guide.

Moreover, inasmuch as petitioners herein are not new employees in the Teaneck School System, any argument advanced by the Board in support of its policy set forth in Schedule D4 - Salary Regulations is misplaced. Similarly, also without merit is the Board's contention that its "long standing" unwritten policy regarding credit for prior teaching experience applies herein. Such policy is patently discriminatory to petitioners who are now regular classroom teachers. It therefore may not be sustained for the reasons articulated by the Commissioner in Ross, supra.

Accordingly, for the reasons laid down by the State Board in Hyman and relied upon by the Commissioner in the instant matter, it is found and determined that the Board's action to deny petitioners credit on its regular teachers' salary schedule for prior auxiliary teaching experience in the Teaneck School System as previously recognized by their place upon the auxiliary teachers' guide is contrary to N.J.S.A. 18A:29-1 et seq. and prior decisional case law as reiterated within the initial decision.

The initial decision in this matter is hereby modified in part and reversed in part in accordance with the Commissioner's determination above.

The Board is hereby directed for the 1984-85 school year, to place petitioners on the appropriate step and level of the regular teachers' salary guide so as to recognize that step and level formerly achieved on the auxiliary teachers' guide. By way of illustration, the Commissioner determines that a former auxiliary teacher having been on the sixth step of the auxiliary teachers' guide shall be placed on the seventh step and level of the regular teachers' salary guide for 1984-85.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JULY 22, 1985

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 733-85
AGENCY DKT. NO. 498-12/84

STEVEN BLOCK,
Petitioner,
v.
JOHN POPE, JAMES MONACO, GEORGE MAIER, ANTHONY ROMANO, WALTER KRAMER and the HOBOKEN BOARD OF EDUCATION,
Respondents.

Steven Block, petitioner, pro se

James P. Granello, Esq., for respondents (Murray & Granello, attorneys)

Record Closed: May 22, 1985 Decided: June 10, 1985

BEFORE **STEPHEN G. WEISS,** ALJ:

On December 5, 1984, Steven Block, a member of the Board of Education of the City of Hoboken, filed a petition of appeal with the Commissioner of Education alleging that in June 1984 two other members of the seven-member board, respondents John Pope and James Monaco, had without legal authority approved payment of extra compensation to the Superintendent of Schools, George Maier. Block also alleged that thereafter the superintendent illegally authorized the increase in his own salary and that on two

occasions in July 1984 and August 1984 the secretary of the board, respondent Anthony Romano, and the business manager, respondent Walter Kramer, failed in their duties to bring the alleged illegal action to the attention of the entire board, even though requested to do so by an internal auditor. Finally, Block alleged that Pope, the Board President, also failed in his duty to bring the matter to the attention of the full board. Block concluded his petition with the observation that on October 23, 1984 the board illegally approved retroactive payment of extra compensation to the superintendent. Accordingly, Block requested a determination by the Commissioner that the named respondents, Pope, Monaco, Maier, Romano and Kramer, had acted improperly and also sought an order directing that all steps be taken to recover any funds improperly paid by virtue of their actions, and to discipline each of the respondents in such manner as would assure that they did not act in violation of the public trust in the future.

In an answer filed by the individual respondents the allegations of illegality were denied. In addition, by way of separate affirmative defenses, the respondents maintained, inter alia, that the petition was time barred by virtue of the application of N.J.S.A. 10:4-15(a) and by N.J.A.C. 6:24-1.2, and by the New Jersey Tort Claims Act (N.J.S.A. 59:1-1 et seq.).

A prehearing conference was conducted before me on April 25, 1985 and the issue to be determined was identified as follows: "Were the actions or inactions of any one or more of the respondents raised in the petition improper and, if so, to what relief is petitioner entitled?" During the course of the conference it was also agreed that the Hoboken Board of Education itself would be added as a party respondent as of April 25, 1985, and that an answer would be filed on its behalf. Subsequently, and in accordance with that determination, an amended answer was filed on behalf of the board. It essentially tracked the language of the original answer and added, as well, a separate defense to the effect that the petition of appeal against the Board also was barred by the 45-day time limit contained in N.J.S.A. 10:4-15(a) and by the 90-day time limit set forth in N.J.A.C. 6:24-1.2.

In addition, at the prehearing conference counsel for the respondents noted that it was his intention to file a motion to dismiss the petition and/or for Summary Judgment. Thus, a briefing schedule for the motion was established in the Prehearing Order. In accordance with that schedule a Motion to Dismiss or for Summary Judgment, together with a supporting brief, was timely filed on behalf of the respondents. The time allowed for a reply by the petitioner passed without any filing being made by him. Accordingly, the motion is now ripe for my determination.

DISCUSSION

Certain essential facts are not in dispute. On June 14, 1984, Pope, the board president, and Monaco, chairman of the school government committee, authorized Maier to forego his summer vacation and to work through the months of July and August 1984. In consideration for such services Maier was to be compensated at his regular rate of pay. In particular, in a letter dated June 14, 1984, Maier wrote to Pope and requested permission to work through the summer months in lieu of taking vacation, and for such services he requested "financial compensation for the extra work." (See Addendum A to Brief of Respondents.) In his letter Maier set forth that the basis for that request was the existence of "several unique problems." Specifically, he listed a "budget crisis" and "problems resulting from the layoff of personnel." He also observed that "negotiations are . . . barely started with the Hoboken Teachers Association" and that members of the Board of School Estimate "have determined that the budget prepared by the Board of Education should be reduced substantially." Following Maier's listing of these and additional matters of pressing concern, he concluded that all of the problems needed to be resolved "in the short term." At the bottom of the letter signature lines for Messrs. Pope and Monaco were provided. They did, in fact, sign the letter, thereby signifying their assent to Maier's proposal.

Additional undisputed facts are contained in affidavits filed in support of the motion by board members DeBari, Monaco and Lugo. According to these three members, they conferred with each other prior to June 14, 1984, regarding the necessity of directing

Maier to work through his summer vacation for various reasons. Each of them swore in their affidavits that they had agreed to authorize the superintendent to perform such work and to be compensated for the same in view of the fact that he was foregoing his vacation. DeBari, for example, noted that among the outstanding problems to be addressed over the summer months were the consequences of a food poisoning outbreak at one of the schools and preparation for the fall evaluation by the New Jersey Department of Education and the Middle States Association. Ms. Lugo's affidavit also mentioned the same items of concern (see Addendum D to Brief of Respondents).

On October 23, 1984, the Hoboken Board of Education duly met and passed the following resolution by a vote of four in favor, one opposed (petitioner Block), with two members absent:

> WHEREAS, special circumstances existed in the Hoboken School District in the summer of 1984 requiring the special attention of the Superintendent of Schools, including but not limited to such matters as the Rue School, the Vocational Program, collective bargaining and total evaluation of the School District by the State Department of Education; and
>
> WHEREAS, the Superintendent of Schools is entitled to a paid vacation in the summer; and
>
> WHEREAS, the Superintendent of Schools was not able to take his vacation in the summer and worked throughout the summer;
>
> NOW, THEREFORE, BE IT RESOLVED, that the Hoboken Board of Education ratifies and approves that the Superintendent worked throughout the summer of 1984 for the Board of Education without taking his paid vacation and in lieu of said paid vacation the Board of Education ratifies and approves payment to the Superintendent of Schools for his vacation and his regular rate of pay. It is understood that this payment is in addition to the superintendent's annual salary. (Addendum B, Brief of Respondent)

At the same meeting petitioner Block proposed a series of resolutions which alleged that the activities surrounding the "authorization" for the superintendent to

perform work during the summer for additional compensation was improper and that action be taken by the board to correct such improprieties. Each of his resolutions were defeated by votes of one in favor (Block) and four opposed.

The instant Motion to Dismiss or for Summary Decision raises several legal points. Respondents first argue that the board has the authority retroactively to approve the authorization given to the superintendent to work throughout the summer for compensation, and that its resolution of October 23, 1984 specifically articulating that ratification is unassailable. Respondents Monaco and Pope, in a second point, maintain that any allegations concerning them as individual board members must be dismissed since the only grounds for such action are contained in N.J.S.A. 18A:12-3, not cited by or relied upon by the petitioner. A third point maintains that the bulk of the petition should be dismissed under N.J.A.C. 6:24-1.2 since many of the acts complained of by petitioner took place more than 90 days prior to the filing of the petition, which they claim was December 12, 1984. So, too, it is alleged that the amendment to the petition of appeal, which added the Hoboken Board of Education as a respondent in April 1985, similarly must be dismissed since all of the actions complained of which involve the board as a whole obviously took place substantially more than 90 days prior to the effective date of the amendment. A fourth point sets forth that even in the event it is determined that the Open Public Meetings Act was violated in June 1984, when Maier was given authority to work through the summer for his regular rate of pay in lieu of vacation, any petition challenging such action has to be filed within 45 days under N.J.S.A. 10:4-15(a). Since it was not, the petition of appeal, as amended, is subject to dismissal. Indeed, the respondents point out that even if the triggering date of the cause of action is deemed to be October 23, 1984, the date of the ratifying resolution, the petition would still be out of time since, in their view, it was filed on December 12, 1984, 50 days thereafter. Finally, in a fifth point, the respondents maintained that the petition of appeal is nothing more than an effort by a disgruntled board member to harrass the respondents, and since the superintendent did, in fact, perform work over the summer months, he would be entitled to be paid on a "quasi-contract" theory in any event.

Having read and considered the amended pleadings in this case, together with the brief and supporting documents filed in connection with the Motion to Dismiss or for Summary Decision, I am convinced that a determination granting Summary Decision in favor of the several respondents is in order. It is not disputed that Maier was authorized by two board members, with the knowledge of two others (hence a majority of the seven-member board) to forego his summer vacation and to attend to a variety of pressing matters during the months of July and August. On the pleadings and other materials before me it is not disputed that Maier actually performed such work during those months. Nor is it disputed that the meeting of October 23, 1984 was regularly scheduled in accordance with the requirements of the Open Public Meetings Act, and that a resolution ratifying the previous authorization and approving payment to Maier in lieu of vacation, at his regular rate, was passed by a vote of four in favor and one opposed. I, therefore, agree with the respondents that even assuming, arguendo, that the June 14, 1984 directive to the superintendent was without legal basis, and even further assuming that any work he did by virtue of that directive was without lawful authority, the board's subsequent action taken at its October 23, 1984 meeting ratifying and approving the authorization and the work cured the alleged defect. Clearly, a board of education is vested with the authority to enter into an agreement with its superintendent respecting work to be performed by him and the rate of pay which he is to receive for the same. Thus, the activities authorized to be undertaken by Maier, and which he performed, were those which were lawfully within his and the board's authority to direct and perform. Similarly, the determination to pay Maier at his regular rate of pay for the work was a matter within the business judgment of the board. Whether or not Maier should have received compensation at his regular rate, or at some lesser rate, is not a proper matter for this tribunal to determine, absent a prima facie showing of abuse of the public purse. In this case a majority of the board determined to compensate Maier at a rate which it deemed appropriate, and which he found acceptable, in order to perform the services required of him. Neither the Commissioner nor I should substitute our judgments for that determination.

Ratification by a governmental entity of previous acts which were within its authority to direct is a concept which has been upheld by the courts. See, e.g., Houman v.

Mayor and Council, Borough of Pompton Lakes, 155 N.J. Super. 129 (Law Div. 1977). Although the petition alleges that the circumstances surrounding the decision in June 1984, and subsequent events, were improper and illegal, the undisputed facts which are before me in connection with this motion support a contrary conclusion. The affidavits and other documentary evidence reveal that there were a number of problems facing the school district during the summer of 1984. As chief executive officer of the school system, it behooved the superintendent to address himself to those matters. To that end, he requested the board's authority to undertake to do so and asked to be compensated for the same. He then was given instructions to proceed, which he did. At its duly called meeting of October 23, 1984, a majority of the board approved the prior actions and the amount of compensation to be paid. Thus, by virtue of its adoption of the appropriate resolution, a valid ratification took place, even assuming the activities were without prior authority. Accordingly, for this reason alone, the petition of appeal should be **DISMISSED.**

In addition, the failure by petitioner to join the board of education as a necessary party respondent until April 25, 1985 was fatally defective as to it, insofar as the 90-day rule is concerned. The latest board action complained of by the petitioner took place on October 23, 1984. While his filing of the petition on December 5, 1984 arguably was within the 90 days, insofar as the other respondents were concerned,* any relief sought against the board as a whole did not arise until the prehearing conference in April 1985. This was substantially beyond the running of the 90 days, since no acts subsequent to October 23, 1984 were even attacked by the petitioner. Accordingly, a dismissal of the amended petition against the board of education also is appropriate. In this respect I should point out that although various and sundry activities challenged by petitioner took place prior to 90 days before the filing of the petition on December 5, 1984, I believe that the triggering date for the 90-day rule with regard to these actions did not arise until the board's resolution of ratification was passed in October. Put another way, the actions of Pope, Monaco, Maier, Romano and Kramer which are impuned in the petition constituted, on balance, a continuing course of conduct which culminated in the resolution of October

* Although the respondent's brief states that the petition of appeal is dated December 12, 1984, it is actually dated December 3, 1984, and marked "filed" on December 5, 1984.

23, 1984. Thus, so much of the motion by respondents to dismiss as against those individuals on the basis of the 90-day rule is **DENIED.**

Similarly to be denied is the ground set forth in the moving papers to the effect that the 45-day time limit contained in N.J.S.A. 10:4-15(a) constitutes a basis to dismiss so much of the petition as complains about a violation of the Open Public Meetings Act in June 1984. First, no meeting was even held in June to which the provision would apply. Insofar as any potential claim that the action of October 23, 1984 was in violation of the Open Public Meetings Act, the petition was filed with the commissioner on December 5, 1984, a period of only 43 days after that meeting date.

With regard to the point made by respondents Pope and Monaco that an action to remove individual board members must be related to N.J.S.A. 18A:12-3, I agree that controversies involving board members, which seek their removal, must involve grounds specifically set forth in that statute. For present purposes, then, I would dismiss so much of the petition as seeks the removal of Pope and Monaco for their alleged activities, since the grounds cited by petitioner in this case do not involve their failure to be residents, or for failing to attend board meetings. Nor is there any conflict of interest aspect to this case. However, since the relief sought in the petition with respect to the individual board members only asked that they be disciplined, and such relief, even if eventually found to have been appropriate, does not necessarily involve removal, then no overall dismissal is proper.

The fifth and final point discussed in the brief is essentially a recapitulation of the previous arguments. The only additional ground has to do with the observation that since the superintendent actually performed the work, he would be entitled to be paid on a "quasi-contract" theory. Given my determination to dismiss because of the ratification by appropriate board action in October 1984, there would not appear to be any need to address this additional point.

Accordingly, for the reasons herein set forth, and in view of the board's resolution of October 23, 1984 ratifying the previous actions respecting the authorization given to Maier, and his compensation, it is recommended to the Commissioner of Education that the petition of appeal, as amended, be **DISMISSED.**

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

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

June 10, 1985
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

JUN 12 1985
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

June 13 1985
DATE

Ronald H. Tuck
FOR OFFICE OF ADMINISTRATIVE LAW

ms/e

STEVEN BLOCK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JOHN POPE ET AL., HUDSON COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a comprehensive and thorough review of the record in this matter, the Commissioner does not accept the recommendation of the Office of Administrative Law dismissing the Petition of Appeal for the following reasons.

Firstly, N.J.S.A. 18A:17-19 states that:

> "The board or boards of education employing a superintendent or assistant superintendent of schools shall fix the salaries of the superintendent and the assistant superintendent of schools and the salary of a superintendent shall not be reduced during his term of office."

Therefore, any action to compensate the superintendent for working during the summer could only occur by law through formal Board action on the matter at a public meeting. The Board president is not authorized to take such action, nor is the vice president.

The fact that several other Board members were consulted and concurred is also of no moment. As articulated in North Bergen Federation of Teachers v. Bd. of Ed. of North Bergen, 1978 S.L.D. 218, aff'd State Board 250, aff'd N.J. Superior Court, Appellate Division, 1980 S.L.D. 1522, it is a 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.***" (at 242)

Therefore, any payments made to the superintendent prior to the Board's official action on October 23, 1984 are determined to be ultra vires. Further, any action of the Board on October 23, 1984

ratifying and approving that the superintendent worked throughout the summer without taking his paid vacation and that payment at his regular rate of pay should be made does not serve to remedy the illegal payments made to him prior to that date. Houman, supra, addresses at length ratification of voidable acts. It states:

> "***The general rule of ratification of prior acts is stated in 4 Mc Quillin, Municipal Corporation, [sec.] 13.47 at 563:
>
> > 'Generally, a governmental body may effectively ratify what it could theretofore have lawfully authorized. Ratification after the Act is said to be as potent as authority before the Act. Irregular and void (voidable) acts may be ratified or confirmed at a subsequent meeting, provided it is a valid or legal meeting.***'
>
> "Whatever a public body may authorize, it may subsequently ratify, and such ratification, being equivalent to an original grant of power, is operative and relates back to the date of the original action which is subsequently being ratified. McKenzie v. Mukilteo Water Dist. 4 Wash. 2d 103, 102 P. 2d 251 (1940); Fulton Cty. Fiscal Court v. Southern Bell Tel. & Tel. Co., 289 Ky. 159, 158 S.W. 2d 437 (1942). Ratification is equivalent to previous authorization and relates back to the time when the Act ratified was done. 75 C.J.S., Ratification, at 608. A ratification is, in its effect upon the act of an agent, equivalent to the possession by the agent of a previous authority and operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. Marsh v. Fulton Cty., 10 Wall 676, 77 U.S. 676, 19 L. Ed. 1040 (1871).
>
> "These basic principles of ratification have been applied by the New Jersey courts, which have consistently held that where a public body has the power and authority to enter into an agreement, but has failed to follow proper procedures in exercising that authority, it may subsequently ratify the agreement. Johnson v. Hospital Service Plan, 25 N.J. 134 (1957); DeMuro v. Martini, 1 N.J. 516 (1949); City Affairs Comm. v. Board of Comm'rs, 134 N.J.L. 180 (E. & A. 1946); Riddlestorffer v. Rahway, 82 N.J. Super. 36 (Law Div. 1963). These decisions draw a distinction between agreements that are ultra vires in the primary sense, being entirely beyond the scope of municipal authority, and those which are ultra

> vires in the secondary sense, being deficient for failure to proceed in a proper manner. Those agreements which are merely ultra vires in the secondary sense may be subsequently ratified by the municipality. Although all of these cases involve governmental ratification of contracts, the court is satisfied that these generally applicable principles of ratification should be applied to other types of governmental action, such as the decision to proceed with the tax appeals.***" (at 159-60)

While the judge is correct in stating in the initial decision, ante, that Houman, supra, upholds ratification by a government entity of previous acts which were within its authority to direct, it does not uphold ratification of previous actions of individual Board members that were ultra vires. The actions taken in this matter in June 1984 by the Board president and vice president were ultra vires in the primary sense articulated in Houman in that they acted entirely beyond the scope of their authority. Further, the instant matter is not a case wherein the Board took action in June, 1984 that was subsequently found to be flawed or procedurally defective in the secondary sense addressed in Houman which would permit later corrective action.

Consequently, the Commissioner finds and determines that the action taken by the Board on October 23, 1984 did not constitute ratification of previous acts by a government entity which were within its authority to direct because as a Board it had never taken any previous action with respect to payment to the Superintendent for work during the summer of 1984. As such, any payment ordered can only be considered prospective in nature. Further, the language of the resolution itself makes no reference to retroactive approval of payments already made. Even if it did, however, as previously stated, the October 23 Board action cannot remedy illegal payments derived from ultra vires acts of individual Board members.

Accordingly, it is ordered that the superintendent repay to the Board those monies received illegally prior to October 23, 1984. In addition, the Commissioner affirms the judge's determination that the Petition of Appeal as it relates to joining the Board as a necessary party is defective because it fails to comply with the 90 day rule and is therefore dismissed. He likewise affirms the determination that the petition is not time barred as it relates to the other respondents in that the actions of these individuals impugned in the petition constituted, on balance, a continuing course of conduct which culminated in the October 23, 1984 resolution. Therefore, he adopts as his own the judge's recommendation denying the motion by respondents to dismiss the Petition of Appeal.

Upon a careful and thorough review of the record in this matter, the Commissioner must express his grave concern regarding a

number of the allegations raised by petitioner which, if credited, seriously call into question the fiscal responsibility shown by the respondents in this matter. The allegations raise the possibility that the sequence of events in this matter may not have been mere oversight or misperception of the authority vested in individual Board members. Unfortunately, the judge determined not to take testimony relative to the accuracy of such allegations as (1) the superintendent, contrary to N.J.S.A. 18A:27-4, determined the time and mode of payment for the illegally authorized summer pay; (2) purchase orders relative to said payments repeatedly went unsigned by the Board secretary and the business manager, yet the payroll was certified; (3) the internal auditor repeatedly protested the legality of the payments since no formal Board action had occurred increasing the superintendent's salary; and (4) the internal auditor had duly informed not only the Board secretary and business manager of the matter but the Board president as well (Petition of Appeal and Addendum B, Brief of Respondent). Therefore, no affirmative determination can be made regarding these and other alleged violations of both state mandated procedures (N.J.S.A. 18A:19-1 et seq.) and internal district procedures with respect to expenditure of funds. What can be stated, however, is that had the respondents faithfully assured that those requirements were adhered to, they would not have been vulnerable to subsequent accusations of fiscal irresponsibility or illegality. The Commissioner therefore cautions the respondents herein that strict adherence to all fiscal procedures, whether state or locally determined, must be followed at all times so that allegations such as in the present matter do not arise again. As expressed by the Supreme Court of New Jersey in Cullum v. Bd. of Ed. North Bergen, 15 N.J. 285 (1954), school board members are public officers holding a public trust who have a fiduciary responsibility to those they have been elected or appointed to serve. No less can be said of administrative staff employed by a district as well.

COMMISSIONER OF EDUCATION

JULY 25, 1985

NEW JERSEY DEPARTMENT OF EDUCATION
225 West State Street
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